Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Eidgenössisches Volkswirtschaftsdepartement EVD
Staatssekretariat für Wirtschaft SECO
Direktion für Wirtschaftspolitik

Strukturberichterstattung
Nr. 47/3

Panagiotis Delimatsis

Exportpotenziale im Dienstleistungssektor

Cross-border Supply
of Business Services
by Swiss Service Suppliers
within the EU

Studie im Auftrag des
Staatssekretariats für Wirtschaft

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Eidgenössisches Volkswirtschaftsdepartement EVD
Staatssekretariat für Wirtschaft SECO
Direktion für Wirtschaftspolitik

Strukturberichterstattung
Nr. 47/3

Panagiotis Delimatsis

Exportpotenziale im Dienstleistungssektor

Cross-border Supply
of Business Services
by Swiss Service Suppliers
within the EU

Bern, 2011

Studie im Auftrag des
Staatssekretariats für Wirtschaft

Panagiotis Delimatsis is Associate Professor of EU and WTO Law and Senior Member of the Tilburg Law and Economics Center (TILEC), Tilburg University, the Netherlands; and a Senior Research Fellow at the World Trade Institute, University of Bern, Switzerland.

ACKNOWLEDGEMENTS

This is the final report of a project financed by the Swiss State Secretariat of Economic Affairs (SECO). I am particularly thankful to Pierre Sauvé for effective research co-ordination of this project and thoughtful comments which substantially improved the comprehensiveness of this study. Peter Balastèr, Marianne Abt from SECO and Christoph König from the Swiss mission at the European Union provided numerous useful insights. Research assistance by David Herren, Ronald Abegglen and Lyndsay Thomsin is particularly acknowledged. Remaining errors are of the author's alone.

Disclaimer

The views expressed in this study are of the author's and do not necessarily reflect those of the Swiss State Secretariat for Economic Affairs (SECO). SECO should not be regarded as having any responsibility for the accuracy of the information included in this study.

TABLE OF CONTENTS

A. INTRODUCTION 1

I. Significance of the Service Sector and bilateral Swiss-EU Services Trade 1

II. Scope of the Study 8

B. RELEVANT EU LAW AND ITS INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE (ECJ) 13

I. Over Fifty Years of European Integration – Successes, Recipes and Constitutionalization 13

II. The Internal Market and the Individual 17

III. Justifying Derogations from EU Free Movement Rules 23

IV. The Scope of the EU Freedom to Provide (and Receive) Services 27

1. Historical background and facts 27
2. Primary law and relevant jurisprudence in the area of services 29

a) Services as an ancillary freedom? 29
b) The constituent elements of this freedom 31
c) From a 'discrimination' to a 'restriction' approach 33
d) The ubiquitous nature of services 36
e) The corollary rights to the freedom to provide services 37

3. Secondary law – the Services Directive 40

V. Distinguishing Among the Freedoms 45

1. Freedom to provide services versus free movement of goods 45
2. Freedom to provide services versus freedom of establishment 46
3. Services versus free movement of workers/persons 48
4. Services versus free movement of capital 50

VI. Applicability of the EU fundamental freedoms to private conduct 52

VII. The issue of recognition of professional qualifications 58

C. THE SWISS-EU BILATERAL AGREEMENT ON THE FREE MOVEMENT OF PERSONS AND THE FREEDOM TO PROVIDE SERVICES – HOW MUCH EU LAW IS APPLICABLE? 66

I. Introductory remarks 66

II. Freedom to provide services according to the Agreement 72

III. Freedom to receive services (passive Dienstleistungsfreiheit) 80

IV. Professional qualifications 82

D. THE PARTICULAR BUSINESS SERVICES SUB-SECTORS UNDER REVIEW 86

I. Introductory remarks 86

II. Empirical results relative to the study – Challenges in getting feedback and political economy considerations 91

E. CONCLUSIONS 103

REFERENCES 108

APPENDIX I: THE TREATY OF THE FUNCTIONING OF THE EUROPEAN UNION – RELEVANT PROVISIONS 115

APPENDIX II. LIST OF PROFESSIONAL ASSOCIATIONS AND INDIVIDUAL COMPANIES THAT WERE CONTACTED FOR THE PURPOSES OF THIS STUDY 125

APPENDIX III: THE QUESTIONNAIRE SENT TO PROFESSIONAL ASSOCIATIONS AND COMPANIES 128

TABLE OF ABBREVIATIONS

BBT	Bundesamt für Berufsbildung und Technologie
BGE	Bundesgerichtsentscheid (Switzerland)
BPO	Business Process Outsourcing
BverfG	Bundesverfassungsgericht (Germany)
CCT	Common Customs Tariff
CRD	Citizens' Rights Directive
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
ECT	European Community Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
EuroStat	European Statistics Authority
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
IMF	International Monetary Fund
ICT	Information and Communication Technologies
MS	Member States (EU)

OJ	Official Journal of the European Union
OECD	Organisation for Economic Cooperation and Development
PQD	Professional Qualifications Directive
R & D	Research and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization

TABLE OF CASES

i. European Court of Justice

Case 26/62, *Van Gend en Loos* [1963] ECR 1

Case 75/63, *Hoekstra* [1964] ECR 177

Case 6/64, *Costa v ENEL* [1964] ECR 585, at 593

Case 155/73, *Sacchi* [1974] ECR 409

Case 2/74, *Reyners* [1974] ECR 631

Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837

Case 33/74, *van Binsbergen* [1974] ECR 1299

Case 36/74, *Walrave and Koch* [1974] ECR 1405

Case 41/74, *Van Duyn* [1974] ECR 1337

Case 39/75, *Coenen* [1975] ECR 1547

Case 43/75, *Defrenne v SABENA* [1976] EC 455

Case 118/75, *Watson and Belmann* [1976] ECR 1185

Case 13/76, *Donà* [1976] ECR 1333

Case 71/76, *Thieffry* [1977] ECR 765

Case 106/77, *Simmenthal* [1978] ECR 629

Case 120/78, *Rewe-Zentral* (*Cassis de Dijon*) [1979] ECR 649

Case 62/79, *Coditel* [1980] ECR 881

Case-270/80, *Polydor* [1982] ECR 329

Case 152/82, *Forcheri v Belgium* [1983] ECR 2323

Joined Cases 286/82 and 26/83, *Luisi and Carbone* [1984] ECR 377

Case 220/83, *Commission v France* [1986] ECR 3663

Case 64/84 *Cinéthèque* [1985] ECR 2605

Case 205/84, *Commission v Germany* [1986] ECR 3755

Case 66/85, *Lawrie-Blum* [1986] ECR 2121

Case 263/86, *Humbel* [1988] ECR 5365

Case 186/87, *Cowan v le Trésor Public* [1989] ECR 195

Case 305/87, *Commission v Greece* [1989] ECR 1461

Case 344/87, *Bettray* [1989] ECR 1621

Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417

Case C-154/89, *Commission v France* [1991] ECR I-659

Case C-180/89, *Commission v Italy* [1991] ECR I-709

Case C-221/89, *Factortame II* [1991] ECR I-3905

Case C-288/89, *Gouda* [1991] ECR I-4007

Case C-340/89, *Vlassopoulou* [1991] ECR I-2357

Case C-357/89, *Raulin* [1992] ECR I-1027

Case C-76/90, *Säger* [1991] ECR I-4221

Case C-159/90, *Grogan* [1991] ECR I-4685

Case C-204/90, *Bachmann* [1992] ECR I-249

Case C-148/91, *Veronica* [1993] ECR I-487

Case C-109/92, *Wirth* [1993] ECR I-6447

Case C-275/92, *Schindler* [1994] ECR I-1039

Case C-55/93, *van Schaik* [1994] ECR I-4837

Case C-384/93, *Alpine Investments* [1995] ECR I-1141

Case C-415/93, *Bosman* [1995] ECR I-4921

Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165

Case C-3/95, *Sandker* [1996] ECR I-611

Case C-34-36/95, *De Agostini* [1997] ECR I-3843

Case C-70/95, *Sodemare* [1997] ECR I-3395

Case C-222/95, *Parodi* [1997] ECR I-3899

Case C-398/95, *SETTG v Ypourgos Ergasias* [1997] ECR I-3091

Joined cases C-51/96 and 191/97, *Deliège* [2000] ECR I-2549

Case C-56/96, *VT4* [1997] ECR I-3143

Case C-85/96, *Martínez Sala* [1998] ECR I-2691

Case C-108/96, *Mac Quen and Others* [2001] ECR I-837

Case C-118/96, *Safir* [1998] ECR I-1897

Case C-176/96, *Lehtonen* [2000] ECR I-2681

Case C-410/96, *Criminal Proceedings against André Ambry* [1998] ECR I-7875

Case C-416/96, *El-Yassini* [1999] ECR I-1209

Joined Cases C-10/97 and C-22/97, *Ministero delle Finanze v IN.CO.GE. '90 and others* [1998] ECR I-6307

Case C-212/97, *Centros* [1999] ECR I-1459

Case C-255/97, *Pfeiffer* [1999] ECR I-2835

Case C-55/98, *Bent Vestergaard* [1999] ECR I-7641

Joined Cases C-49, 50, 52, 54, 68, and 71/98, *Finalarte* [2001] ECR I-7831

Case C-97/98, *Jägerskiöld* [1999] ECR I-7319

Case C-405/98, *Gourmet* [2001] ECR I-1795

Case C-165/98, *Mazzoleni and ISA* [2001] ECR I-2189

Case C-224/98, *D'Hoop* [2002] ECR I-6191

Case C-228/98, *Dounias v Minister for Economic Affairs* [2000] ECR I-577

Case C-238/98, *Hocsman* [2000] ECR I-6623

Case C-281/98, *Angonese* [2000] ECR I-4139

Case C-184/99, *Grzelczyk* [2001] ECR I-6193

Case C-235/99, *Kondova* [2001] ECR I-6427

Case C-298/99, *Commission v Italy* [2002] ECR I-3129

Case C-309/99, *Wouters* [2002] ECR I-1577

Case C-385/99, *Müller-Fauré* [2003] ECR I-4509

Case C-390/99, *Canal Satélite Digital* [2002] ECR I-607

Case C-413/99, *Baumbast* [2002] ECR I-7091

Case C-451/99, *Cura Anlagen* [2002] ECR I-3193

Case C-17/00, *De Coster* [2001] ECR I-9445

Case C-31/00, *Dreessen* [2002] ECR I-663

Case C-60/00, *Carpenter* [2002] ECR I-6279

Case C-438/00, *Kolpak* [2003] ECR I-4135

Case C-131/01, *Commission v Italy* [2003] ECR I-1659

Case C-215/01, *Schnitzer* [2003] ECR I-14847

Case C-313/01, *Morgenbesser* [2003] ECR I-13467

Case C-413/01, *Ninni-Orasche* [2003] ECR I-13187

Case C-36/02, *Omega* [2004] ECR I-9609

Case C-71/02 *Karner* [2004] ECR I-3025

Case C-171/02, *Commission v Portugal* [2004] ECR I-5645

Case C-200/02, *Zhu and Chen* [2004] ECR I-9925

Case C-442/02, *CaixaBank France* [2004] ECR I-8961

Case C-456/02, *Trojani* [2004] ECR I-7573

Case C-60/03, *Wolff & Müller* [2004] ECR I-9553

Case C-134/03, *Viacom Outdoor* [2005] ECR I-1167

Case C-140/03, *Commission v Greece* [2005] ECR I-3177

Case C-189/03, *Commission v Netherlands* [2004] ECR I-9289

Case C-209/03, *Bidar* [2005] ECR I-2119

Case C-215/03, *Oulane* [2005] ECR I-1215

Case C-265/03, *Simutenkov* [2005] ECR I-2579

Case C-330/03, *Colegio* [2006] ECR I-801

Joined Cases C-94/04 and C-202/04, *Cipolla* [2006] ECR I-11421

Case C-150/04, *Commission v Denmark* [2007] ECR I-1163

Joined Cases C-151/04 and 152/04, *Nadin* [2005] ECR I-11203

Case C-157/05, *Holböck* [2007] ECR I-4051

Case C-196/04, *Cadbury's Schweppes* [2006] ECR I-7995

Case C-255/04, *Commission v France* [2006] ECR I-5251

Case C-406/04, *De Cuyper* [2006] ECR I-6947

Case C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521

Case C-490/04, *Commission v. Germany* [2007] ECR I-6095

Case C-519/04, *Meca-Medina v Commission* [2006] ECR I-6991

Case C-40/05, *Lyyski* [2007] ECR I-99

Case C-97/05, *Gattoussi* [2006] ECR I-11917

Case C-101/05, *Skatteverket v A* [2007] ECR I-11531

Case C-193/05, *Commission v Luxembourg* [2006] ECR I-8673,

Case C-231/05, *Oy AA* [2007] ECR I-6373

Case C-274/05, *Commission v Greece* [2008] ECR I-7969

Case C-291/05, *Eind* [2007] ECR I-10719

Case C-341/05, *Laval* [2007] ECR I-11767

Case C-370/05, *Festersen* [2007] ECR I-1129

Case C-438/05, *The International Transport Workers' Federation and the Finnish Seamen's Union* [2007] ECR I-10779

Case C-465/05, *Commission v. Italy* [2007] ECR I-11091

Case C-346/06, *Rüffert* [2008] ECR I-1989

Case C-500/06, *Corporación Dermoestética* [2008] ECR I-5785

Case C-531/06, *Commission v Italy* [2009] ECR I-4103

Case C-161/07, *Commission v Austria* [2008] ECR I-10671

Case C-169/07, *Hartlauer* [2009] ECR I-1721

Joined Cases C-171/07 and 172/07, *Apothekerkammer des Saarlandes*, judgment of 19 May 2009

Case C-13/08, *Stamm and Hauser* [2009] ECR I-11087

Case C-127/08, *Metock and others* [2008] ECR I-6241

Cases 155 and 157/08, *X and E.H.A. Passenheim-van Schoot v Staatssecretaris van Financiën* [2009] ECR I-5093

Case C-169/08, *Presidente del Consiglio de Ministri v Regione Sardegna* [2009] I-10821

Case C-200/08, Commission v France, Removed from the register on 1 July 2010

Case C-345/08, *Peśla*, judgment of 10 December 2009

Case C-351/08, *Grimme* [2009] ECR I-10777

Case C-356/08, *Commission v Austria* [2009] ECR I-108

Case C-386/08, *Brita*, judgment of 25 February 2010

Case C-458/08, *Commission v Portugal*, judgment of 18 November 2010

Case C-541/08, *Fokus Invest*, judgment of 11 February 2010

Case C-70/09, *Hengartner and Gasser*, judgment of 15 July 2010

Case C-145/09, *Tsakouridis*, judgment of 23 November 2010

Case C-162/09, *Lassal*, judgment of 7 October 2010.

Case C-225/09, *Jakubowska*, judgment of 2 December 2010

Case C-233/09, *Dijkman and Dijkman-Lavaleije*, judgment of 1 July 2010

Case C-247/09, *Xhymshiti*, judgment of 18 November 2010

Cases C-422, 425&426/09, *Vandorou and others*, judgment of 2 December 2010

Case C-287/10, *Tankreederei I SA*, judgment of 22 December 2010

Case C-34/09, *Zambrano*, judgment of 8 March 2011

ii. Swiss Federal Court

BGE 133 V 33

BGE 129 II 249

BGE 131 I 223

BGE 132 II 135

BGE 133 V 624

iii. German Constitutional Court

BverfG, 2 BvE 2/08 of 30.6.2009

EU DIRECTIVES

Directive 73/148 on the abolition of the restrictions on movement and residence within the Union for nationals of Members States with regard to establishment and the provision of services [1973] OJ L 172/14

Council Directive 77/249/EEC [1977] of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L 78/17

Council Directive 89/48 of 21 December 1988 on a General System for the Recognition of Higher Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration [1989] OJ L 19/16

Council directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement directive 89/48/EEC [1992] OJ L 209/25

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18 of 21.1.1997

Directive 98/5/EC of the European Parliament and the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L 77/36

Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions [2000] OJ L 126/1

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member-States [2004] OJ L 158/77

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L 376/36

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1

TABLE OF FIGURES

Figure 1. Exports of goods and services during the financial crisis (OECD)

Figure 2. Exports of financial services of selected economies, 2005-2009

Figure 3. Cross-border Exports of other commercial services, World 2007 (BOP basis)

Figure 4. Subsector contributions to business services total: Number of enterprises, turnover, value added and number of persons employed, EU-27, 2005 (%)

Figure 5. Individual companies and natural persons, per sector

INTRODUCTION

I. Significance of the Service Sector and bilateral Swiss-EU Services Trade

With annual exports totalling about €50 billion and a determined outward-oriented policy, Switzerland ranks among the world's leading exporters of services. The country's services exports accounted for over 2.5 per cent of global exports at year-end 2009, a level that dwarfs the country's share in global output.[1] Switzerland's services exports have increased steadily in recent years and so has its surplus, making Switzerland a significant net exporter in the field (except in transport and communication services).

Switzerland's services trade performance was significantly affected by the recent financial turmoil, with financial services exports registering a 20 percent year-on-year decline in the last quarter of 2008 (see Figure 2).[2] There is, however, every reason to believe that Switzerland will remain a major services exporting economy, all the more so when one considers the country's overall crisis resilience when compared to other advanced industrial countries, according to the latest OECD economic survey of Switzerland.[3]

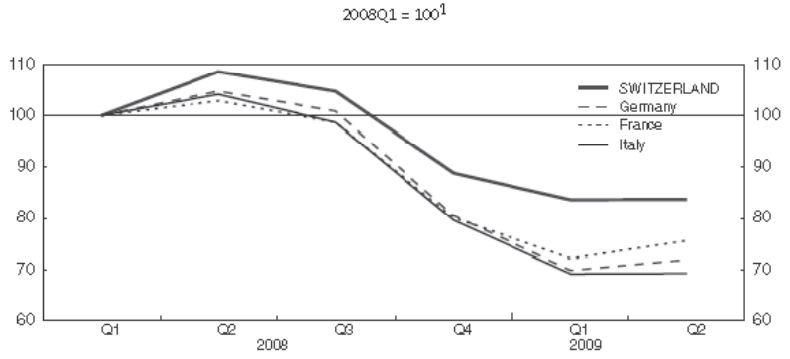
---

[1] Eurostat statistics available at: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/switzerland/index_en.htm. In turn, these statistics are in part retrieved from the World Trade Organization Trade Statistics.

[2] This trend is in line with the global situation of financial services exports. See WTO, *International Trade Statistics 2010* and Figure 2. Financial services contribute some 11% to Swiss GDP. See OECD, *Economic Survey: Switzerland*, 2009, p. 21.

[3] Which, however, is due to the pharmaceutical sector, suggesting that, again, the impact crisis may spread over several years. See OECD, *Economic Survey: Switzerland*, 2009, p. 20.

Figure 1. Exports of goods and services during the financial crisis (OECD)

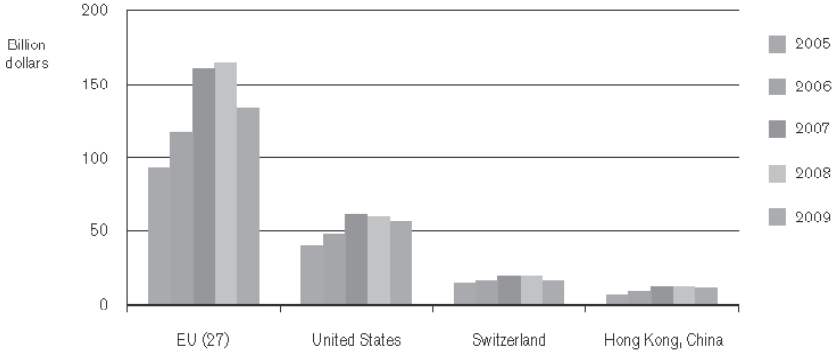


1. Index calculated on the value of quarterly exports of goods and services measured in US dollars (national accounts basis).

Source: OECD, OECD *Economic Outlook n° 86 database.*

Services contribute more than 70 per cent of Swiss GDP and employment. The continued growth of services trade is a prerequisite for sustained competitiveness and expansion of market access of Swiss firms to export markets.

Figure 2. Exports of financial services of selected economies, 2005-2009



Source: WTO, *International Trade Statistics*, 2010

The prospects for increased trade in services among the EU and Switzerland are very good. In the following, we provide some statistics that the European Statistics Authority makes publicly available in its website. It bears noting, however, that there is disagreement as to the accuracy of the statistics used by the EU and Switzerland and thus there may be under-reporting on both sides with respect to services imports. Such shortcomings constitute a caveat that the reader should take into consideration when reading this section.

Switzerland is a landlocked country with immediate borders with important EU Member States (MS) such as Germany, France, Italy and Austria. With a multilingual and open multicultural tradition, Switzerland is well-positioned to take full advantage of its location attributes and endowments. Switzerland is a privileged trading partner of the EU in that no other country has as many bilateral agreements with the EU in force. There were 120 such agreements at latest count. Such agreements have boosted bilateral trade, which peaked at €178 billion in 2008, before registering a sharp cyclical decline to €162 billion in 2009 in the wake of the financial crisis and its impact on the real economy.

The European Union is Switzerland's predominant trading partner, absorbing approximately 60 per cent of Switzerland's total trade. In overall trade terms, Switzerland ranked fourth among the EU's major trading partners in 2009, accounting for over 7 per cent of total EU trade.[4] To understand the resulting level of interdependence, Switzerland's trade with the US, its second most important trading partner, accounts for a mere 10 per cent of aggregate Swiss trade. Close to two-thirds of Swiss imports come from the European Union.

In the area of services, Switzerland is the EU's second-biggest partner after the United States, accounting for 11 per cent of extra-EU27 trade in services. The

[4] The statistics we use do not take into account Switzerland's trade relationship with Bulgaria and Romania. While the above figures have declined slightly over during the past two years, this likely represents a cyclical rather than structural development.

United Kingdom and Germany[5] continue to dominate EU trade in services. The United Kingdom has typically recorded the largest surplus with non-EU countries in services, followed by Sweden, Greece and France. The most open EU economies in services trade are the United Kingdom, France and Denmark, where extra-EU trade in services accounts for more than half of total trade in the sector. Conversely, Ireland and Italy recorded the largest bilateral deficits in non-EU trade in services. However, it is Belgium and Luxembourg which appear to have been most negatively affected during the recent credit crunch. Spain and Austria also rank among the key Swiss trading partners in services trade.

In 2009, Switzerland ran a surplus of about €25 billion, with exports twice as high as imports.[6] Despite such impressive achievements, Switzerland runs a negative balance on trade in services with the EU. In fact, according to EU statistics, Switzerland runs a trade deficit in services with most EU27 economies. Such a deficit stood at €20 billion at the end of 2009.[7] This is the EU's single largest bilateral trade surplus in services. To appreciate the magnitude of such a result, it bears noting that the EU's second highest surplus on the services account (with Russia) is some three times lower, at about €7 billion. Germany is by far Switzerland's most important trading partner, accounting on its own for almost half of the EU's surplus in the 'other business services' category prior to the economic crisis.[8] Switzerland has strong ties in this sector with Italy, Luxembourg, Belgium and France. Most EU countries registered surpluses with Switzerland in other business services in 2007

[5] Germany managed to turn a deficit into a surplus the last three years, although it continued to be the most significant of services from non-EU countries.

[6] Eurostat statistics, above note 1. According to the OECD, in the period 2006-2008, Switzerland run a surplus of some $38 billion. See OECD StatExtracts, Switzerland's statistical profiles 2010, available at: http://stats.oecd.org/Index.aspx?QueryId=23109.

[7] Eurostat statistics, above note 1. In 2009, the balance fo the EU's trade in services with the US turned into a deficit, probably because of the severe financial problems of US firms and the depreciation of the Euro against the US dollar.

[8] According to Eurostat, other business services include merchanting and trade-related services, operational leasing services and miscellaneous business, professional and technical services.

except Luxembourg (€1 billion), Portugal (€220 million), Italy (€176 million) and Netherlands (€77 million).[9]

Two-way Swiss-EU services trade amounted to an estimated €110 billion in 2009. There is considerable mobility of people (as workers and tourists) between the two countries. As estimated one million EU citizens live in Switzerland, and even more cross the borders every day to work or travel through the country regularly. Meanwhile, some 450'000 Swiss citizens reside in Europe.

The EU as a block is the world's leading player in international trade in services, with a surplus of over €80 billion in 2008.[10] The highest surplus, representing more than half of the total surplus in services, was in the category of business services. Most of the EU trade in services (around 60 per cent) occurs *between* EU MS (i.e. intra-EU trade), but this figure appears to be in secular decline. Intra-EU27 trade in services accounts for one-quarter of global trade in services.[11] Prior to the crisis (in 2008), services accounted for 71.6 per cent of total gross value-added in the EU.[12]

Business services play a particularly important role in all modern economies. Several services coming under this category, such as legal services, play a central enabling role.[13] In the category of 'other business services', the EU displays a surplus of over €30 billion. Many of the activities covered by this sector of the economy (computer services, real estate, R&D, and other business activities such as legal, accounting and auditing, market research, advertising etc) have taken advantage of the recent trend towards the establishment of supply chains in services and the

[9] Eurostat, *European Union international trade in services – Analytical Aspects: Data 2003-2007* (2009 edition), p. 80.

[10] Due to the crisis, this surplus shrinked to about €65 billion in 2009. See also the most recent WTO Trade Policy Review of the European Union, WT/TPR/S/214/Rev.1, 8 June 2009, p. 11.

[11] IMF, *Balance of Payments Statistics*.

[12] Eurostat, *Europe in Figures – Eurostat Yearbook 2010*, at 93.

[13] See also WTO, 'Legal Services', Background Note by the Secretariat, S/C/W/318, 14 June 2010.

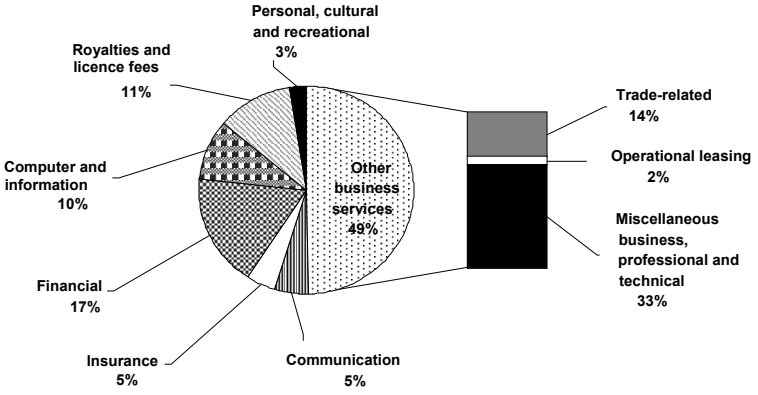
growing recourse to cross-border outsourcing, which may explain their recent rapid export growth.

The recent advent of business process outsourcing (BPO) is due to unprecedented advances in information and communication technologies (ICT) and their application to everyday business transactions. In India, revenue from legal outsourcing grew from US$ 146 million in 2006 to about US$640 million by the end of 2010, with employment growth rising from 7'500 to 32'000 Indian lawyers over the same period.[14] The increasing willingness of companies located in developed countries, particularly in Europe and the United States, to outsource non-core business functions also reinforces this trend. From call centers to legal research and text editing, manifold operations of developed-country companies are supplied by companies established in India, the Philippines or other developing countries nowadays.[15] The above developments explain why almost half of cross-border exports of services worldwide is in business services (Figure 3).

[14] ValueNotes Outsourcing Weekly, Legal Outsourcing hype: can India deliver; 6 October 2006: Vol. III, No. 40.

[15] For a retroactive study on BPO, see UNCTAD, *E- Commerce and Development Report 2003* (United Nations Publication, 2003), Chapter 5.

Figure 3. Cross-border Exports of other commercial services, World 2007 (BOP basis)



Source: WTO Secretariat (2009)

Whereas the EU is the largest absolute trader of services worldwide, the business service sector in the EU lags well behind its US counterpart. The EU maintains a significant share of international trade in business services vis-à-vis the US (26% vs. 18%). However, in absolute numbers the overall US net balance is double that of the EU. Several knowledge-intensive business services, such as legal or accountancy services, show a considerable deficit. Studies show that, in business services, the Netherlands, the United Kingdom and to a smaller extent Spain, are generally more outward-oriented in the area of business services, whereas France, Germany and Italy appear to be more inward-oriented as a result of relatively more restrictive regulatory environments. Nonetheless, these three are the very countries

where Swiss export-oriented service suppliers are most likely to deliver services due to geographical proximity, market size and language compatibilities.

II. Scope of the Study

Switzerland concluded seven bilateral agreements with the EU (Bilaterals I), thus complementing the 1972 Agreement relating to free trade and competition rules.[16] In 2004, Switzerland signed nine additional agreements with the EU (Bilaterals II). These agreements can be regarded as literal proxies for EU membership in the light of Switzerland's reluctance to re-activate its application for EU membership. From a political point of view, the form that the continuation of this relationship should take will be the subject of debate among the political leaders of the two sides in the next years.[17]

The Agreement on the free movement of persons (henceforth, the 'Agreement') is the crown jewel of the two packages of Swiss-EU bilateral agreements and certainly one of the most important steps towards further integration among the two economies, notably as it applies now to Swiss relations with all 27 EU MS, after consecutive successful referenda on this score in Switzerland.[18] The level of Swiss economic success in recent years can to a certain extent be traced to the gradual implementation of the free movement of persons according to the relevant Swiss-EU bilateral agreement since 2002. Freely employing personnel within the European

[16] Agreement between the European Economic Community and the Swiss Confederation, [1972] OJ L 300/189.

[17] From the EU side, the President of the European Council, Herman van Rompuy, in a recent meeting with the president of the Swiss Confederation, expressed EU's willingness to build future bilateral relationships on 'sound legal and political foundations', alluding at the same time to the importance that the EU attributes to the application by Switzerland of the acquis communautaire with regard to the internal market. See Press Release, 'Remarks by Herman Van Rompuy, President of the European Council, following his meeting with Doris Leuthard, President of the Swiss Confederation', PCE 169/10 of 19 July 2010, referring to the EU Council Conclusions on EU relations with EFTA countries of 5 December 2008, 16651/1/08, Rev. 1.

[18] In 2009, the Swiss population expressed renewed support for the continuation of the Agreement and its extension to the two most recently acceding EU MS (i.e. Romania and Bulgaria).

Economic Area (EEA) has been a major advantage that Swiss firms have used to respond to strong foreign demand for high-quality Swiss products. Additionally, the high level of qualifications that EEA professionals interested in the Swiss labour market display can entail additional advantages, especially if coupled with efforts to increase labour productivity through further economic reforms, as pointed out by the most recent OECD Economic Survey of Switzerland.

Against this backdrop, this study aims to clarify the legal framework that applies to the cross-frontier supply of selected business services between the EU MS and Switzerland, most notably professional services and other business services which are of interest to Switzerland in its relations with the EU. The focus is on a broad array of sectors entailing movement of professionals such as legal, accounting and auditing, architecture and engineering, technical testing and analysis services, computer-related services, and commercial representatives. Professional categories such as electricians, sport service suppliers (e.g. ski instructors, mountain guides), nurses and midwives also form part of the study. The focus of the present study does not concern the *establishment* of natural or legal persons in the two territories in the context of business service delivery, but the cross-border supply of services between the EU MS and Switzerland.

It bears mention that the GATS, which currently provides an over-arching framework governing the supply of services between Switzerland and European Union,[19] defines services through the identification of four modes of supply, [20] i.e.

a. 'Cross-border supply', which – like in trade in goods – occurs when a *service* crosses a physical frontier. Thus, under this mode, neither the supplier nor the

[19] As a preliminary remark, this would mean, in theory at least, that a given restriction to the cross-frontier supply of business services by Swiss service suppliers within the EU may not be against the EU's obligations under the EU-Swiss bilateral agreements, but it may still violate the EU's GATS commitments. For this, however, the EU would need to have undertaken sector-specific commitments to this effect.

[20] See also WTO, 'Cross-border Supply (Modes 1 and 2)', Background Note by the Secretariat, S/C/W/304, 18 September 2009.

consumer of a service actually moves. For example, a domestic consumer takes a loan or purchases an insurance cover from a financial institution located abroad;

b. 'Consumption abroad', whereby consumers buy services abroad, sometimes by physically moving to the location of the suppliers, as in the case of tourism services, or by sending their property abroad, as in the case of ship repair services;

c. 'Commercial presence', whereby, the service supplier establishes in the host country to provide its services; for instance, a foreign bank or transport company establishes a branch or subsidiary in another Member's territory to deliver services; and

d. 'Temporary movement of natural persons', whereby, for example, natural persons supply construction services in the territory of another Member on a temporary basis. This mode relates both to independent service suppliers and to employees of juridical persons supplying services, covering potentially the presence, for instance, of independent financial consultants as well as intra-corporate transferees.

The present study adopts the distinction between the provision of services and the concept of establishment as understood in EU law. Under EU law, the provision of services includes Modes 1, 2, and 4 within the meaning of the GATS. In other words, for the purposes of this study, cross-border supply of a service should incorporate:

a) The movement of the *service* through electronic means;

b) The movement of the *recipient* of a service to the country of the provider to consume the service;

c) The *temporary* movement (notably not exceeding 90 days per calendar year) of a *service supplier* (natural or legal person) in the country of the service recipient.

The last type of cross-frontier service supply lies at the heart of the study. In this respect, the study identifies the remaining barriers that Swiss service suppliers face when they attempt to supply their services in EU MS, notably when they take advantage of the 90-day rule enshrined in Article 5 of the Agreement. Intensive data gathering was undertaken with a view to identifying the various barriers that Swiss firms and providers face when they attempt to supply their services without establishing themselves in a given EU MS, in accordance with Article 5 of the Agreement and Article 17 of Annex I.

Restrictions to trade in services may take the form of obscure licensing procedures; discriminatory taxation; discretionary qualification requirements and procedures; denial of the ability to establish a commercial presence; the application of similar requirements for both establishment and provision of services in a cross-border manner, and so forth. Indeed, the complex structure of many services sectors and the multiplicity of levels of regulation (public vs private or self-regulation; State vs sub-regional or local level) provides numerous opportunities for effective (i.e. *de facto*) discrimination and the imposition of opaque measures of ostensibly protectionist intent. Accordingly, foreign companies entering new markets often face formidable barriers.

The current study is structured as follows: **Section B** entails a detailed overview of EU law and the ECJ relevant jurisprudence. This is warranted notably because a correct analysis of the meaning of the Agreement presupposes a good grasp of the relevant EU law provisions and the corresponding case-law, notably in relation to services which is at the core of this study. As explained below in detail, the Agreement shall be interpreted on the basis of EU law and the case-law delivered by the ECJ. A fallacy regarding the Agreement is that it ostensibly constitutes an agreement on services liberalization among the Contracting Parties. However, it should be underscored at the outset that no possible interpretation exists which would convert the Agreement into an accord between the EU and Switzerland to

apply the EU freedom to provide services in their relations. In other words, the Agreement is *not* a services agreement. Section C aims at describing the depth and breadth of the freedom to provide services and how it can be distinguished from the other EU fundamental freedoms. Identifying the boundaries among the freedoms is of paramount importance, as it determines which legal provisions are applicable to a certain activity. For instance, whereas the freedom to provide services can only be invoked by EU nationals, the free movement of capital can also be invoked by third-country nationals. In addition, Section C deals with two significant areas that are crucial in the area of business services, that is, the role of rules adopted by private bodies (recall that several business services are self-regulated by sometimes powerful professional associations) and the recognition of professional qualifications (where, by the way, professional associations may also have a say depending on the legal traditions of a given country). **Section C** builds on the previous section to describe the various constraints of the limited framework regulating the provision of services between the EU and Switzerland that the Agreement has created, which substantiates our claim that the latter is not a services agreement. Having said this, whereas the Agreement cannot be taken to transpose the EU freedom to provide services in the EU-Swiss context, it nonetheless includes provisions which under certain circumstances can allow for access to the EU services market, notably when it comes to services of brief duration supplied by natural persons. Indeed, what connects the Agreement with the provision of services is the fact that services can only be supplied by natural persons, and in turn, the objective of the Agreement is to ensure free movement of such persons regardless of whether they want to be employed or to exercise an independent activity. We discuss our empirical results and refer to the possible peculiarities of the business sector in **Section D**. **Section E** concludes.

RELEVANT EU LAW AND ITS INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE (ECJ)

III. *Over Fifty Years of European Integration – Successes, Recipes and Constitutionalization*

The European Union is a never-ending experiment whereby an ever-increasing number of European countries has decided to reach closer integration within a diverse set of legal traditions and values.[21] Building on the ashes of a devastated and divided Europe, the early European Economic Community gradually evolved into an area where closer forms of integration were tested, with varying levels of success. The European recipe centered on market integration as a means of achieving broader economic, and ultimately political, goals.[22] As the German Constitutional Court underscored in its recent *Lisbon* judgment,[23]

> [e]conomic intertwining, as far-reaching as possible, and a Common Market, were intended to result in the practical need for political communitarisation'. Commercial and economic conditions were to be created which would lead towards political unity, including foreign and security policy, to be viewed as the only logical conclusion.

---

[21] The European Union is the outcome of a series of subsequent treaties among several European countries. What started as a European Economic Community (EEC) among 6 European countries in 1957, evolved into a European Community with the Merger Treaty in 1967, and later into a European Union with the entry into force of the Treaty of Maastricht in 1993, which co-existed with the European Community in a so-called three-pillar structure. The treaty of Lisbon, which entered into force in December 2009 and is the most recent amendment of the EU constitutive treaties, provides for the abolition of the three-pillar structure. This means that the Community ceases to exist and is succeded, for all practical purposes, by the European Union, which nowadays comprises 27 Member States: See Article 1 TEU.

[22] To be sure, political backup has always been the *conditio sine qua non* for the success of the EU project. Just as every endeavour of that scale and magnitude, it has largely been MS-driven. As the former Belgian Prime Minister, Paul-Henri Spaak, famously noted, '[t]*ous ceux qui ont essayé de régler les problèmes économiques que posait les traité de Rome en oubliant le coté politque de la chose sont allés à un échec et aussi longtemps qu'on examinera [ces] problèmes uniquement sur le plan économique et sans penser à la politque, je le crains, nous irons à des échecs répétés*'. Speech at the Chambre des Représentants, 14 June 1961.

[23] BVerfG, 2 BvE 2/08 vom 30.6.2009, para. 7.

It was peace and prosperity which would increase the popularity and legitimacy of the then Community. Increasing the interconnectedness of the European economies would create pressures for further integration from industries and interest groups. Thus, integration within Europe, in accordance with Jean Monnet's vision, had to be conceived as technocratic, elite-led gradualism, along with corporatist-style engagement of affected interests, thereby creating pressures for 'more Europe'.[24]

Indeed, in its first decades of existence, the EU story was focused on the market and the removal of discriminatory barriers.[25] Such removal was many times induced by far-reaching judgments from the ECJ, which was advancing teleological interpretations (based on the doctrine of *effet utile* and the *finalité* of the Treaties, ie not that much what the wording of the Treaties suggested as what were the long-term objectives of the founding fathers of the Treaties) of the provisions enshrined in the Treaties (habituated by an overarching vision of the Community as a single market place)[26] and perhaps, at the same time, was indirectly expressing its discontent for the, at times, inertia of the supranational legislative institutions. Such developments compelled the EU legislative (that is, both the European Commission and the Council) to react and reflect on the necessary legislative responses to keep up with the ECJ's judicial activism. Indeed, as famously noted by Eric Stein, 'tucked away in the fairyland Duchy of Luxembourg and blessed [initially] with benign

[24] This theory has been framed as the neofunctionalist theory of European integration. See Paul Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), at pp. 3-7. To this theory, one should also add the external dimension or parallelism of EU developments. An increased pro-European consensus will allow to the EU to play the important role that it strives for at the global level. Thus, unity is essentially considered as a prerequisite in order to adequately face contemporary global challenges. Cf James Rogers, 'From "Civilian Power" to "Global Power": Explicating the European Union's "Grand Strategy" Through the Articulation of Discourse Theory' 47(4) *Journal of Common Market Studies* (2009) 831.

[25] F. Jacobs, 'The Evolution of the European Legal Order' 41 *Common Market Law Review* (2004) 303, at 304.

[26] Cf Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837 ; also Case 24/68, *Commission v Italy* [1969] ECR 193.

neglect by the powers that be and the mass media, [the ECJ] has fashioned a constitutional framework for a federal-type structure in Europe'.[27]

This success story was built on a customs union. According to Article 28:1 of the Treaty on the Functioning of the European Union (TFEU), the EU comprises a customs union. This means that customs duties are prohibited between MS, whereas a common customs tariff (CCT) is endorsed vis-à-vis third countries. Quite astonishingly at that time, and in a critical turn for the future evolution of the EU, the ECJ decided, in judging a customs duties case, to underline the peculiarity of the European project, and its difference from any other international law entity.[28] In the celebrated *Van Gend en Loos*, the Court found that:[29]

> [t]his Treaty is more than an agreement which merely creates mutual obligations between the Contracting States…[T]he Community [sic] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law [sic] therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

---

[27] E. Stein, 'Lawyers, Judges, and the Making of Transnational Constitution' 75(1) *American Journal of International Law* (1981) 1.

[28] Note, however, the German constitutional court's finding in its recent *Lisbon* judgment that the European Union remains a *derived* fundamental order, as its empowerment to exercise supranational powers comes from the MS, which permanently remain the masters of the Treaties (*Herren der Verträge*). The BVerfG goes on to suggest that the EU *'establishes a supranational autonomy which undoubtedly makes considerable inroads into everyday political life but is always limited factually. Here, autonomy can only be understood…as an autonomy to rule which is independent but derived, i.e. is granted by other legal entities*.' In this respect, the BVerfG refers to the principle of conferral, i.e. that the Union can act only within the limits of competences conferred upon it by the MS, and emphasizes that this principle is the expression of the foundation of EU authority in the constitutional law of the MS. See BVerfG, 2 BvE 2/08 vom 30.6.2009, paras 231, 234.

[29] Case 26/62, *Van Gend en Loos* [1963] ECR 1.

The groundbreaking character of the judgment as far as individuals is concerned is associated with the recognition of direct effect to certain EU law provisions, i.e. the conferment of the right of individuals to rely on EU law and to challenge national measures which prevent or hinder the exercise of EU rights. A couple of years later, the ECJ came back to this crucial issue to find:[30]

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system… By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity, and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields and have thus created a body of law which binds both nationals and themselves.

Along with the confirmation of the aforementioned *Van Gend en Loos* case-law, the Court ruled on the supremacy or primacy of EU law vis-à-vis national legislations and constitutions. Such primacy, just as direct effect, was a principle that had to be applied by *national* courts, thereby transforming national courts into decentralized agents of the ECJ and missionaries of the EU ideal.[31] Around this period, once the transitional period that the Treaty of Rome envisaged expired, the ECJ also accepted the direct effect of all fundamental freedoms, thereby allowing to individuals to directly refer to the Treaty provisions to outlaw discriminatory treatment.

A decade later, the ECJ would go a step further suggesting that national courts are obliged to *disapply* national legislation which may be in conflict with EU

[30] Case 6/64, *Costa v ENEL* [1964] ECR 585, at 593.

[31] As Weiler notes, together with the possibility for a preliminary ruling, these doctrines transformed national courts and individuals into agents for monitoring compliance, thereby nationalizing EU norms: Joseph Weiler, 'The Transformation of Europe'100 *Yale Law Journal* (1991) 2403, at 2420-21.

law, without waiting for any prior confirmation by the highest national court,[32] thereby rendering inoperative any EU-incompatible domestic legal provision.[33] Thus, early on, the ECJ recognized the capacity of a norm of EU law to be applied in domestic court proceedings and to overrule inconsistent norms of national law in such proceedings.[34]

IV. The Internal Market and the Individual

Other than the customs union, which is of paramount importance for external trade, at the heart of the EU project lies the creation and completion of an internal market.[35] Article 3:3 TEU provides as much. According to Article 26:2 TFEU, the internal market constitutes an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Initially perceived as economic, these four freedoms have been gradually upgraded and recognized as fundamental, thereby attributing to them a status virtually equivalent to fundamental rights.[36] For instance, already in 1983 the Court referred to the free movement of workers as a fundamental right,[37] and the same was recognized for the free movement of goods.[38]

---

[32] See Case 106/77, *Simmenthal* [1978] ECR 629.

[33] Cf. Joined Cases C-10/97 and C-22/97, *Ministero delle Finanze v IN.CO.GE. '90 and others* [1998] ECR I-6307, para. 21.

[34] Cf B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), p. 179.

[35] For the sake of simplicity, the terms 'single market', 'internal market' and 'common market' are used interchangeably here. See, in this respect, Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms*, 2nd edition (Oxford University Press, 2010), p. 9.

[36] The Court has invariably used terms such as 'fundamental freedom', 'one of the fundamental principles of the Treaty', a 'fundamental Community provision' or 'one of the foundations of the Community' to describe the significance of the four freedoms. See Peter Oliver and Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' 41 *Common Market Law Review* (2004) 407.

[37] Case 152/82, *Forcheri v Belgium* [1983] ECR 2323, para 11; also Case 222/86, *UNCTEF v Heylens* [1987] ECR 4097, para 14.

[38] C-228/98, *Dounias v Minister for Economic Affairs* [2000] ECR I-577, para. 64. *Schmidberger* is one of the cases where the ECJ's stance reveals the superior status of the freedoms within the internal market

Such rights can be invoked before the national courts, which are obliged to recognize their primacy and their broad, increasingly unlimited, scope.[39]

This was a very important judicial backup of the attempt made by the Commission to promote the mobility of factors of production across the Community. Without the sometimes imaginative protection of social rights of migrant workers, the EU edifice would look differently today.[40] The same goes for the ECJ's decision relating to the concept of 'worker'. Early on, the Court clarified that it would not allow any unilateral determinations and, instead, emphasized that there needed to be a Community meaning for this concept.[41] Of course, the area of free movement of persons is the most apposite for the fundamental-right-like interpretation of the right to free movement (similarly to the rights enshrined in the European Convention on Human Rights) owing to the repercussions that such interpretations may have for the fundamental rights of a given individual with regard to employment, dignity, family life, social benefits and so forth.

Such jurisprudence paved the way for the recognition of derived rights for family members of the workers making use of the freedom and for persons who are economically non-active. This latter led to the most recent development of a body of case-law, which allows free movement based on Community citizenship rules, that

---

even if they have to be balanced against hard core fundamental rights such as the freedom of expression and assembly. See C-112/00, *Schmidberger* [2003] ECR I-5659. Within this line of case-law, *Viking Line* is another leading case exemplifying the type of balancing fundamental freedoms against fundamental rights (*in casu*, the right to strike) that the ECJ would typically apply. See C-438/05, *The International Transport Workers' Federation and the Finnish Seamen's Union* [2007] ECR I-10779.

[39] The Treaty of Lisbon goes one step further with regard to fundamental rights protection within the EU: First, the Charter of Fundamental Rights of the European Union is given the same legal value as the treaties and thus becomes legally binding (Art. 6:1 TEU). Second, the Union's unwritten fundamental rights continue to apply as general principles of the law of the Union (Art. 6:3 TEU). Finally, Art. 6:3 TEU incorporates the EU's commitments to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[40] In *Defrenne*, the Court emphasized that the Community [sic] is 'not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples'. See 43/75, *Defrenne v SABENA* [1976] EC 455, para. 10.

[41] Case 75/63, *Hoekstra* [1964] ECR 177.

is, without requiring any exercise of economic activity.[42] Notably the right to move and reside freely, now enshrined in Article 21(1) TFEU constitutes the prerequisite for the exercise of any of the fundamental freedoms.[43] In this regard, it describes an essential, stand-alone, 'primary and individual' right[44] conferred directly on every citizen of the Union.[45] More generally, it bears mention that, subject to limitations and conditions laid down in the treaties and secondary legislation,[46] all EU citizens enjoy:

i. The right of entry into another MS;
ii. A stand-alone and directly effective right of residence in another MS; and
iii. The right to enjoy social advantages on equal terms with nationals for those lawfully resident in another MS.

Notably with regard to the right of residence in another MS, it is worth noting that such right is unconditional in that a valid identity card or passport suffices.[47] Migrant workers are allowed to start working before completing any

[42] See also European Commission Communication, 'EU Citizenship Report 2010 – Dismantling the obstacles to EU citizens' rights', COM(2010) 603 final, 27 October 2010.

[43] Also C-184/99, *Grzelczyk* [2001] ECR I-6193; and C-85/96, *Martínez Sala* [1998] ECR I-2691.

[44] C-162/09, *Lassal*, judgment of 7 October 2010, para. 29.

[45] Cf C-413/99, Baumbast [2002] ECR I-7091. In para 83 the Court explicitly stated that 'the Treaty on European Union does not require that citizens of the Union puruse a professional or trade activity, whether as as employed or self-employed person, in order to enjoy the rights [relating to the citizenship of the Union]'.

[46] The most important act of secondary legislation on this score is Directive 2004/38 (so-called Citizens' Rights Directive or CRD). It is worth noting that the main legislative activity of the EU institutions is reflected in Regulations and Directives. While Regulations are binding in their entirety and directly applicable, Directives are binding as far as the result to be achieved is concerned. Typically, Directives specify a transposition period, during which MS are obliged to transpose the Directive into national law. Thus, transposition of Directives entails a process of transforming directives into provisions of national law by the competent national legislative body or bodies. For more details, see Sasha Prechal, *Directives in European Community Law – A Study of Directives and their Enforcement in National Courts* (Clarendon Press, 1995).

[47] However, in *Oulane*, the ECJ found that the production of a valid identity card or passport may not be needed when the identity and nationality of a given individual can be proven unequivocally

formalities with the administration of the host country or obtaining a residence permit. It bears mention that, according to settled case-law of the ECJ, the right of residence is a fundamental right derived from the Treaties and is independent of the possession of any particular documents.[48] In *Metock*, the ECJ emphasized that:[49]

> Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any Member State, in particular the Member State whose nationality the Union citizen possesses, in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses.

Even the residence permit is deemed to have a mere *probative* and no *constitutive* value.[50] This right applies to family members as well even if they are non-EU nationals.[51] The right of residence for a period *longer than 3 months*, in turn, is subject to several conditions.

- First the right is recognized for workers or self-employed persons in the host MS.
- Second, such right is granted to those EU citizens who have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host MS and have sickness insurance cover. The absence of sufficient resources and sickness cover can deprive an EU

through other means. In addition, such production is against the free movement rules when the production of a valid identity card or passport is not required by the nationals of the host MS. See C-215/03, *Oulane* [2005] ECR I-1215.

[48] Case 118/75, *Watson and Belmann* [1976] ECR 1185, paras 15-16. Also C-215/03, *Oulane* [2005] ECR I-1215, para. 25.

[49] C-127/08, *Metock and others* [2008] ECR I-6241, para. 68.

[50] This means that the existence of the right is not dependent on the acquisition of a residence permit. Rather, the latter *confirms* the existence of the right of residence. C-85/96, *Martinez Sala* [1998] ECR I-2691.

[51] See Article 6 of Directive 2004/38.

citizen from the right of residence if she is not economically active. A lack of resources cannot be saved by the provisions on the EU citizenship.[52] However, in case that such a citizen is lawfully resident in the host MS for a certain time or possesses a residence permit, she can benefit from social assistance benefits based on the fundamental principle of non-discrimination enshrined in Article 18 TFEU.[53] Thus in case of lawful residence, EU MS cannot discriminate against non-nationals if the latter satisfy the conditions required of nationals of that MS. The MS is allowed to determine that non-nationals having recourse to social assistance no longer fulfil the conditions of their right of residence, but denial of the right of residence cannot be substantiated by such a recourse alone.[54] This should be taken to essentially mean that, because EU citizens falling under this category are not unlawfully resident in a given EU MS, they are entitled to equal treatment.[55]

- Third, the right is recognized to students who need to have sickness insurance cover and sufficient financial resources for themselves and their family members not to become a burden on the social assistance system of the host MS. In *Grzelczyk*, the ECJ suggested that a French national studying in a Belgian University in its fourth year of his studies could apply for minimum income guarantee (minimex) if such scheme was accessible to Belgian students, based on the EU citizenship rules. According to the Court, there exists 'a certain degree of financial solidarity' between nationals of a host MS and nationals of other MS on condition that the latter do not constitute an unreasonable financial burden.[56] In *D'Hoop*, the Court underlined that one of the functions of Article 21 TFEU is indeed to allow nationals from a MS to go

[52] *Trojani*, para. 36.

[53] Ibid, para. 39.

[54] C-184/99, *Grzelczyk* [2001] ECR I-6193, paras. 42-43.

[55] Cf. Barnard, above note 35, p. 444.

[56] *Grzelczyk*, para. 44.

to another MS to pursue secondary education.[57] If Article 21 TFEU is not helpful, the ECJ, just like in *Trojani*, suggested in *Bidar* that students going to another MS for studies can still rely on Article 18 TFEU to claim access to financial assistance in the form of subsidized loans or grants under the same conditions as those applied to students lawfully resident in the host MS.[58]

- Fourth, the aforementioned longer period of residence is equally granted to those family members accompanying or joining an EU citizen who comes under one of the previous three categories. The Case *Zhu and Chen* is fairly striking on this score.[59] Catherine Zhu was a young minor born in Ireland where her Chinese parents had gone a few months before Catherine's birth to allow their child to acquire the Irish nationality. The case reached the ECJ because the United Kingdom's immigration authority rejected Catherine's and her mother's applications for a long-term permit to reside in the United Kingdom. The Court started by underscoring that the right of free movement and residence enshrined in the Treaties was not dependent on any minimum age. It continued by suggesting that the citizenship provisions did apply to such situations as well, notably when the applicants had the necessary financial resources (even if these were Catherine's mother's) and insurance cover so that they did not become a burden on the public purse. In addition, the Court admitted that Catherine's mother could not be regarded as a dependent on Catherine taking into account that the latter was a minor. However, only the fact that the mother was the primary carer of the minor allowed the mother to reside with the child in the host MS, based on Article 21 TFEU. More recently, in *Zambrano*, the Court found that the right to residence is not linked to the exercise of free movement and residence by the child who

[57] C-224/98, *D'Hoop* [2002] ECR I-6191, paras 29-34.

[58] C-209/03, *Bidar* [2005] ECR I-2119.

[59] C-200/02, *Zhu and Chen* [2004] ECR I-9925.

is an EU citizen. Rather, such a derivative right for third-country national parents who are primary carers for a child who is an EU citizen also apply in the country that has granted citizenship to the child, *in casu*, Belgium.[60] Thus, by refusing to grant a right to residence and a work permit to the parents of that child, Belgium was found to deprive that child of the genuine enjoyment of the substance of the rights attaching to the status of the EU citizen.

Finally, Directive 2004/38/EC also includes a right of permanent residence. According to the Directive, this right constitutes a key element in promoting social cohesion and was provided for by that Directive in order to strengthen the sense of Union citizenship. This right can be acquired on the ground of legal residence for a continuous period of five years in the host MS pursuant to Article 16 of Directive 2004/38. In *Lassal*, the Court noted that absences from the host MS of less than two consecutive years are not pertinent as long as a continuous period of five years' legal residence had been completed. Importantly, the Court accepted this even for five-year periods which were completed before the entry into force of the directive.[61]

V. Justifying Derogations from EU Free Movement Rules

Over the years, the ECJ has developed a series of justifications which are not mentioned in the Treaties and which can allow for derogation from the substantive obligations enshrined in the Treaties, thereby limiting the scope of the fundamental freedoms. Thus, the Court has identified several societal concerns as mandatory requirements of the common interest such as the protection of workers;[62] the

[60] C-34/09, *Zambrano*, judgment of 8 March 2011.

[61] C-162/09, *Lassal*, judgment of 7 October 2010.

[62] C-165/98, *Mazzoleni and ISA* [2001] ECR I-2189, para. 27.

financial equilibrium of the system of social security;[63] prevention of fraud on the social security scheme;[64] the requirements of the system of social assistance;[65] the protection against social dumping;[66] professional rules protecting the recipient of a service;[67] protection of intellectual property;[68] consumer protection;[69] conservation of national heritage; [70] the cultural policy;[71] environmental protection;[72] protection against unfair competition;[73] combating illegal employment;[74] the improvement of the education system;[75] the good administration of justice; [76] the coherence of the taxation scheme;[77] the effectiveness of fiscal supervision; [78] or the prevention of artificial arrangements aimed only at avoiding national tax normally due.[79] These objectives constitute judge-made law, although one could reasonably argue that the Court has reacted positively to the pleas of MS relating to such objectives.[80] However, it bears mention that the ECJ was unwilling to accept similar arguments in several cases where such economic justifications were invoked, thereby showing the

[63] C-385/99, *Müller-Fauré* [2003] ECR I-4509, para. 73.
[64] C-406/04, *De Cuyper* [2006] ECR I-6947, para. 41.
[65] C-70/95, *Sodemare* [1997] ECR I-3395, para. 32.
[66] C-341/05, *Laval* [2007] ECR I-11767, para. 103.
[67] C-3/95, *Sandker* [1996] ECR I-6511, para. 38.
[68] Case 62/79, *Coditel* [1980] ECR 881.
[69] Case 220/83, *Commission v France* [1986] ECR 3663, para. 20.
[70] C-180/89, *Commission v Italy* [1991] ECR I-709, para. 20.
[71] C-288/89, *Gouda* [1991] ECR I-4007, paras 22-23.
[72] Joined Cases C-151/04 and 152/04, *Nadin* [2005] ECR I-11203, para. 52.
[73] C-60/03, *Wolff & Müller* [2004] ECR I-9553, para. 41.
[74] C-255/04, *Commission v France* [2006] ECR I-5251, para. 52.
[75] C-40/05, *Lyyski* [2007] ECR I-99, para. 39.
[76] C-3/95, *Sandker* [1996] ECR I-611.
[77] C-204/90, *Bachmann* [1992] ECR I-249.
[78] C-55/98, *Bent Vestergaard* [1999] ECR I-7641, para. 23.
[79] C-196/04, *Cadbury's Schweppes* [2006] ECR I-7995, para. 51.
[80] This of course has led to the proportionality test becoming the ultimate litmus test.

difficulty in drawing a clear line in this regard.[81] Essentially, the standard of review under the free movement rules can be summarized in the following way: [82]

1) Is the measure applied in a non-discriminatory manner?
2) Is the measure justified by the express derogations (public morality; public security; public health) or any overriding reasons based on the general interest?
3) Is the measure suitable for securing the attainment of the objective that it pursues?
4) Is the measure not going beyond what is necessary in order to attain that objective?

In more recent case-law, the ECJ elaborated on the third element mentioned above, i.e. the suitability of a given measure. Thus in *Hartlauer*[83] and *Presidente del Consiglio de Ministri v Regione Sardegna*,[84] the Court found that national legislation is appropriate to ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain such an objective in a *consistent* and *systematic* manner. For instance, in *Corporación Dermoestética*, the Court found that a ban on advertising medical and surgical treatments on national television networks while at the same time allowing broadcasting such advertisements on local television networks revealed an inconsistency of the Italian policy in this respect.[85]

In sum, despite significant legislative efforts and judicial interpretations, the EU internal market is far from completed and thus should be regarded as an on-

[81] See, for instance, C-398/95, *SETTG v Ypourgos Ergasias* [1997] ECR I-3091, para. 25 and compare with Joined Cases C-49, 50, 52, 54, 68, and 71/98, *Finalarte* [2001] ECR I-7831.

[82] See, inter alia, C-108/96, *Mac Quen and Others* [2001] ECR I-837.

[83] C-169/07, *Hartlauer* [2009] ECR I-1721, para. 55

[84] C-169/08, *Presidente del Consiglio de Ministri v Regione Sardegna* [2009] I-10821, para. 42.

[85] C-500/06, *Corporación Dermoestética* [2008] ECR I-5785, para. 39.

going process, several decades after its launch. More recently, the European Commission, after recognizing the structural challenges and the persistent difficulties in increasing cross-border transactions, launched the idea of adopting a Single Market Act. Facilitating trade in services, notably business and professional services, has taken centre stage in the strategy of the European Commission for the near future.[86]

Crucially for the purposes of this study, discrepancies as to the level of completion of a given free movement area can affect the EU's behaviour in its external relations. Such tensions result from the EU's internal attribution of competences, which reflect on the international plane. In *AETR*, the ECJ first established the principle of implied external powers (or parallelism), which suggests that the adoption of internal measures at the EU level prevents MS from concluding agreements with third countries which may affect the application of such internal measures. In such cases, MS can no longer intervene, as a transfer of powers has tacitly taken place.[87] What should be kept in mind, however, is that in the case of agreements relating to the free movement of persons, the ECJ has explicitly suggested that both the Community and the MS are to conclude, concurrently, any international agreement.[88] Such accords are called 'mixed agreements' in the EU law vernacular and have an impact on the preparation, negotiation and adoption of those agreements.[89]

---

[86] European Commission Communication, 'Towards a Single Market Act – For a highly competitive social market economy', COM(2010) 608 final, 27 October 2010.

[87] See also Geert De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), pp. 33ff. This however was nuanced by subsequent case-law. See, for more details, Marise Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), p. 136; Also M. Cremona and B. de Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing, 2008).

[88] Cf. Opinion 1/94, *WTO Agreements* [1994] ECR I-5267.

[89] The Lisbon Treaty appears to modify the landscape here, as it establishes exclusive competences for the EU in the areas of services, intellectual property and investment. See new Article 207 TFEU.

VI. The Scope of the EU Freedom to Provide (and Receive) Services[90]

1. Historical background and facts

The Single (or internal) Market Programme (SMP) set out by the European Commission in its 1985 White Paper 'Completing the Internal Market',[91] and the Single European Act (SEA) of 1986, formally completed in 1992, aimed at the removal of all barriers to trade and FDI in the EU. The SMP aimed to create a unified market in goods and services and establish in effect a single market for production factors. While the SMP has unambiguously fostered greater competition, monetary integration, social protection and common policies to external issues and challenges, several barriers to intra-EU trade in services remain in place.

In 2002, the Commission itself, in its report on 'The State of the Internal Market for Services',[92] which formed part of the internal market strategy for services adopted by the Commission in December 2000,[93] identified the many challenges of completing the internal market for services. More recently, Mario Monti contended that, in the case of services, the EU was still in a phase of 'market construction' that requires the abolition of barriers to cross-border activity, the dismantlement of national administrative and technical barriers and overcoming corporatist resistances.[94] Complex regulatory barriers have been substituted in part for physical and technical barriers, thereby diminishing the possibilities for a genuine, integrated

[90] The review of the mechanics of the fundamental freedom of free movement of workers is out of the scope of this study, as the study focuses on persons (including self-employed ones) moving temporarily to provide a service. For the same reason, the freedom of establishment is outside the scope of this study as well.

[91] See European Commission, *Completing the internal market*, White Paper, COM(85)310 final, June 1985.

[92] European Commission, 'The State of the Internal Market for Services', COM(2002) 441 final, 30 July 2002.

[93] European Commission, 'Internal Market Strategy – Priorities 2003-2006', COM(2003) 238, 7 May 2003. This strategy came as a response to the request by the Lisbon European Council in March 2000. See the Presidency Conclusions of the Lisbon European Council, para. 17.

[94] Mario Monti, 'A New Strategy for the Single Market at the Service of Europe's Economy and Society', Report to the President of the European Commission (Monti Report), p. 37, available at: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf (visited 15 September 2010).

internal market for services. Furthermore, monopolies in certain sectors such as postal services or energy utilities still exist. In addition, MS fail to transpose to national law EU legislation by the due date, notably in areas such as transport, finance and energy.[95] And yet services account for two-thirds of total employment and for all new employment growth within the Union,[96] while other studies praise the growth-generating effects of services liberalization.[97]

The fragmentation that characterizes the regulation of services supply within the European Union has negatively affected the competitiveness of European firms and undermined the ambitious objective of the Union becoming the most competitive and dynamic knowledge-based economy worldwide ('Lisbon Strategy'). In its relations with other countries such as Switzerland, such fragmentation worsens the chances of success for any foreign service supplier attempting to penetrate the EU market, as the regulatory framework according to which that service supplier should operate is vague at best. Moreover, several service sectors such as health or education services are essentially regulated at the EU MS level, while for several services such as tourism, distribution, construction, engineering and consultancy, certification and testing, no comprehensive internal market policy exists.

Such a situation cannot be regarded as sustainable: services exert an essential role in the overall functioning of markets, since they underlie the relations between producers and consumers. Services are a crucial component of the information industry networks on which these relations between producers and consumers depend. Instantaneous interactive communication permits transactions in an increasing number of services to occur at the same time but in different places. This

---

[95] See OECD, *Economic Survey: European Union*, 2009, pp. 75ff.

[96] European Commission, 'New European Labour Markets, Open to All, with Access for All', COM(2001) 116 final, 28 February 2001.

[97] *Inter alia*, Aaditya Mattoo; Randeep Rathindran and Arvind Subramanian, 'Measuring Services Trade Liberalization and Its Impact on Economic Growth: An Illustration' 21:1 *Journal of Economic Integration* (2006), 64-98.

allows overcoming the previously indispensable requirement of proximity between consumer and service supplier and thus increases the tradability of services across borders and jurisdictions, calling for a more efficient reaction in regulatory-making terms from the side of the regulators at a cross-national level. Furthermore, the growing interpenetration of services and goods in the supply and demand cycles means that any policy seeking the optimal allocation of productive resources must now take into consideration regulatory issues in both goods and services and their intermingling.[98] As we will see later, the initially ambitious Services Directive attempted to resolve some of these deficiencies.

2. Primary law and relevant jurisprudence in the area of services

a) Services as an ancillary freedom?

For a long time, services were considered as a subordinate category of economic activity. The wording of the EC Treaty also left open the issue for possible misinterpretations. According to Article 50 of the European Community Treaty (ECT), 'services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement of goods, capital and persons'. Thus, services have been negatively defined in the alternative by reference to the other three fundamental freedoms.[99] The drafters of the Lisbon Treaty did not

[98] P. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (Oxford University Press, 2007), pp. 62-63. For this intermingling, compare C-390/99, *Canal Satélite Digital* [2002] ECR I-607, paras 31-33. In the WTO context, see the recent Appellate Body Report, *China – Publications and Audiovisual Products*.

[99] Case C-275/92, *Schindler* [1994] ECR I-1039, paras 16-30; also C.-D. Ehlermann and G. Campogrande, 'Rules on services in the EEC: A model for negotiating world-wide rules' in E.-U. Petersmann and M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Kluwer Law International, 1988), 484; also J. Snell, *Goods and Services in EC Law – A Study of the Relationship Between the Freedoms* (Oxford University Press, 2002).

feel that any changes to this provision were necessary and thus the new Article 57 TFEU reproduces the previous Article 50 ECT.

Such a definition of services could be regarded as a compromise solution in the absence of a satisfactory definition as to what a service is.[100] Nevertheless, this negatively formulated wording led to interpreting this provision as an ancillary – or residual one, when compared with the freedoms relating to goods, capital or persons. The ECJ has also explicitly ruled as much in *Gebhard*, where it found that:[101]

> The provisions of the chapter on services are *subordinate* to those of the chapter on the right of establishment in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are "established" in two different Member States and, second, as the first paragraph of Article 60 specifies that the provisions relating to services apply *only if those relating to the right of establishment do not apply*. (emphasis added)

As a corollary of this line of thinking, the ECJ argued for the mutual exclusivity of the freedoms when it comes to their applicability to a given measure.[102]

Perhaps driven by the fact that the economies of all MS are by now services economies, the ECJ abandoned this incongruous case-law recently. In *Fidium Finanz*, the ECJ had to decide whether a Swiss company could challenge German rules which made the grant of credit on a commercial basis subject to prior authorization, which in turn was contingent on the company having its central administration or branch in Germany (or within the EEA). The ECJ, in a Grand Chamber formulation to

---

[100] Recall that this is also the case in the General Agreement on Trade in Services (GATS) where services are defined by reference to the mode of supply through which they can be delivered.

[101] Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 22. See also earlier, Cases 60 and 64/84, *Cinéthèque* [1985] ECR 2605, para 10; and C-275/92, *Schindler*. However, in a clearly irrational manner, such an approach was not regarded by the court as neglecting the economic significance of the sector. See Case 205/84, *Commission v Germany* [1986] ECR 3755.

[102] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 20.

underline the gravity of the ruling, suggested that Article 50:1 ECT (now 57:1 TFEU) does not establish any order of priority between the freedom to provide services and the other fundamental freedoms.[103] Rather, the ECJ engaged in positive argumentation by stating that this provision covered services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms.

In addition, the Luxembourg Court ended up abandoning the unsustainable and rather artificial stance relating to an alleged mutual exclusivity among the freedoms. Instead the ECJ confirmed that, in theory, a national provision may *simultaneously* hinder the exercise of *two* freedoms,[104] *in casu*, the freedom to provide services and the free movement of capital.

However, courts are still obliged to examine whether, under the specific circumstances of a case, the national legislation should be examined under one freedom, whereas the other freedom is entirely secondary in relation to the other or should prevail over the other. If the primary freedom is violated, this violation should be regarded as the inevitable consequence of the violation of the former freedom.[105]

b) The constituent elements of this freedom

According to Article 56, 'restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State *other than that of the person for whom the services are intended*' (emphasis

[103] C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521, para 32. See also Christa Tobler, 'Die Fidium Finanz-Entscheidung des EuGH: ein Vorbote der Luxemburger Rechtsprechung zum bilateralen Recht?' 4 *SZIER* (2006) 397.

[104] See by analogy (free movement of goods versus free movement of services), Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paras 31 ff., and Case C-71/02 *Karner* [2004] ECR I-3025, paras 46-47.

[105] C-196/04, *Cadbury Schweppes* [2006] ECR I-7995, para. 33.

added). Thus the inter-MS element is decisive. However, the ECJ has applied the transfrontier element very flexibly to the point that the distinction with its case-law on purely internal situations is hard to make. Cases such as *Carpenter*, *Gourmet* or *Ciola* show that, under certain circumstances, service suppliers can have recourse to EU law and use it against their government. Furthermore, as exemplified in *Alpine Investments* (cold calling) but also *Bond van Adverteerders*, it is possible that neither the supplier nor the recipient of the service move; rather the *service itself* moves.

The second constituent element relates to the existence of *remuneration*. Remuneration lies in the fact that it constitutes consideration for the service at issue, and is normally agreed upon between the provider and the recipient of the service.[106] A series of education-related cases clarified that establishments of higher education do come within this category when they are financed essentially out of *private* funds.[107] Thus, the commercial nature of the services supplied is also an element to be considered. This may incorporate services which may be regarded as 'sensitive' from a public opinion viewpoint such as medical services or gambling services. In the Irish abortion case, for instance, the Court found that abortion performed according to the law of a particular MS is a service.[108]

The last constituent element of this freedom is the temporary nature of the service supplied; in other words, duration. In *Gebhard*, the ECJ found that temporary nature of a given service is to be determined 'in the light, not only of the duration of the provision of the service but also of its regularity, periodicity or continuity'.[109] In *Schnitzer*, however, the Court clarified that services may vary widely in nature and include[110]

[106] Case 263/86, *Humbel* [1988] ECR 5365, paras 17-19.

[107] C-109/92, *Wirth* [1993] ECR I-6447.

[108] C-159/90, *Grogan* [1991] ECR I-4685, para. 21.

[109] C-55/94, *Gebhard* [1995] ECR I-4165, para. 27.

[110] C-215/01, *Schnitzer* [2003] ECR I-14847, para. 30.

> services which are provided over an extended period, even over several years…Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, for example the giving of advice or information for remuneration.

The ECJ concluded by ruling that there is actually no EU law provision to allow the determination, *in abstracto*, of the duration or frequency beyond which the supply of a service or of a certain type of service in another MS can no longer fall under the provision of services rules.

c) From a 'discrimination' to a 'restriction' approach

As with other freedoms, the ECJ initially had to deal with and condemn discriminatory (*de jure* or *de facto*) measures that violated EU law on the basis of the origin of the service supplier. Thus, in *Coenen*,[111] the ECJ ruled that

> [t]he restrictions to be abolished pursuant to Article [56 TFEU] include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the state where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the persons providing the service.

Hence, the Court found that requiring from a service provider supplying insurance services to have both his business office and permanent private residence in the host MS violates the free movement rules relating to services provision. As the Court suggested in consistent subsequent case-law, the requirement of a permanent

[111] Case 39/75, *Coenen* [1975] ECR 1547.

establishment is the *very negation* of the freedom to provide services.[112] In addition, setting conditions to the provisions of services which are normally required for establishment would deprive the free movement provisions relating to services supply of their *effet utile*.[113] Thus, discrimination on the basis of nationality or place of establishment leads to a breach of the fundamental freedom relating to services[114]. In addition, service providers from other MS should have access to essential facilities such as housing and thus cannot be discriminated against. Thus, in *Commission v Greece*, the Court found that restrictions on the right to purchase or use immovable property that are only imposed on nationals of other MS, but not Greeks breach the freedom to provide services, as one of the corollaries of the latter is access to ownership and the use of immovable property to allow for effective exercise of the freedom.[115]

As domestic regulators became more creative in legislating services industries by using ostensibly origin-neutral measures to protect their domestic service suppliers, the Court adapted its case-law as a response to this development. Thus, in *Säger*, the Court shed away from the 'discrimination approach' towards a more intrusive 'obstacle approach' when it found that the freedom to provide services:[116]

> requires not only the elimination of all discrimination against a person providing services on the ground of his nationality 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, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services*. (emphasis added)

---

[112] Case 205/84, *Commission v Germany* [1986] ECR 3755, para. 52; and C-222/95, *Parodi* [1997] ECR I-3899, para. 31.

[113] C-154/89, *Commission v France* [1991] ECR I-659, para. 12 (outlawing restrictions applied to tourist guides accompanying groups of tourists from another MS).

[114] C-288/89, *Gouda* [1991] ECR I-4007, para. 10.

[115] See Case 305/87, *Commission v Greece* [1989] ECR 1461.

[116] Case 76/90, *Säger* [1991] ECR I-4221, para 12; also C-346/06, *Rüffert* [2008] I-1989, para. 37.

Thus, in the post-*Säger* case-law, the focus of the Court was concentrated on whether there is a restriction to the free movement of services. For instance, in *Commission v. Germany*, a case relating to posting of workers, the Court regarded as restrictions certain obligations to translate the relevant documents in German because they involved:[117]

> …additional expenses and an additional administrative and financial burden for undertakings established in another Member State, so that those undertakings do not find themselves on an equal footing, from a competitive point of view, with employers established in the host Member State and may thus be dissuaded from offering the services in that Member State.

The same happened with the *private security activities* case where the ECJ found, among others, that a requirement of oath of allegiance to Italy and the Head of State; a requirement of prior authorization from each one of the provinces where it intends to supply private security services before being able to supply such services; or the requirement to have a place of business in each of the provinces where the service supplier is active all violate the free movement rules.[118]

Bringing its restriction-based case-law to an extreme, the Court found in a series of financial services-related cases that, in order to permit the achievement of the objectives of the single market, the freedom to provide services[119]

> …precludes the application of any national rules which have the effect of making the provision of services between Members States more difficult than the provision of services *purely within one Member State*. (emphasis added)

---

[117] C-490/04, *Commission v. Germany* [2007] ECR I-6095, para. 69. However, the Court found that these requirements were proportionate.

[118] Note that Italy has 103 provinces. Also C-465/05, *Commission v. Italy* [2007] ECR I-11091.

[119] C-118/96, *Safir* [1998] ECR I-1897, para. 23; C-150/04, *Commission v Denmark* [2007] ECR I-1163, para. 38; and C-356/08, *Commission v Austria* [2009] ECR I-108, para. 35.

Similar findings were delivered in recent cases relating to taxation with implications for the freedom to provide services.[120] Thus, the Court requires that courts consider as benchmark the level of liberalization in the domestic market and require that the measure at issue be examined against it. A related topical issue is the relationship of the restriction-based case-law with the notion of ensuring market access as an objective in itself.[121]

d) The ubiquitous nature of services

Since the provision of services can be hindered through legislation adopted by both home and host state rules, Article 56 TFEU has been interpreted as covering both situations. For instance, the ECJ found that requiring a lawyer to be resident in a MS before he is authorized to supply his services violates Article 56 (host state requirement).[122] On the other hand, in cases such as *Carpenter*[123] or *Alpine Investments*,[124] the ECJ found that domestic laws of the home state (alias, where the service provider is established) can discourage a service provider from supplying its services in another MS (even if his clientele is only remote and unidentifiable).[125]

---

[120] C-155 and 157/08, *X and E.H.A. Passenheim-van Schoot v Staatssecretaris van Financiën* [2009] ECR I-5093, para. 32; and C-287/10, *Tankreederei I SA*, judgment of 22 December 2010, para. 15.

[121] C-356/08, *Commission v Austria* [2009] ECR I-108, paras 39-41. See also Jukka Snell, The Notion of Market Access: A Concept or a Slogan? (2010) 47 *Common Market Law Review* 437.

[122] Case 33/74, *van Binsbergen* [1974] ECR 1299, which, by the way, is also the case where the Court accepted direct effect for the freedom to provide services. 1974 was an important year for the ECJ case-law, as the *Dassonville* judgment in the area of free movement of goods was delivered. In a similar, expansionist mode, the ECJ found in *van Binsbergen* that EU law and the freedom to provide services not only prohibited residency requirements imposed on a service supplier, but also 'all requirements which may prevent or otherwise obstruct his/her activities'. Ibid, para. 10.

[123] C-60/00, *Carpenter* [2002] ECR I-6279.

[124] C-384/93, *Alpine Investments* [1995] ECR I-1141, para. 19.

[125] See also C-405/98, *Gourmet* [2001] ECR I-1795, para. 35, where the Court found that a domestic law prohibiting domestic companies from selling advertising space in their publications to potential advertisers established in other MS violates the freedom to provide services. The Court appears to disagree with a total ban because it has the effect of preventing the *development* of a (then non-existent) domestic market. See also A. Biondi, 'Recurring Cycles in the Internal Market: Some Reflections on the

Furthermore, the Court found that the freedom to provide services creates rights not only for the service *suppliers*, but also for the service *consumers*. Thus, in *Luisi and Carbone* the ECJ found that consumers in their capacity as tourists, persons receiving medical treatment or those travelling for the purpose of (private)[126] education are to be regarded as recipients of services who are entitled to make use of the freedom to provide services, as the freedom to receive services is the necessary corollary of that freedom.[127] In *Cowan*, the ECJ found that France violated the same freedom when refusing, based on the French criminal compensation scheme, to compensate a British tourist who had been attacked while in Paris.[128]

More recently, in *Hengartner and Gasser*, the Court found that the making available to some private parties, in return for payment and on certain conditions, of an area of land in order to hunt there, would come under the freedom to *receive* services provided that it is of a cross-border nature. The service in that case is the grant, in return for payment, of the exploitation of a right to hunt in an area of land for a limited time.[129]

e) The corollary rights to the freedom to provide services

Other than the TFEU provisions relating to services, the rights of providers and recipients of services are further regulated by the Directive 73/148[130] and the CRD,

---

Free Movement of Services' in A. Arnull; P. Eeckhout; and T. Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008) 229, at 238.

[126] Contrary to private education, courses given in a higher education institution which is financed essentially out of public funds cannot be considered as services within the meaning of Article 57 TFEU: Case C-109/92, *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447.

[127] Joined Cases 286/82 and 26/83, *Luisi and Carbone* [1984] ECR 377, para. 16.

[128] C-186/87, *Cowan v le Trésor Public* [1989] ECR 195.

[129] C-70/09, *Hengartner and Gasser*, judgment of 15 July 2010, nyr, paras 32-33.

[130] Directive 73/148 on the abolition of the restrictions on movement and residence within the Union for nationals of Members States with regard to establishment and the provision of services [1973] OJ L 172/14.

which repealed the former only in part. Importantly, in *Metock*, the ECJ confirmed the broad scope of the CRD not only for the individual service supplier but also for the members of its family, even if they are third-country nationals (TNCs). The Court explicitly associated the protection of the family life of nationals of the MS (even if this family life includes TNCs) with the proper exercise of the fundamental freedoms enshrined in the Treaties.[131] The Court found that the CRD aims at strengthening the right to free movement and thus it should be regarded as conferring more rights than any previous piece of secondary legislation.[132] Therefore, the Court found that the Directive[133]

> …confers on all nationals of non-member countries who are family members of a Union citizen…, and accompany or join the Union citizen in a Member State other than that of which he is a national, rights of entry into the residence in the host Member State, regardless of whether the national of a non-member country has already been lawfully resident in another Member State.

The ECJ went on to confirm that the Directive cannot be interpreted restrictively, and must not be deprived of its *effet utile*.

Other than the right of entry, residence and departure and the right related to access to a given market discussed under Section C.II, there are also other rights that one should discuss such as social or tax advantages. The basic principle to keep in mind is the one of equality before the laws of any MS. Thus, no discrimination regardless of the place of residence is guaranteed through ECJ established case-law.[134]

---

[131] See also C-291/05, *Eind* [2007] ECR I-10719, para. 44.

[132] See C-127/08, *Metock and others* [2008] ECR I-6241, para. 59; also C-145/09, *Tsakouridis*, judgment of 23 November 2010, para. 23.

[133] Ibid, para. 70.

[134] See, for instance, cases like *Cowan* or *Bickel*. There is a series of cases in which the basic non-discrimination rule of Article 18 TFEU played a key role.

With regard to tax treatment, the ECJ found in *De Coster* that a Belgian tax on satellite dishes led to a preferential treatment of cable broadcasters *vis-à-vis* broadcasters supplying their services through satellite and thus violated Article 56.[135] More recently, in *Presidente del Consiglio de Ministri v Regione Sardegna*, the Court had to decide on the consistency with EU law of Sardinian tax legislation which imposes a regional tax in the event of stopovers for tourist purposes by aircraft used for the private transport of persons only on undertakings that have their tax domicile outside the territory of the region. By referring to previous case-law relating to the freedom to *receive* services and noting that the tax differential introduces an extra cost for undertakings established outside Sardinia, the Court had no difficulty in finding the measure at stake inconsistent with Article 56.[136] In contrast, in *Mobistar*[137] and *Viacom Outdoor*,[138] the Court found that municipal taxes (on transmission pylons, masts and antennas for GSM, on one side, and on outdoor advertising on the other side) were fully compatible with Article 56 because they similarly affected the provision of services *within* one MS and the provision of services *between* MS.[139]

Generally, social advantages in the area of free movement of workers has been given a broad meaning to extend almost any form of welfare benefit which is given to the host country nationals. In the case of services, Article 56 was interpreted in a way that allows individuals to claim certain welfare entitlements and gain access to public services of other MS such as healthcare or education.[140]

---

[135] C-17/00, *De Coster* [2001] ECR I-9445.

[136] C-169/08, *Presidente del Consiglio de Ministri v Regione Sardegna* [2009] ECR I-10821.

[137] C-545/03, *Mobistar* [2005] ECR I-7723.

[138] C-134/03, *Viacom Outdoor* [2005] ECR I-1167.

[139] See also V. Hatzopoulos and T. Do, 'The case-law of the ECJ concerning the free provision of services: 2000-2005' 43 *Common Market Law Review* (2006) 923, at 960.

[140] D. Chalmers; C. Hadjiemmanuil; G. Monti; and A. Tomkins, *European Union Law* (Cambridge University Press, 2007), p. 760.

3. Secondary law – the Services Directive

In the absence of tariffs charged at the border, services supply suffers from regulatory impediments that restrict their supply. Services are vulnerable to this type of impediments: they are intangible, have limited storability, and are above all heterogeneous with limited possibilities of mass production. In addition, considerations of quality and consumer protection, the "holy grail" of every law and regulatory measures governing services, is closely intertwined with the characteristics, education, qualifications, or experience of individual service provider as well as the domestic preferences and traditions of each EU MS.

These characteristics of services regulations increase transaction costs and can undermine the pursuit of efficiency when regulating this highly heterogeneous sector of the economy. In addition, numerous studies have identified the deadweight losses generated by existing barriers relating, for instance, to restrictive licensing conditions or to the lack of recognition of professional qualifications.[141] Only to make things worse, several services activities are regulated by the corresponding professional bodies in the shadow of the law. Sometimes the rules that such bodies adopt can go against the spirit of state legislation or raise barriers aiming at the protection of incumbents whose income is maximized if access to a given activity is restricted.

Given the existence of remaining barriers of this type which hamper the potential of the service sector to improve productivity and employment in the EU, the overarching objective of the European Commission at the beginning of the new millennium has been the achievement of a genuine internal market for services by 2010 (the so-called Lisbon Strategy). It is largely acknowledged that the Lisbon Strategy has yet to meet its stated objectives. However, the liberalization of various

[141] See Centre for Strategy and Evaluation Services, 'Barriers to Trade in Business Services – Final Report', commissioned by the European Commission, January 2001.

service sectors, such as finance or infrastructure services, did take place, albeit at varying speed across MS. Again, harmonization and mutual recognition efforts in the area of business services, and notably professional services, have met with limited overall success to date within the EU.

The adoption of the Services Directive was the EU's long-awaited reaction to this unsatisfactory situation. Its core aim is to achieve more effective regulation and reap the economy-wide efficiency gains from more competitively supplied services within the Union.[142] Earlier, the European Commission's Proposal for a Services Directive (hereinafter 'the Proposal')[143] recognized the importance of trust in the achievement and the smooth functioning of a genuine internal market for services. The lack of trust reveals the absence of a 'thinking European' mentality[144] and is translated into protectionist interests that foreclose or impede foreign competition; negate the possibility of comparison; and thus dampen the incentive for domestic service suppliers to improve their services.[145] In turn, such lack of trust evidently affects consumer welfare within the EU.

The tale of the EU Services Directive reveals how even within highly integrated areas such as the EU, services remain hostage to regulations impeding their supply. One should not lose sight of the fact that the timing of the Services Directive also was somewhat unfortunate, as it was associated with fears expressed in several MS of uncontrolled flows of (especially lower-skilled) worker-migrants from the new Eastern European MS to the old EU15 MS. It is for this reason that one

---

[142] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L 376/36. The Directive had to be implemented by December 2009 at the latest. For a detailed account of the Directive, see Catherine Barnard, 'Unravelling the Services Directive' 45 *Common Market Law Review* (2008) 323.

[143] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market', COM(2004) 2, 13 January 2004.

[144] European Commission, above note 92, 45.

[145] For the positive effects of mutual trust more generally, see the seminal work by Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Free Press, 1995).

of the major tools to achieve full market integration in the area of services, i.e. the country of origin principle, did not ultimately find its way into the final text of the Directive. Nevertheless, static analyses had earlier found that the removal of the country of origin principle could deprive the EU of an additional €2-4 billion per annum. This represents up to 10 per cent of the expected welfare gains flowing from the adoption of the Directive.[146]

The Services Directive takes a horizontal approach based on the understanding that, while ubiquitous and diverse, several service sectors call for regulatory intervention to pursue a set of legitimate public policy objectives which are common across sectors, such as consumer protection, the integrity of the profession, or ensuring the quality of the service. The Directive has a broad scope in that it aims to outlaw any requirement which may negatively affect access to or the exercise of a service activity.[147] The objective of the Directive is to enable both service suppliers and consumers to benefit from the fundamental freedoms guaranteed in Articles 49 and 56 TFEU, that is, the freedom of establishment and the freedom to provide services.[148] In this respect, the Directive consolidates previous European

[146] See Copenhagen Economics, 'The Economic Importance of the Country of Origin Principle in the Proposed Services Directive', 2005, p. 9 at http://www.copenhageneconomics.com/Admin/Public/DWSDownload.aspx?File=%2fFiles%2fFiler%2fPublikationer%2fCountry_of_origin_principle.pdf (last visited 10 December 2010). In other studies, the negative effects of the non-incorporation of the country of origin principle appear to be even greater. See R. de Bruyn, H. Kox and A. Lejour, 'The trade-induced effects of the Services Directive and the country of origin principle' (CPB document no. 108, February 2006) 42 at: http://www.cpb.nl/sites/default/files/publicaties/download/trade-induced-effects-services-directive-and-country-origin-principle.pdf (last visited 10 December 2010).

[147] M. Klamert, 'Way to go? – More on the Services Directive and the Fundamental Freedoms' 64 *Zeitschrift für öffentliches Recht* (2009) 335.

[148] The Directive provides that suppliers already established in another MS cannot be prevented from providing their services in a given MS on the basis that they do not have an establishment in that MS (Art. 16:2(a)). For the sake of comparison, Art. 56 on the freedom to provide services is the equivalent of Mode 1, Mode 2 *and* Mode 4 under the GATS, since it covers the supply of services on a *cross-border* basis, the movement of the *consumer* to the location of the supplier to *receive* the service and the *temporary* movement of the supplier in order for him to be able to supply the service in question in the host country.

Court of Justice (ECJ) case-law on related issues.[149] While numerous sectors are excluded from the scope of the Directive such as gambling, audiovisual, telecommunication services or financial services, it still applies to business services and covers, *inter alia*, most of the regulated professions within the EU. Importantly, *ratione materiae*, the Directive adopts a sweeping definition of the term 'requirements' to cover:[150]

> …any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organizations, adopted in the exercise of their legal autonomy.

Thus, the Directive confirms the horizontal direct effect of EU law in this field, that is, that private action by professional associations when they self-regulate their activities equally is subject to the obligations laid down in the Directive.

Other than codifying existing case-law, the Directive validates the difficulty that MS will have to justify any discriminatory measures and adduce evidence that proves that they comply with the principles of necessity and proportionality. In addition, the Directive confirms the view that in the case of services the home state is the primary regulator and thus, contrary to what happens under the freedom of establishment, the right to intervene in the case of the freedom to provide services is narrower.

Crucially, the Directive incorporates obligations for MS to conduct a screening and self-evaluate their regulations relating to services against EU law, whereas administrative simplification is encouraged or, under certain circumstances,

---

[149] See, inter alia, C-55/94, *Gebhard* [1995] ECR I-4165, paras 22-27.

[150] Art. 4:7 of the Directive. See also European Commission (DG Internal Market and Services), 'Handbook on Implementation of the Services Directive', 2007, 16.

required. Furthermore, the Directive calls for the creation of single contact points for service providers, the establishment or maintenance of electronic procedures, the promotion of the quality of the services supplied and the establishment of effective administrative co-operation among the MS. The Directive also includes a convergence programme, which *inter ali*a promotes the idea of creating pan-European codes of conduct in professional services.[151]

Overall, whereas services and service suppliers from non-EU MS do not benefit directly from this new regulatory framework, the aim of simplifying procedures and 'screening' unnecessary obstacles impeding the supply of services across the EU as a result of the implementation of the Directive can be expected to generate indirect benefits for all non-EU services and service suppliers seeking to provide services within the EU.[152] The Services Directive is widely acknowledged as a major step towards liberalization and market integration. It requires, for instance, that all EU MS assess the impact of their legislation at all levels and reconsider domestic rules and measures that are out of proportion to their stated objectives and have negative effects on trade in services. In the medium-term, this should be expected to lead to better regulation, the modernization of bureaucratic practices and the streamlining of administrative procedures that should also prove beneficial to third-country service suppliers.

[151] See, in more detail, P. Delimatsis, 'The EU Services Directive and the Mandate for the Creation of Professional Codes of Conduct' in I. Lianos and O. Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge University Press, 2011).

[152] See, for instance, Article 15 of the Services Directive.

VII. Distinguishing Among the Freedoms

1. Freedom to provide services versus free movement of goods

In borderline cases, in which the freedom to provide services and the free movement of goods can be pertinent, the ECJ attempts to identify the source of value in the transaction.[153] In *Sacchi*,[154] the Court had to decide on the relevance of the free movement rules for penal proceedings against an Italian operator of a private television-relay station who was receiving transmissions by cable without having paid the licence fee. The Court found that television advertising and transmission of television signals was a service, whereas trade in material, sound recordings, films, apparatus and other products used as media of diffusion of such signals would rather come under the rules on free movement of goods. As the former was at stake, the purview of the free movement of goods was not pertinent.

In *Schindler*,[155] where the importation of lottery commercials and tickets was at stake, the Court found that organization of lotteries was not an activity related to goods, but to services and thus the TFEU chapter relating to the supply of services was applicable. Similarly, in *Van Shaik*, at stake was Dutch legislation permitting only to cars which has a certificate from Dutch garages to drive in the Dutch roads. The Court found that the supply of goods was only incidental to the main activity, which was the supply of services by the garages.[156]

Having said this, in cases where drawing a distinction between the freedoms may not be feasible, the Court will not hesitate to apply both freedoms.[157]

---

[153] Also D. Chalmers et al, above note 140, p. 753.

[154] Case 155/73, *Sacchi* [1974] ECR 409.

[155] C-275/92, *Schindler* [1994] ECR I-1039.

[156] C.55/93, *van Schaik* [1994] ECR I-4837; also C-36/02, *Omega* [2004] ECR I-9609. Similarly, the issuance of a trading permit to fish or the leasing of a car would be governed by Articles 56 TFEU *et seq*. See C-97/98, *Jägerskiöld* [1999] ECR I-7319; and C-451/99, *Cura Anlagen* [2002] ECR I-3193.

[157] C-34-36/95, *De Agostini*[1997] ECR I-3843.

2. Freedom to provide services versus freedom of establishment

Similarities between the freedom to provide services and the freedom of establishment clearly outweigh their differences, notably when one takes account of the increasing convergence that can be pinpointed when it comes to the interpretation of the scope of the freedoms.[158]

The right of establishment allows all types of self-employed activity to be taken up and pursued in the territory of any Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up.[159] Decisive elements under this freedom are a fixed establishment in another MS, the pursuit of an actual economic activity and the existence of an indefinite period of time.[160]

According to the ECJ case-law, the concept of establishment is a very broad one, allowing a Community national to participate, on a *stable* and *continuous* basis, in the economic life of the host Member State and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.[161] In *Commission v Italy*, the Court clarified that the decisive element for the application of the provisions on the freedom to provide services is the absence of stable and continuous participation by the person concerned in the economic life of the host MS.[162] A year later, in *Commission v Portugal*, the Court attempted to draw the dividing line between the two freedoms more clearly:[163]

> ...the key element is whether or not the economic operator is established in the Member State in which it offers the services in question. Where it is

[158] Cf H. Jarass, 'A Unified Approach to the Fundamental Freedoms' in M. Andenas and W.-H. Roth (eds), *Services and Free Movement in the EU Law* (Oxford University Press, 2002), 141.

[159] C-255/97, *Pfeiffer* [1999] ECR I-2835, para. 18.

[160] Cf C-221/89, *Factortame II* [1991] ECR I-3905, para 20.

[161] C-161/07, *Commission v Austria* [2008] ECR I-10671, para. 24.

[162] C-131/01, *Commission v Italy* [2003] ECR I-1659, para. 23.

[163] C-171/02, *Commission v Portugal* [2004] ECR I-5645, paras 24-26.

> established (in a principal or secondary establishment) in the Member State in which it offers the service, it falls within the scope of the principle of freedom of establishment, as defined in Article 43 EC. On the other hand, where the economic operator is not established in that Member State of destination, it is a transfrontier service provider covered by the principle of freedom to provide services laid down in Article 49 EC. In this context, the concept of establishment means that the operator offers its services on a stable and continuous basis from an established professional base in the Member State of destination… The Court has thus found that services within the meaning of Article 49 EC may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, for example the giving of advice or information for remuneration.

The Court went on to recall its finding in *Schnitzer* as to the impossibility of determining in an abstract manner the duration and frequency beyond which the supply of a service should be examined under the rules relating to the freedom of establishment. However, the ECJ did make clear in *Trojani* that activities without a foreseeable limit to their duration do fall under the freedom of establishment.[164] In turn, the freedom of establishment is distinct from the free movement of workers in that the latter covers *paid* activities, while the former is about self-employed activities.

The borderline between the freedom of establishment and that of service supply has also arisen in a number of cases relating to broadcasting. In *Veronica*, for instance, the ECJ had to deal with the EU consistency of a Dutch legislative measure that prohibited broadcasting companies established in Dutch territory from investing in a broadcasting company established in another MS which however directed its services towards the Netherlands. In the view of the Court, no breach of Article 56 should be accepted in this case, as it was aimed at ensuring that such companies do

[164] C-456/02, *Trojani* [2004] I-7573, para. 28; also C-215/01, *Schnitzer* [2003] ECR I-14847, paras. 27-29.

not circumvent Dutch legislation through the use of the freedom to supply services from another MS.[165]

In a similar vein, the Court found in *TV10* that broadcasting companies may be regarded as domestic broadcasters for the purposes of Dutch legislation. This would allow avoiding any abuse, which was regarded as a proper ground for justifying derogations from the fundamental freedom to provide services. More recently, the approach seems to have changed in that the use of the possibilities that the EU law gives can no longer be considered *ipso facto* as an abuse. This was exemplified in cases like *VT4*,[166] but also in *Centros*.[167] This approach is also reflected in the Audiovisual Media Services Directive (2010/13/EU), which opts for home-country control (or the transmitting-state-principle, as discussed in *De Agostini*)[168] and freedom of reception. Thus, the Directive is based on the principle of mutual recognition. Nevertheless, MS are still allowed to derogate from their obligations under the Directive, notably on public morality grounds.[169]

3. Services versus free movement of workers/persons

Besides considering the concept of 'worker' as one having a Community meaning which should not be interpreted narrowly, the ECJ suggested that the activities under consideration should be real and genuine, i.e. they are capable of being regarded as forming part of the normal labour market.[170] This would exclude

[165] C-148/91, *Veronica* [1993] ECR I-487.

[166] C-56/96, *VT4* [1997] ECR I-3143.

[167] C-212/97, *Centros* [1999] ECR I-1459.

[168] Joined Cases C-34-36/95, *De Agostini* [1997] ECR I-3843, para. 28.

[169] See Arts 6 and 27 of the Directive 2010/13.

[170] In *Bettray*, the ECJ found that activities constituting merely a means of rehabilitation or reintegration for the person concerned are not real and genuine: Case 344/87, *Bettray* [1989] ECR 1621, para. 17.

activities on such a small scale as to be regarded as purely marginal and ancillary.[171] This assessment is to be made based on objective criteria, whereby an overall assessment of all the circumstances of the case relating to the nature of both the activities at stake and of the employment relationship at issue is warranted.[172]

Contrary to the freedom to supply services, the essential feature of this freedom relating to workers is the existence of an employment relationship under which, for a certain period of time, a person performs services *for and under the direction of another person* in *return* for which she receives remuneration.[173] The *sui generis* nature of the employment relationship under national law, the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration have no impact on accepting that the person concerned can make use of the free movement of workers rules.[174] This is the logical outcome of the ECJ observation that the concept of worker has a Community meaning and cannot be interpreted narrowly.

The *Trojani* case exemplifies how intermingled the fundamental freedoms are, notably when attempting to legally classify complex human interactions in real life. Mr Trojani performed, for the Salvation Army and under its direction, various jobs for approximately 30 hours a week, as part of a personal reintegration programme, in return for which he received benefits in kind and some pocket money. In its ruling, the Court excluded consideration of the freedom of establishment, as the latter does not cover paid activities. As to the freedom to provide services, the Court also found that an activity without a foreseeable limit to its duration escapes the purview of Article 56. Thus, only the free movement of workers could be relevant. However, for this, Mr Trojani's activity had to be real and

[171] See, for instance, C- 357/89, *Raulin* [1992] ECR I-1027.

[172] C-413/01, *Ninni-Orasche* [2003] ECR I-13187, para. 27.

[173] The leading case in this regard is the Case 66/85, *Lawrie-Blum* [1986] ECR 2121, paras 16-17.

[174] See C-456/02, *Trojani* [2004] ECR I-7573, para. 17.

genuine, which seemed rather unlikely. The Court ultimately found that a citizen of the Union who does not enjoy a right of residence in the host Member State under the three aforementioned freedoms may, simply as a citizen of the Union, enjoy a right of residence by direct application of Article 21(1) TFEU.

4. Services versus free movement of capital

As mentioned earlier, the ECJ has gradually moved from the position arguing for the mutual exclusivity of freedoms to a more reconciliatory approach. When examined against both the freedoms of establishment and of services, the provisions relating to the free movement of capital were regarded as subordinate.[175] Such a stance may be explained by the fact that the free movement of capital, contrary to the three other freedoms, can under certain circumstances, be invoked by third country nationals. Thus, the ECJ was hesitant to extend the benefits of EU law to non-EU countries.[176]

More recently, the Court has shown a readiness to scrutinize the legislation at issue under both Articles 49[177] (or, respectively, 56)[178] and 63 TFEU when it is unable to distinguish whether one freedom should prevail over the other due to the circumstances at issue. However, in principle the ECJ manages to find that, in the specific circumstances of a given case, one freedom is totally secondary and thus

[175] See, for instance, with respect to establishment: C-231/05, *Oy AA* [2007] ECR I-6373, paras 20, 23; and with regard to services: C-118/96, *Safir* [1998] ECR I-1897, para 35; also C-410/96, *Criminal Proceedings against André Ambry* [1998] ECR I-7875, para 40.

[176] For a case where the ECJ preferred to examine the dispute under the freecom of capital rather than services, see C-233/09, *Dijkman*, Judgment of 1 July 2010.

[177] See C-531/06, *Commission v Italy* [2009] ECR I-4103, para 40.

[178] cf C-452/04, *Fidium Finanz*, para 30. Cases where such simultaneous application took place are: C-155 and 157/08, *X and E.H.A. Passenheim-van Schoot v Staatssecretaris van Financiën* [2009] ECR I-5093, para. 76.

should be regarded as subordinated to the other.[179] In the latter case, the purpose of the legislation concerned must be taken into account by the courts.[180]

For a non-EU (and non-EEA) service supplier, the interesting aspect here is that the application of the provisions relating to the free movement of capital constitutes the only means of benefiting from the ECJ's broad interpretation of the scope of the fundamental freedoms.[181] Aware of this possibility to indirectly expand the territorial scope of the freedoms, the ECJ in *Fidium Finanz* decided to only apply Article 63 TFEU, thereby limiting the scope of the freedom to EU and EEA natural and juridical persons. Interestingly, in *Fidium Finanz*, the European Commission backed the position of the Swiss company that the grant of credit on a commercial basis is covered by the free movement of capital provisions, thereby advancing a liberal approach. The ambivalence in that case stems from the fact that EU secondary legislation relating to banking and insurance services typically also uses Article 63 (along with Articles 49 and 56 TFEU) as legal basis. The Court referred to its previous case-law[182] and the then applicable Banking Directive 2000/12 suggesting that the activity of granting of loans constitutes a financial service.

In that case, even the application of the bilateral agreement on the free movement of persons, which entered into force subsequently, would not help much, as the latter does not entail an unconditional application of the freedom to provide services discussed above, notably when it comes to *legal* persons.

[179] See C-71/02, *Karner* [2004] ECR I-3025, para. 46 and C-36/02, *Omega* [2004] ECR I-9609, para. 26.

[180] C-233/09, *Dijkman and Dijkman-Lavaleije*, judgment of 1 July 2010, para. 26.

[181] Cf. C-101/05, *Skatteverket v A* [2007] ECR I-11531.

[182] C-222/95, *Parodi* [1997] ECR I-3899.

VIII. Applicability of the EU fundamental freedoms to private conduct[183]

As the boundaries between state, legally binding action and private, essentially voluntary action are increasingly blurred and private authority sometimes emerges as a law-maker of similar effectiveness to public authority, the scope *ratione materiae* and the value of the fundamental freedoms is growing. It is commonplace now to find that the fragmentation of the internal market for services is the inevitable result of divergent standards adopted by non-public bodies in MS, such as professional associations, sport federations, the social partners drawing up collective agreements, or interested parties or groups drawing up codes of conduct or collective rules in the exercise of their legal autonomy. However, one mainstream view suggested that such an extension would distort the philosophy of the Treaties, which would seem to tackle this type of situations under the competition law rules enshrined in the TFEU.[184]

Recognizing that the activities of market participants can be equally restricted by private action,[185] the ECJ interpreted the fundamental freedoms in a broad manner with a view to enabling market participants to have adequate judicial protection and equal opportunities to gain access anywhere in the EU.[186] Hence, the traditional approach that horizontal effect was only applicable with regard to the rules of competition, whereas the rules on free movement only had vertical effect was abandoned.[187]

---

[183] This section draws in part on P. Delimatsis, '"Thou shall not…(dis)trust": Codes of conduct and harmonization of professional standards in the EU' 47:4 *Common Market Law Review* (2010), 1049-1087.

[184] . M. Quinn and N. MacGowan, 'Could Article 30 Impose Obligations on Individuals' 12 *European Law Review* (1987), 163.

[185] See D. Chalmers et al, above note 140, p. 749.

[186] See also D. Edward and N. Nic Shuibhne, 'Continuity and Change in the Law Relating to Services' in A: Arnull; P. Eeckhout, and T. Tridimas (Eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008), p. 243.

[187] See, for instance, 41/74, *Van Duyn* [1974] ECR 1337, paras 4-8.

The delimitation of the effect of the fundamental freedoms has been at issue in various cases before the ECJ. In *Walrave and Koch* and in *Bosman*, two of the leading cases dealing with sport activities, the Court found that the fundamental freedoms of workers and services have not only vertical direct effect, but also horizontal direct effect:[188]

> Prohibition of such discrimination [on grounds of nationality] does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services. The abolition of obstacles to [free movement] would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law. Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.

Thus, settled case-law of the ECJ makes clear that circumventing the abolition of State barriers to market integration through obstacles stemming from rules (or the application thereof) set out by associations or organizations not governed by public law that are entrusted with broad legal autonomy and regulatory power cannot be allowed.[189] Indeed, rules of *any* nature set out by private bodies aimed at regulating gainful (self-) employment and the supply of services in a collective manner can impede the functioning of the internal market and thus come within the purview of the fundamental freedom provisions of the Treaty.[190]

---

[188] Case 36/74, *Walrave and Koch* [1974] ECR 1405, paras 17-19.

[189] See also 13/76, *Donà* [1976] ECR 1333, paras 17, 18; C-415/93, *Bosman* [1995] ECR I-4921, paras 83-84; C-176/96, *Lehtonen* [2000] ECR I-2681, para 35; C-309/99, *Wouters* [2002] ECR I-1577, para. 120.

[190] C-519/04, *Meca-Medina v Commission* [2006] ECR I-6991, para. 24.

This case-law found its way into the recently adopted Services Directive. Article 4(7) of the Directive provides that 'requirement' within the meaning of the Directive means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the MS or administrative practice, *the rules of professional bodies, or the collective rules of professional associations or other professional organizations, adopted in the exercise of their legal autonomy*.

Furthermore, in *Angonese*, the Court broadened this case-law by ruling that horizontal direct effect is also attributed in cases of actions of individuals who do not have the power to make rules regulating gainful employment (*in casu*, a single employer who refuses to employ a given individual because of its nationality).[191] In ruling so, the Court got inspiration from its *Defrenne* case-law where the Court found that prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts *between individuals*.

In *Viking Line*, the Court had to decide whether a private undertaking can confer rights from the free movement rules on which it can rely against a trade union or an association of trade unions. The Court had no difficulty in clarifying that the fundamental free movement rules extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.

The same result was found in *Laval* with regard to the freedom to provide services.[192] Confirming its stance in *Viking Line*, the ECJ again appeared to balance the conflicting rights (fundamental freedom against fundamental rights to protect workers against social dumping) in favour of free movement. In this case, however, it was more eloquent than in *Viking Line*. Whilst in the latter, the ECJ suggested that it is for the national court to undertake the proportionality test, in *Laval* the ECJ, in light

[191] C-281/98, *Angonese* [2000] ECR I-4139.

[192] C-341/05, *Laval* [2007] ECR I-11767.

of the severity of the means chosen by the domestic trade union (ie a blockade of sites), decided to undertake the proportionality test itself to conclude that it was not met, based on the safety net already provided by the Directive 96/71 on the posting of workers and on the obscurity or absence of any provisions at all at a national level specifying the obligations of employers with respect to minimum pay.

However, it would be erroneous to consider that the ECJ adopted a human-rights- or labour-unfriendly stance. Arguably, the rulings of the ECJ are strictly fact-specific and should not be used to draw more general conclusions as to social protection within the Union. On the other hand, it would be safe to say that the ECJ is not prepared to overrule light-heartedly a restriction on the fundamental freedoms, notably when their application may ensure an optimal allocation of resources throughout the enlarged Union.

It follows from the previous discussion that the ECJ, by focusing on the activity at stake, is determined to outlaw any provision of any nature capable of preventing or deterring an EU citizen from leaving its home country to exercise its right to freedom of movement. Any signal of disadvantaging nationals of another MS in the territory of a given MS, which subsequently impedes or renders less attractive the use of the Treaty constitutional rights, can be sufficient to trigger the application of the free movement provisions.[193] In *Mobistar*, for instance, the ECJ submitted that rules which have the effect of making the provision of services between MS more difficult than the provision of services within one MS are to be outlawed.[194] When the exercise of fundamental rights conflicts with the exercise of the freedom of movement, the Court will attempt to strike a balance based on the facts of the case and the interests at stake.

[193] C-442/02, *CaixaBank France* [2004] ECR I-8961, paragraph 11.

[194] C-545/03, *Mobistar* [2005] ECR I-7723, para. 30.

Nonetheless, neither fundamental rights nor fundamental freedoms are absolute.[195] The Court is willing to take up this daunting task, absent any serious attempt by the State to resolve the matter in a satisfactory manner. The Court's case-law hints at the need for a more pro-active and reflexive reaction from the State when such issues arise so that recourse to judicial means is precluded. Indeed, MS can and should interfere with private rules through appropriate legislation or court decisions at any time. Given the risk of bias that may characterize private rules, such state intervention may become essential in restoring the balance of rights and obligations or complying with the obligations enshrined in the Treaty.

This, however, may not be the end of the story for purposes of examining the consistency with EU law of restrictions based on private conduct. Even if non-discriminatory, a restriction on free movement cannot be sustained unless it pursues an EU-consistent legitimate objective, is justified by overriding reasons of public interest and complies with the proportionality principle. In *Gebhard*,[196] and more recently in *Wouters*, the Court found or implied that national measures liable to hinder or make less attractive the exercise of the right to free movement can be justified, based on certain aspects that are inherent to a given profession or considerations such as professional ethics.[197] If so, the measure should additionally

[195] To corroborate this view, see Art. 52:1 of the Charter of fundamental rights of the European Union, which provides that: '[a]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others'. See also AG Maduro's opinion in *Viking Line*, point 23.

[196] C-55/94, *Gebhard*.

[197] Or rules justified by the 'general good'. See also Cases 33/74, *Van Binsbergen* [1974] ECR 1299, para. 12; and 71/76, *Thieffry* [1977] ECR 765, para. 12. See, by analogy, in regard to the reputation of a given services sector. C-384/93, *Alpine Investments* [1995] ECR I-1141, paras 42-44. In *Deliège*, the Court had found that, although selection rules for sporting events restrict the freedom to provide services, the limitations that such rules imply are 'inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted'. See Joined cases C-51/96 and 191/97, *Deliège* [2000] ECR, I-2549, para. 64.

comply with the principle of proportionality, that is, be suited to the attainment of the objective pursued and not go beyond what is necessary in order to attain it.[198]

In a very recent case, the ECJ had to decide whether a prohibition imposed by Italian legislation on lawyers registered in Italy being employed, even on a part-time basis, by a public enterprise was consistent with EU law. The Court first recalled that both primary and secondary EU law (in this case Directive 98/5/EC) do not preclude that a lawyer practising in the host MS is subject to the rules of professional conduct in force in that MS. Such rules are not harmonized and therefore can differ greatly among MS. Failure to comply with such rules of conduct can lead to a lawyer being removed from the register in the Bar of the host MS.

The Court went on to suggest that preventing conflicts of interest for lawyers is a legitimate objective, as lawyers should be in a situation of independence vis-à-vis the public authorities and other operators, by whom they should not be influenced. Such conflicts may indeed arise when a lawyer is registered with a Bar and simultaneously employed, even part-time, by another lawyer, an association or firm of lawyers or a public or private enterprise. Nonetheless, the Court also reminded

[198] See, inter alia, C-415/93, *Bosman*, para. 104. This proportionality test will be much more flexible in cases where the professionals at issue are the agents of protecting an important policy objective such as public health within the sphere of competences retained to the MS. See Joined Cases C-171/07 and 172/07, *Apothekerkammer des Saarlandes*, judgment of 19 May 2009, nyr. In this case, the Court suggested, inter alia, that the double nature of the pharmacists, ie the fact that they operate a pharmacy not only to make profit, but also as professionals bound by the rules of law and professional conduct, may justify a restriction allowing only to pharmacists to own and operate pharmacies. According to the Court, moderating factors inherent in their function make them special when compared to non-pharmacists. Previously, the ECJ did not accept a similar exception for opticians. See C-140/03, *Commission v Greece* [2005] ECR I-3177. In *Apothekerkammer des Saarlandes* (para 60), the ECJ explained: 'Unlike optical products, medicinal products prescribed or use for therapeutic reasons may nonetheless prove seriously harmful to health if they are consumed unnecessarily or incorrectly, without the consumer being in a position to realise that when they are administered. Furthermore, a medically unjustified sale of medicinal products leads to a waste of public financial resources which is not comparable to that resulting from unjustified sales of optical products'. See also C-531/06, *Commission v Italy*, paras 89-90.

that such requirement should be non-discriminatory and apply to all lawyers registered in the host MS.[199]

IX. The issue of recognition of professional qualifications

The EU gradually replaced its strategy of adopting harmonization legislation enshrined in vertical directives during the 1970s and mid-1980s with horizontal directives, applying *across* services sectors.[200] Such horizontal directives came in the aftermath of important decisions delivered by the Court relating to the principle of mutual recognition.[201] However, the general system of directives fell short of ensuring recognition. Rather, these directives obliged MS to take into account qualifications and, if needed, impose additional requirements to achieve equivalence with nationals holding national titles. The new Directive on the recognition of professional qualifications (2005/36/EC), replacing all previous ones, aims at introducing a more flexible and automatic procedure which uses as a basis common platforms established by professional associations.[202] As a result of the Directive, significant reforms in all EU MS regarding professional services were discussed or implemented with a view to fostering greater competition.[203]

---

[199] C-225/09, *Jakubowska*, judgment of 2 December 2010. Even if the case was concerned with the Directive 98/5 relating to the establishment of lawyers, it would be erroneous to believe that such line of reasoning would not apply in the case of cross-border supply of services on a temporary basis.

[200] Directives 89/48 [1989] OJ L 19/16 and 92/51 [1992] OJ L 209/25.

[201] Most notably, Case 120/78, *Rewe-Zentral* (Cassis de Dijon), [1979] ECR 649; and C-340/89, *Vlassopoulou* [1991] ECR I-2357.

[202] Barnard, above note 35, p. 309.

[203] Several of these proposed reforms have been discussed in the European Commission, 'Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services', Commission Staff Working Document, COM(2005)405 final, 5 September 2005.

The Directive has replaced three general and twelve sectoral directives on the recognition of professional qualifications. It applies to regulated professions[204] and covers both employed and self-employed activities within the EU. By recognizing the professional qualifications of a given individual, the host MS allows it to gain access in that MS to the profession for which she is qualified in the home MS and to pursue it under the same conditions as host country nationals. The profession can be considered as being the same if the activities are 'comparable'.[205] The Directive also suggested that a European professional card be developed by professional associations.[206] However, this idea was never taken up by the associations.[207]

One of the novelties of the Directive vis-à-vis the previous ones is the partial liberalization of the provision of services.[208] When the freedom to provide services is exercised, the Directive provides that access to the market of the host MS cannot be made conditional on the recognition of qualifications by that MS if the service supplier is legally established in a given MS and pursues there the same profession. If the profession is not regulated in the home MS, then the service supplier can legitimately be requested to provide evidence of two years of professional experience gained over the previous ten-year period. The Services Directive leaves no doubt as to the full application of the chapter of the Professional Qualifications Directive

[204] According to the Directive, 'regulated profession' is a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit'.

[205] See Art. 4 of the Directive.

[206] See recital 32 o f the Directive 2005/36.

[207] In the current discussions for a revision of the Directive within the framework of the Single Market Act, the European Commission has raised again the issue of creating a European Professional Card. See the European Commission's Memo of 7 January 2011 at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/7&format=HTML&aged=0&language=EN&guiLanguage=en.

[208] For more practical information, see European Commission, 'User Guide – Directive 2005/36/EC', available at: http://ec.europa.eu/internal_market/qualifications/docs/guide/users_guide_en.pdf.

(PQD) relating to the freedom to provide services (Title II). Thus, the freedom to provide services within the meaning of Article 16 of the Services Directive will apply, for regulated professions, only to those issues which are not associated with professional qualifications such as commercial communications, multidisciplinary practices, tariffs and so on.

The PQD creates a presumption that the qualifications of an applicant entitled to pursue a regulated profession in one MS are sufficient for the pursuit of that profession in other MS.[209] Nevertheless, the service supplier can be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications such as the definition of the profession, the use of titles and codes of conduct aimed as consumer protection and safety which are applicable in the host MS to professionals supplying the same services. [210]

In addition, the previous derogation that the Services Directive incorporates with respect to the applicability of the PQD functions as a conflict rule in that it gives priority to the latter regarding certain obligations that the host MS can impose on service suppliers such as the obligation of a prior declaration on an annual basis. The host MS may require that the first declaration be accompanied by certain documents such as proof of the nationality of the service supplier; an attestation that she legally exercises professional activities in the home MS; evidence of professional qualifications; evidence of no criminal convictions if employed in the security sector.[211] The service supplier may also be required to submit certain information to

[209] Cf. C-274/05, *Commission v Greece* [2008] ECR I-7969, para. 30.

[210] Cf Art. 4:1 of the Directive 77/249/EEC [1977] OJ L 78/17. See also Arts 6 and 7 of Directive 98/5 of the European Parliament and the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L 77/36. Directive 2005/36 provides that the Lawyers' Cross-Border Services Directive remains applicable, although the PQD regulates the recognition of professional qualifications for lawyers for the purpose of immediate establishment under the professional title of the host MS. See Recital 42 of the Directive.

[211] Ibid., Art. 7.

the service recipient related to its home-country professional qualifications; liability cover; membership to professional associations; or its VAT identification number.[212]

However, in *Commission v Italy*, the ECJ found that Italy breached its obligations under the fundamental freedom to provide services (and the freedom of establishment) by requiring that (i) the application for diploma recognition be accompanied by the original diploma and a certified copy; and (b) a certificate of nationality and (c) all the documents be translated in Italian. According to the ECJ, such requirements create additional obstacles for all applicants seeking recognition of their diplomas and delays. In addition, there are additional costs for the certification of copies.[213]

Whereas prior controls and authorizations are in principle prohibited under EU law and settled ECJ case-law,[214] in the case of regulated professions that may have a negative impact on public health or safety (and which do not come under the automatic recognition regime that we discuss below), home MS authorities are allowed to perform an *a priori* evaluation of the professional qualifications of the service supplier to avoid serious damage to the health or safety of the service recipient due to a lack of professional qualification of that provider. Such an evaluation can take place only prior to the *first* provision of services. This means that service suppliers providing their services periodically for several years cannot be subject to such a requirement more than once.

---

[212] A Code of Conduct was adopted to assist competent authorities in the implementation of the Directive. See 'Code of Conduct approved by the Group of Coordinators for the Directive 2005/36/EC on the recognition of professional qualifications – National Administrative Practices falling under Directive 2005/36/EC', available at: http://ec.europa.eu/internal_market/qualifications/docs/future/cocon_en.pdf. The Code is not legally binding.

[213] C-298/99, *Commission v Italy* [2002] ECR I-3129. The case was concerned about free movement of architects under the at the time sectoral directive 85/384.

[214] Cf C-189/03, *Commission v Netherlands* [2004] ECR I-9289, paras 17-18.

If there are substantial differences between the professional qualifications of the service supplier and the training warranted in the host MS which may be harmful to public health or safety, the host MS shall offer to the supplier the opportunity to demonstrate that it has in fact the necessary competences. For this purpose, the MS are encouraged to use an aptitude test.[215] Under such exceptional circumstances, Article 7:4 of the PQD recalls that, strict time limits for a final decision (one month) should be respected. The same applies to the principle of proportionality. Absent any decision by the competent home MS authority within the given timeline, the service supplier is allowed to deliver its services. In this case, the supplier is required to use its home-country professional title.[216]

More generally, the PQD provides that the service supplier wishing to deliver services on an occasional and temporary basis can only use the professional title of the home MS. Only in cases of automatic recognition can the service supplier use the professional title of the *host* MS. Few professions, which have been harmonized initially through sectoral directives, benefit from automatic recognition. These include: doctors, nurses in charge of general care, dentists, veterinary surgeons, midwives, pharmacists and architects. For such recognition to occur, the Directive sets minimum training requirements and notably the minimum duration of studies for every profession coming under the above categories. Any service supplier meeting these requirements can automatically practice in any MS.

---

[215] In *Commission v Italy*, the Court found that, while an aptitude test must be determined on a case-by-case basis following a point-by-point comparison between qualifications and experience acquired and warranted, this does not relieve the host MS of the obligation to specify and publish the subjects regarded as indispensable for practising the profession concerned and the rules regulating the conduct of the aptitude test for the sake of legal certainty. Potential applicants can thus be acquainted with the nature and context of the test they must take. See C-145/99, *Commission v Italy* [2002] I-2235, paras 52-53. See also Art. 3(h) of the Directive 2005/36, codifying this line of case-law.

[216] In *Hartlauer*, the Court emphasized that a prior administrative authorization scheme can only be justified if it is based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circuscribe thee exercise of the national authorities' discretion: C-169/07, *Hartlauer* [2009] ECR I-1721, para. 64.

Finally, if a profession is regulated by a professional association in the host MS, the service supplier should be able to become a member of that organization. However, according to Article 6, in the case of a service provider supplying services on a temporary basis within the meaning of Article 56 TFEU, the host MS cannot require that the provider be registered or become member of the corresponding host-state professional association before authorizing it to supply services.[217] However, MS are allowed to provide for automatic temporary registration with or *pro forma* membership of such a professional association, provided that such registration does not have negative effects on the provision of services nor creates additional costs for the service provider.

For instance, in *Schnitzer*, the Court found that the requirement for a Portuguese company supplying plastering work-related services in Germany to register in the skilled trades' register was in breach of the freedom to provide services. If such registration is deemed necessary, it must in no way delay or complicate the exercise of the right of service suppliers of other MS to provide services in another MS nor entail any additional costs for the service provider.[218]

It bears mention that recent case-law suggests that the Court explicitly underlined the limits of derogations once secondary law is in place. For instance, in *Commission v. Portugal*, Portugal attempted to justify certain restrictions on the construction sector based on consumer protection considerations, safety and protection of the environment. The Court noted that these objectives were taken into account in the introductory text of the PQD and thus were reflected in the provisions

[217] Note that Art. 16:2(b) of the Services Directive also provides that MS cannot restrict the freedom to provide services by imposing an obligation on the provider to obtain an authorization from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in the Directive or other instrument of EU law.

[218] See C-215/01, *Schnitzer* [2003] ECR I-14847, paras 36-38. See also C-298/99, *Commission v Italy* [2002] ECR I-3129, paras 58-64.

of the Directive.[219] Thus, when harmonization measures are adopted, the possibility for successfully derogating is restrained.

In the above case, what was more specifically at issue was whether the Portuguese law violated EU law by imposing in the building sector the same requirements to both suppliers wishing to supply their services temporarily and those wishing to establish themselves permanently. The Court seized the opportunity to confirm the 'bite' of Article 56:[220]

> …a restriction of Article [56 TFEU] can be justified only to the extent that the public interest sought to be protected by national legislation is not safeguarded by the rules to which the service provider is subject in the Member State of establishment. The Court has thus held, in particular, that a national authorisation scheme goes beyond what is necessary where the requirements to which the issue of authorisation is subject duplicate the equivalent evidence and safeguards required in the Member State of establishment, inferring in particular an obligation on the part of the host Member State to take account of controls and verifications already carried out in the Member State of establishment.

The Portuguese scheme did not take due account of equivalent obligations to which such a service supplier is subject in the MS of establishment. Furthermore, the Court found that the complexity of co-operation with the administrative authorities of other MS, including the MS of establishment, cannot be accepted as a justification for making the issue of authorization to a service supplier already established in another MS subject to requirements which duplicate the equivalent evidence and safeguards required in the MS of establishment.[221]

In cases falling outside the scope of the horizontal Directive 2005/36, the principles outlined by the ECJ in *Gebhard*, *Heylens*, *Vlassopoulou*, *Aranitis* and *Bobadilla*

[219] C-458/08, *Commission v Portugal*, judgment of 18 November 2010, paras 89-90.

[220] Ibid, para. 100.

[221] Ibid, para. 105.

still apply. This means that EU primary law continues to give guidance as to the proper *modus operandi*.[222] Indeed, as underlined in *Dreessen*, the object of the horizontal directives on recognition of qualifications should not be 'to make recognition of diplomas, certificates and other evidence of formal qualifications more difficult in situations falling outside their scope, nor may they have such an effect'.[223] More specifically, settled case-law suggests that national competent authorities take into consideration the knowledge, diplomas, certificates, qualifications and experience already recognized or acquired in another MS (notably when imposing supplementary requirements), and give adequate reasons in case of non-recognition and allow for access to an effective judicial remedy.[224]

More recently, the Court clarified that all practical experience in the pursuit of related activities, even if it is acquired in the host MS, can increase the applicant's knowledge and therefore should be taken into account. The ECJ found that it is for the competent national authorities to decide what value to attach to such experience 'in the light of the specific functions carried out, knowledge acquired and applied in pursuit of those functions, responsibilities assumed and the level of independence accorded to the person concerned.'[225] The Court went on to emphasize that the obligation to take into account all relevant experience exists independently of the adoption of directives on mutual recognition of diplomas.[226]

A similar type of comparison may also be warranted in the case of EU nationals who have acquired formal qualifications and practical experience in a third country.[227] In practice, the Court will undertake a very broad interpretation of the fundamental freedoms enshrined in Articles 49 and 56 TFEU to outlaw any

[222] See, for instance, C-531/06, *Commission v. Italy*, paras 35, 37.

[223] C-31/00, *Dreessen*, [2002] ECR I-663, para. 26.

[224] See also C-345/08, *Peśla*, Judgment of 10 December 2009.

[225] Joined cases C-422, 425&426/09, *Vandorou and others*, judgment of 2 December 2010, paras 68-70.

[226] Ibid, para. 71; also C-313/01, *Morgenbesser* [2003] ECR I-13467, para. 58.

[227] See, inter alia, C-238/98, *Hocsman* [2000] ECR I-6623, para. 35.

requirement which is liable to hinder or make less attractive the exercise of the fundamental freedoms unless it is justified based on legitimate policy grounds and proportionate to the objective pursued.[228]

In 2010, the European Commission launched consultations with a view to revising and simplifying the framework relating to the recognition of professional qualifications by 2015. The declaration system is considered difficult to implement, whereas the idea of common platforms does not seem to have worked. Ideas such as the creation of a European Professional Card or adopting European curricula to complement national curricula are being put on table, just as the simplification of the prior declaration system in the case of service providers moving to another EU MS temporarily.[229]

THE SWISS-EU BILATERAL AGREEMENT ON THE FREE MOVEMENT OF PERSONS AND THE FREEDOM TO PROVIDE SERVICES – HOW MUCH EU LAW IS APPLICABLE?

X. Introductory remarks

In the broadest terms, Switzerland's relationship with the EU continues to this day to be governed by the 1972 Agreement. Switzerland, while an EFTA country, is not a member of the EEA. Following the rejection of accession to the EEA by the Swiss population in 1992, Switzerland has opted for a sector-based approach potentially leading to a long-term rapprochement with the EU and a parallel process of regulatory approximation.[230] This approach led to the adoption of a series of

[228] See C-108/96, *Mac-Quen* [2001] ECR I-837, paras 24-26; and C-370/05, *Festersen* [2007] ECR I-1129, para. 26.

[229] See European Commission, 'Consultation Paper by DG Internal Market and Services on the Professional Qualifications Directive', MARKT.D.4 D(2010), 7 January 2011.

[230] Hufbauer and Baldwin describe the EU-CH relationship as an example of 'hub-and-spoke' bilateralism. G. Hufbauer and R. Baldwin, 'The Shape of a Free Trade Agreement between Switzerland and the United States – A Report by the Institute for International Economics', 2005.

agreements, the most important of which were signed in 1989 (insurance), 1999 (bilaterals I, covering the free movement of persons; air transport; government procurement; agriculture; the carriage of goods and passengers by rail and road; mutual recognition in relation to conformity assessment; and scientific and technological cooperation) and 2004 (bilaterals II, covering processed agricultural goods; asylum; environment; taxation of income and fraud; audiovisual; statistics; and scientific and technological cooperation). Since December 2008, Switzerland is part of the Schengen area and has adopted the Schengen *acquis*, which entails above all the suppression of internal border controls and thus allows persons who are legally present in one country party to the Schengen Agreement to move freely within the Schengen area without having to show passports when crossing internal borders.

In *Grimme*, the ECJ reviewed the EU-Swiss bilateral agreements and noted in a somewhat bitter tone that:[231]

> [t]hose agreements were signed after the rejection by the Swiss Confederation, on 6 December 1992, of the Agreement on the European Economic Area (EEA). The Swiss Confederation, by its refusal, did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements between the Community [sic] and its Member States in specific areas. Therefore, the Swiss Confederation did not join the internal market of the Community the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes inter alia the freedom to provide services and the freedom of establishment… In that context, the interpretation given to the provisions of Community law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement [on the free movement of persons] itself'.

[231] C-351/08, *Grimme* [2009] ECR I-10777, paras 27, 29.

Thus, the Agreement is not aimed at the establishment on an internal market between Switzerland and the EU through the abolition of all obstacles to the movement of goods, persons, services and capital. Rather, it is clearly asymmetrical in that it is aimed at bringing Switzerland closer to the EU rather than *vice versa*.[232] First, this is evident in the Preamble of the Agreement, which provides that the two Contracting Parties are determined 'to bring about the free movement of persons between them *on the basis of the rules applying in the European Community* [sic]' (emphasis added). Furthermore, according to Article 16 of the Agreement, parties are required to take all measures necessary to ensure that rights and obligations equivalent to those contained in the EU's vast body of legislation to which reference is made are applied in their relations. To this end, ECJ case-law delivered prior to 1999, i.e. the date of signature of the Agreement, should be taken into account. In addition, the final Act includes a joint declaration from both parties to 'take the necessary measures to apply the *acquis communautaire* to nationals of the other Contracting Party in accordance with the Agreement concluded between them.'[233] Thus, the *acquis communautaire* takes centre-stage as far as the EU-Swiss bilateral relation is concerned.[234]

---

[232] This is not an unreasonable development if viewed within the context of EU-Swiss bilateral relationship after the Swiss denial to participate in the EEA. In other words, the Agreement is to be viewed within both parties' attempts to find substitutes for the Swiss rejection of structures that the other EFTA members were keen to adhere to. In this context, and within a broader framework of 'raprochement', which nevertheless does make sense for a small country like Switzerland from an economic viewpoint, Switzerland decided to apply unilaterally the Cassis-de-Dijon principle. Hence, as of 1 July 2010, Switzerland recognizes as equivalent all products lawfully produced and marketed in an EU or EEA country. Specific derogations are foreseen for food products.

[233] See Joint Declaration attached to the Final Act relating to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons [2002] OJ L 114/70.

[234] The approximation of Swiss law to EU law is a phenomenon that dates back to the late 80s. See Adam Lazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union' 45 *Common Market Law Review* (2008) 1433, at 1436. For an interesting view of the 'Europeanization' of Swiss law, see Francesco Maiani, 'Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe"', EUI MWP 2008/32, European University Institute, 2008.

The Agreement consists of a framework agreement including 25 Articles, three Annexes and several Protocols. By virtue of Article 15 of the Agreement, the Annexes and Protocols are to be considered as integral parts of the Agreement. Annex I elaborates on the rights and obligations enshrined in the framework agreement as regards the free movement of persons. Annex II aims to regulate the co-ordination of social security schemes among the Contracting Parties, whereas Annex III relates to the mutual recognition of professional qualifications by reference to a series of EU directives, both horizontal and sector-specific.

With regard to services, the Contracting Parties, recognizing the importance of the sector for their economies, jointly committed themselves towards general liberalization of service provision on the basis of the *acquis communautaire*.[235] Such negotiations started in the framework of the Bilaterals II process in June 2002. However, after four rounds of discussions, the issue was decoupled from the remaining agenda items. In 2003, negotiations were postponed for an indefinite period of time.[236]

While being an international treaty, the Agreement is meant to achieve the free movement of persons between the two parties *on the basis of the rules applying in the EU*.[237] However, absent a long-term vision of the Agreement, notably when compared to the so-called 'Europe Agreements' (preparing States for accession to the EU) or the EEA (extending the internal market rules to the EEA countries), the Agreement can only be regarded as an ordinary international treaty that the EU concluded with a third country.

---

[235] The legal mandate took the form of a joint declaration in the final act of the Agreement on the free movement of persons: OJ L 114/70 of 30 April 2002.

[236] See also C. Nufer, 'Bilaterale Verhandlungen wie weiter? Liberalisierung der Dienstleistungen zwischen der Schweiz und der EU: Gewinner und Verlierer aus Schweizer Sicht', Basler Schriften zur europäischen Integration No 79, 2006, p. 8.

[237] See also BGE 129 II 249, at 259. A Joint Declaration of the parties to the Agreement requires that the parties take 'the necessary measures to apply the acquis communautaire to nationals of the other Contracting Party in accordance with the Agreement concluded between them'. See above note **Erreur ! Signet non défini.**.

[238] Although the Vienna Convention traditionally applies to treaties between States, the ECJ has

As with the interpretation of every international treaty, the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT) are relevant.[238] Article 31 of the VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. The ECJ has thus recognized the importance of the terms in which a given international instrument is worded and its objectives.[239]

For instance, when interpreting several association agreements that the EU concluded, the Court accepted the direct effect of provisions the wording of which resembled that of the free movement rules, thereby interpreting them in a way similar to the fundamental freedoms.[240] However, one should keep in mind that more recently the Court has adopted a broad approach vis-à-vis the Union's citizenship provisions, thereby giving several rights to migrant EU nationals who are not economically active.[241]

The Court has further warned in *Polydor* that a simple similarity in a provision enshrined in the EU Treaties and of an international treaty that the EU concluded with a non-MS cannot *ipso facto* be taken as interpreting that treaty in the same way as the EU legal texts.[242] The task of the Court will be to reach such a conclusion only after taking into account the aim pursued by each provision in its

---

[238] Although the Vienna Convention traditionally applies to treaties between States, the ECJ has accepted that the rules of this Convention apply to agreements concluded between a State and an international organization, in so far as the rules are an expression of general international customary law such as the rules of interpetation. See, more recently, C-386/08, *Brita*, judgment of 25 February 2010, paras 40-41.

[239] C-416/96, *El-Yassini* [1999] ECR I-1209, para. 47.

[240] See, inter alia, C-416/96, *El-Yassini* [1999] ECR I-1209 (EU-Morocco Cooperation Agreement); C-438/00, *Kolpak* [2003] ECR I-4135 (EU-Slovakia Association – or 'Europe' – Agreement); C-265/03, *Simutenkov* [2005] ECR I-2579 (EU-Russia Partnership Agreement); C-97/05, *Gattoussi* [2006] ECR I-11917 (EU-Tunisia Association Agreement); C-235/99, *Kondova* [2001] ECR I-6427 (EU-Bulgaria Association – 'Europe' – Agreement).

[241] See C-184/99, *Grzelczyk* [2001] ECR I-6193; and C-413/99, *Baumbast* [2002] ECR I-7091.

[242] Case 270/80, *Polydor* [1982] ECR 329, paras 14-21; also *Kondova*, para. 51.

own particular context. A comparison between the objectives and context of the agreement and those of the EU Treaties is decisive in this respect. In any event, no automatic application of the interpretation of a fundamental freedom by analogy to the interpretation of an international treaty is possible unless an express provision to this effect is included in this latter treaty.[243]

Contrary to other agreements that the EU concluded, which aim at the creation of stronger ties with the EU through a multifaceted programme of integration or even accession to the EU, the Swiss-EU Agreement is clearly focused mainly on the liberalization of movement of *natural* persons.[244] Such liberalization appears to be done in a rather static manner.[245] Thus, the only possible anchors for an interpretation of a given provision along the lines we analyzed earlier under Section C are the second recital of the preamble of the Agreement (calling for the establishment of free movement of persons 'on the basis of the rules applying in the [European Union]) and Article 16:2 of that Agreement, which provides that: '[i]*nsofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the* [Court of Justice] *prior to the date of its signature*'.

This latter temporal limitation again reveals the static character of the Agreement. Thus, developments in EU law and jurisprudence are not to be taken automatically into account and may require an amendment of the Agreement. This was clarified in *Xhymshiti*,[246] where the Court suggested that the scheme established in the Agreement (in this case, Annex II on social security) is not intended to also

---

[243] C-351/08, *Grimme* [2009] ECR I-10777, para. 29.

[244] In *Fokus Invest*, the ECJ found that the objectives of the Agreement pursuant to Art. 1, are established for the benefit of nationals of the signatories, and thus for the benefit of natural persons, and that all the categories of persons covered by the Agreement, with the exception of persons providing services and recipients of services, are by their nature categories of natural persons: C-541/08, *Fokus Invest*, judgment of 11 February 2010, para. 29.

[245] See the Opinion by Advocate General Jääskinen in the case C-70/09, *Hengartner and Gasser*, paras 45-46.

[246] Cf C-247/09, *Xhymshiti*, judgment of 18 November 2010, para. 36.

make applicable EU legislation subsequent to the signature of the Agreement and thus not explicitly mentioned in the text of the Agreement, even if such legislation is nothing but an amendment or updated version of the Regulations mentioned in the Agreement.

However, with regard to ECJ case-law in particular, it bears noting that the Swiss Federal Court explicitly suggested that ECJ case-law subsequent to the signature of the Agreement (i.e. delivered after 21 June 1999) can still be taken into account for interpretive reasons if it does nothing more than specify previous case-law.[247] Any interpretation other than textual would have suggested that such legislation may be applicable, especially if it concretizes legislative acts explicitly mentioned in the Agreement. This view is also corroborated by Article 1:1 of Annex II to the Agreement which provides that the Contracting Parties agree to apply EU acts to which reference is made, as in force in June 1999 *or rules equivalent to such acts*.

Previously, the Swiss Federal Court accepted that at least the provisions of the Agreement relating to the rights of the citizens of the Contracting Parties (notably those contained in Annex I) were sufficiently clear and precise and thus should in principle be regarded as producing direct effect ('self-executing').[248]

XI. Freedom to provide services according to the Agreement

While not being a services agreement,[249] the Agreement does incorporate certain provisions which aim to facilitate the provision of services among the signatories. One of the objectives of the Agreement is to facilitate the provision of services in the

[247] See BGE 133 V 624, at 631, cons. 4.3.2; See also Thomas Cottier and Erik Evtimov, 'Probleme des Rechtsschutzes bei der Anwendung der sektoriellen Abkommen mit der EG' in T. Cottier and M. Oesch (eds), *Die sektoriellen Abkommen Schweiz-EG* (Stämpfli, 2002), at 200.

[248] BGE 129 II 249, at 257.

[249] See, among others, Walter Kälin, 'Die Bedeutung des Freizügigkeitsabkommens für das Ausländerrecht' in T. Cottier and M. Oesch (eds), at 28.

territory of the signatories for the benefit of EU and Swiss nationals, and to liberalize the provision of services of brief duration.

Ratione personae, the Agreement mainly aims to facilitate the movement of *natural* persons. Its objective is to accord a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the signatories.[250] Once in the host country, nationals should enjoy the same living, employment and working conditions as those accorded to nationals. As we will see below, though, this non-discrimination clause, enshrined in Article 2 of the Agreement is in no way to be interpreted in the same expansive manner that Article 18 TFEU has been interpreted by the ECJ.[251] Rather, the Court will follow a textual, formalistic approach in interpreting a legal instrument such as the Agreement.[252] Finally, the Agreement accords a right of entry into, and residence in, the territory of the signatories to natural persons without an economic activity in the host country under certain conditions. The Agreement covers the following categories of persons:

a) self-employed, which include self-employed frontier workers;
b) workers, which include employed workers, workers on secondment and employed frontier workers;

---

[250] After the entry into force of the Agreement, the Swiss federal law relating to residency and establishment of foreigners (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer-ANAG) applies only in case the Agreement does not contain any rules on this score or when that law incorporates more favourable provisions than the Agreement. See BGE 129 II 249, at 257. Thus, the Agreement envisages minimum guarantees that EU citizens are eligible to enjoy when they are present in Swiss territory.

[251] Article 18 TFEU provides:

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

See also the Opinion by Advocate General Jääskinen in the case C-70/09, *Hengartner and Gasser*, paras 55ff.; and C-70/09, *Hengartner and Gasser*, para. 39.

[252] Cf. Stephan Breitenmoser, 'Sectoral Agreements Between the EC and Switzerland: Contents and Context' 40 *Common Market Law Review* (2003) 1137, at 1152.

c) persons providing and receiving services;
d) persons employed for less than one year in the territory of a Contracting Party;
e) students;
f) jobseekers;
g) persons not engaged in gainful activity; and
h) members of the families of those various categories of nationals.

Importantly, the applicability of the Agreement depends on the existence of a factual situation with a sufficient cross-border anchor. This means that, just as in EU law, purely internal situations are left to be tackled on the basis of internal legal provisions. This may mean, just as with EU law, that nationals who have not made use of the free movement provisions enshrined in the Agreement may, under certain circumstances, be treated less favourably than foreigners who are nationals of a Contracting Party.[253] The pervasive non-discrimination rule of Article 2 of the Agreement cannot be invoked in this regard, as its application equally hinges on the existence of a cross-border element.[254] In addition, the ECJ confirmed in *Grimme* that the non-discrimination principle enshrined in Article 9 of Annex I to the Agreement cannot preclude discriminatory treatment by the German State against a German citizen who carries out activities in the German branch of a company established in Switzerland. Rather, the Agreement prohibits discriminatory treatment by reason of nationality against a national of a Contracting Party in the territory of *another* Contracting Party.[255]

For the most part, the Agreement aims to regulate and facilitate cross-border movement of natural persons, be it self-employed, employed or service providers.

[253] See BGE 129 II 249, at 261.

[254] Ibid.

[255] C-351/08, *Grimme* [2009] ECR I-10777, paras 47-49.

Only Articles 5:1 of the Agreement and 18 of Annex I provide that companies also have the right to provide a service. However, such service cannot be provided for a period exceeding 90 days of actual work in a calendar year.[256] No other right is granted to legal persons, such as the right of establishment.[257] The latter right is given only to natural persons who are to be granted a five-year renewable residence permit if they wish to exercise a self-employed activity.[258] Reference to the *acquis communautaire* in Article 16:1 of the Agreement does not alter the distinction made here. This was confirmed in *Grimme* where the Court underscored that Article 16 reminded that, whereas the application of the *acquis communautaire* to the bilateral relationship hinges on reference being made to rights and obligations equivalent to those found in the EU legal acts, the Agreement does not refer to any provision relating to the right of establishment of *legal* persons.[259]

For a Swiss service supplier, this would mean that it can supply services in all 27 MS, as long as the *aggregate* number of days does not exceed the three-month period.[260] Notably in cases of cross-frontier services supply not exceeding 90 days of actual work per year, the Agreement establishes in Article 17(a) of Annex I to the Agreement an outright prohibition against any restriction, regardless of whether the service is supplied by a legal or a natural person. Article 19 of Annex I to the Agreement states that during the 90-day period, the host MS cannot impose on those service suppliers (legal or natural persons) who are nationals of one Contracting Party less favourable conditions vis-à-vis its own nationals.

---

[256] Art. 21 of Annex I to the Agreement.

[257] Cf. C-351/08, *Grimme* [2009] ECR I-10777, paras 35, 37.

[258] C-13/08, *Stamm and Hauser* [2009] ECR I-11087, para. 44.

[259] C-351/08, para. 38.

[260] Cf. Bundesamt für Berufsbildung und Technologie (BBT), Neue europäische Richtlinie über die Anerkennung von Berufsqualifikationen (RL 2005/36/EG) – Erläuternder Bericht (Anhörung), 2006, p. 15.

In addition, no residence permit, but merely a valid identity card or passport clearly indicating the nationality of its holder, is warranted for the provision of services not exceeding the 90-day limit. However, service suppliers can still be subject to laws, regulations and administrative provisions when providing their services within the 90-day period if such rules serve an imperative requirement in the public interest.[261] Other than the imperative requirements discussed under Section C.III,[262] such rules also comprise requirements relating to road traffic; the development or use of land; town and country planning; building standards or administrative penalties imposed for non-compliance with such requirements. Those rules need to be applicable to all providers in the course of carrying out their economic activity in the same way as to individuals acting in their private capacity.[263] It bears noting that pursuant to the EU Services Directive, economic needs tests (ENTs), which make the granting of authorization subject to proof of the existence of an economic need or market demand in a given area fall within the category of prohibited measures.[264]

Immaterial services, i.e. services supplied through remote means (internet, post etc) arguably also fall under the scope of the Agreement, all the more so because they often do not require any time of actual work. This is so because consumers of the service can be contacted and their orders treated via remote means. Thus supply and consumption are simultaneous. [265] Having said this, it is worth noting that the

---

[261] For instance, the requirement that certain documents are translated in the home-country language and maintained on-site to allow home-country civil servants to monitor the activities were found to serve the legitimate objective of social protection of workers and the monitoring of such protection. See C-490/04, *Commission v. Germany* [2007] ECR I-6095, para. 70. See also C-113/89, *Rush Portuguesa* [1990] ECR I-1417, para. 18.

[262] See also recital 40 of the EU Services Directive.

[263] Ibid, recital 9.

[264] Ibid, Art 14:5. Such case-by-case tests were considered as highly discretionary and therefore negotiators at the WTO included in their agenda for this Round the abolition of ENTs.

[265] See Lukasz Adamczyk, 'The Agreement on the Free Movement of Persons and its Potential Impact on Direct Taxes Systems of EU Member States' 35:3 *International Tax Review* (2007) 183, at 195.

Contracting Parties retain the right to regulate the activities of temporary and interim employment agencies. The same derogation applies to financial services when their provision is subject to prior authorization and the host country imposes certain prudential requirements on financial service suppliers.

In *L. GmbH and M. v Kantonsrat des Kantons Zürich*, the Swiss Federal Court took a fairly broad and open-minded stance towards the rights that EU legal persons can derive from the Agreement. At stake was whether a prohibition of litigation financing services was, *inter alia*, against the fundamental right of economic freedom enshrined in Article 27 of the Swiss Constitution and, if so, whether a foreign legal person could successfully raise such a claim. The latter was to date recognized to foreign natural persons with a residence permit and to domestic legal persons. The Swiss Federal Court was of the view that such a right is to be recognized to EU legal persons that wish to supply services in the Swiss market on the basis of the Agreement. Litigation financing is a legal service of financial nature and the Court found as much. Because the Agreement entitles EU suppliers of such services to an economic activity in Switzerland, the natural extension of such a constellation suggests that a right to raise a claim based on the right of economic freedom should be granted to those service suppliers.[266]

Pursuant to Article 5:2(b) of the Agreement in conjunction with Articles 17(b) and 20:2 of Annex I to the Agreement, the 90-day limit can be exceeded if the service provider has received authorization to provide a service from the competent domestic authorities. In that case, a residence permit, giving access to the entire territory of Switzerland or the EU MS concerned, is to be issued for a period equal to that of the supply of services.[267] In instances where prior authorization is granted for a period longer than 90 days, the Agreement establishes a prohibition on any restriction on the right of entry and residence to those service suppliers (and the

[266] BGE 131 I 223, at 226-227.

[267] Art. 20:2, 3 of Annex I to the Agreement.

members of their family, irrespective of their nationality) established in one Contracting Party and wishing to supply their services in the territory of another Contracting Party.

Clearly, the Agreement applies to Swiss and EU nationals, who are the main beneficiaries of the Agreement.[268] Third-country nationals (TCNs),[269] however, can benefit from the right to entry and residence if they are employees of Swiss or EU nationals providing services and are posted for the provision of a service on behalf of their Swiss – or EU – employer.[270] For this purpose, TCNs have to be integrated into the labour market of a Contracting Party. However, according to Article 22:2 of Annex I to the Agreement referring to the Directive 96/71 on the posting of workers, the Contracting Parties are free to apply laws, regulations and administrative provisions regarding the application of working and employment conditions to persons posted to provide a service.

When combined with Article 16 of the Agreement, one could reasonably argue that the ECJ case-law that we analyzed earlier with regard to posting of workers will be taken into account to ensure that rights and obligations equivalent to those contained in the Directive are applied to Swiss nationals (and, by implication, to TCNs).[271] This view is corroborated by the declaration included in the final act of the Agreement providing that the signatories consider that the relevant EU legal provisions regulating posting of employees who are TCNs and cross-border

[268] That TCNs may not invoke the Agreement was confirmed in C-247/09, *Xhymshiti*, judgment of 18 November 2010.

[269] Note that we used the term TCNs earlier when describing the EU internal market rules as well. In that case, Swiss nationals are also considered as TCNs, as the fundamental freedoms only apply to EU nationals (with the exception of the free movement of capital).

[270] A. Epiney and P. Zbinden, ‚Arbeitnehmerentsendung und FZA Schweiz – EG: Zur Tragweite und Auslegung der Dienstleistungsfreiheit im Freizügigkeitsabkommen Schweiz – EG', Jusletter of 31 August 2009.

[271] The relevant legal framework in Switzerland consists of the Entsendegesetz (EntsG, SR 823.20) and the Entsendeverordnung (EntsV, SR 823.201).

provision of services should be their benchmark when it comes to posting of TCNs in the EU-CH bilateral relationship.[272]

TCNs can also benefit from the Agreement as members of the family of the service provider who is a national of a Contracting Party.[273] Members of the family, within the meaning of the Agreement are:[274]

a) a spouse and relatives in the descending line who are under 21 years old or are dependent;
b) relatives in the ascending line and those of a spouse who are dependent;
c) in the case of a student, a spouse and dependent children.

The Agreement makes clear that the rights mentioned above do not apply to activities involving the exercise of public authority in any of the Contracting Parties, even if this activity is undertaken on an occasional basis. Corresponding ECJ case-law under Articles 51 and 62 TFEU[275] suggests that this exception has to be narrowly construed and applies to activities which have a *direct* and *specific* connection with official authority.[276] More broadly, as Barnard underscores, the Court will apply the TFEU provisions to functions that are merely auxiliary and preparatory, notably when carried out by a private body which is supervised by an entity which effectively exercises official authority by taking the final decision.[277]

[272] See 'Declaration by the European Community and its Member States on articles 1 and 17 of Annex I', OJ L 114/72 of 30 April 2002.

[273] Cf. BGE 129 II 249, at 259.

[274] See Art. 3 of Annex I to the Agreement.

[275] Article 51 TFEU provides that fundamental free movement rules shall not apply to activities which in a given MS 'are connected, even occasionally, with the exercise of official authority'.

[276] Case 2/74, *Reyners* [1974] ECR 631, para. 45.

[277] Barnard, above note 35, p. 504, referring to the case C-404/05, *Commission v Germany* [2007] ECR I-10239, para. 38.

XII. Freedom to receive services (passive Dienstleistungsfreiheit)

According to the Agreement (Article 5:3 thereof in conjunction with Article 23 of Annex I to the Agreement), EU and Swiss nationals wishing to receive services in the territory of any Contracting Party have the right of entry and residence. If the consumption of the service at issue lasts longer than three months, then the service recipient should hold a residence permit equal in duration to the service. Such permit, as with all other types referred to earlier, are valid throughout the territory of the issuing state. Unrestricted geographical mobility is thereby ensured. Social security schemes may not be applicable to the service recipient during its period of residence.

In *Hengartner and Gasser*, at issue was whether Austrian legislation imposing a hunting tax to Swiss nationals which was higher than the one imposed to EU nationals was consistent with the Agreement. In deciding whether different taxation is covered by the Agreement,[278] the Court started by examining the activity at issue. By recognizing that the fact that a right to hunt in the Austrian province is leased gives rise to the tax, the ECJ focused on the contractual obligation at issue. It found that, in fact, the grant to Mr Hengartner and Mr Gasser, in return for payment and under certain conditions, of the exploitation of a right to hunt in an area of land for a limited time constitutes a service of a cross-border nature supplied to the plaintiffs. Therefore, one had to evaluate the purview of the provisions of the Agreement relating to the provision of services.

After reviewing the nature and objectives of the Agreement along the lines explained earlier, the Court referred to the non-comprehensive nature of the non-discrimination principle enshrined in Article 2 of the Agreement, alluding to the analysis that the Advocate-General made. Absent a general and absolute prohibition

[278] Taxation (notably taxation of dividends distributed to an EU citizen b a company established in Switzerland) has been at stake in several cases brought before the ECJ. See, for instance, C-157/05, *Holböck* [2007] ECR I-4051; and C-101/05, *Skatteverket v A* [2007] ECR I-11531.

on all discrimination against nationals of the Contracting Parties,[279] the Court, following the above-mentioned textual and overly formalistic interpretive method, found no provision in the Agreement which would be specifically intended to allow recipients of services to benefit from the principle of non-discrimination as regards fiscal provisions relating to the commercial transactions whose subject is the provision of services.[280]

The Swiss Federal Court has demonstrated similar levels of rigidity in a series of cases relating to the reimbursement of medical costs of treatments that Swiss nationals had in an EU country. The Court suggested that the Agreement is aimed at the liberalization of services only in part. As to the consumption of services, it merely aims to grant a right of entry and residence, as opposed to the modalities of supply and the consumption of medical services in the territory of a Contracting Party.[281] Following the argumentation of the ECJ, the Swiss Federal Court acknowledged that the establishment of an internal market is not the objective of the Agreement, but merely the facilitation of service supply, notably of brief duration, in principle not exceeding 90 days per calendar year. Absent any ambition for creating an area without internal frontiers, the far-reaching ECJ case-law relating to reimbursement of medical costs cannot be taken into account in a Swiss context.

[279] Cf. Art. 21 of the Charter of Fundamental Rights of the European Union. See also Art. 9 of Annex I to the Agreement which seems to be much more absolute when it comes to employed persons residing in the territory of one Contracting Party. In fact, Art. 2 of the Agreement, by its reference to the three Annexes to the Agreement, reflects varying levels of application of the non-discrimination principle among the different categories of persons coming under the scope of the Agreement.

[280] In that sense, TCNs residing within the EU may be treated more favourably than Swiss nationals wishing to receive services on an occasional basis through the cross-frontier consumption of a given service.

[281] Here the Court refers to the statements of the Federal Council and the fact that separate negotiations with a view to liberalizing services were initiated according to the Agreement, but ultimately failed. See for instance Swiss Federal Court, 133 V 624.

XIII. Professional qualifications

With regard to the mutual recognition of professional qualifications, the Agreement determines as relevant for the bilateral relationship the former EU regime relating to the recognition of professional qualifications, i.e. Directive 89/48 establishing a general system for the recognition of higher-education diplomas (3-year duration) and Directive 92/51 establishing a second general system covering regulated professions for which a diploma is not necessarily required. Such professions should not be subject to a sectoral Directive, including its amendments. As noted earlier, this system was accompanied by a series of sectoral Directives which now determine the conditions of recognition of professional qualifications and in part extend the system of automatic recognition discussed above within the context of the Swiss-EU relationship pursuant to Annex III to the Agreement.[282]

The application of the general system essentially provides that education, professional experience and training are to be taken into account by the competent host-country authorities. If substantial differences are found, the authorities can require that the applicant satisfy certain compensatory measures, either a period of adaptation or an aptitude test. In *Colegio*, at issue was whether an Italian civil engineer specialized in hydraulics should be allowed to exercise the more general profession of civil engineer in Spain. The Court suggested that under Directive 89/48, a partial recognition of professional qualification may be accepted when problems arise due to professions that differ in their scope in home and host MS.

In such cases, if the applicant so requests, the competent authority may limit the activities of the migrant professional to those for which he was qualified in the home MS, thereby excluding other activities which domestic professionals qualified in the host MS are allowed to take up and pursue. Thus, the Court clearly outlawed any outright exclusion of a given professional in a similar situation where a given

[282] Cf BGE 132 II 135, at 141.

activity can objectively be separated from the rest of the activities covered by the profession in question in the host MS. Importantly, the Court underlined the dissuasive effect that compensatory measures may have. Partial recognition, dispensing the migrant professional from having to comply with the compensatory measures and allowing it to take up immediately professional activities for which he or she is already qualified conforms to the spirit of the general system of recognition of professional qualifications.[283]

The most important aspect of the current discrepancy between the EU system introduced with Directive 2005/36 discussed under Section D.VIII and the system that the Agreement follows is that the latter does not contain any specific provisions on the conditions applicable to the cross-frontier provision of services. More specifically, one of the objectives of Directive 2005/36 was to ensure that less onerous conditions apply to the cross-border provision of services on a temporary basis than those applicable to the right of establishment. The Directive still provides for safeguards, for instance in cases of important safety or health concerns in accordance with Article 7 of the Directive. However, as the entire system has been traditionally based on building mutual trust, it is for the competent authorities, as opposed to the service supplier, to act pro-actively.

In June 2008, the Swiss Federal Council agreed on the necessity of adopting Directive 2005/36 and thus a revision of Annex III to the Agreement was deemed warranted.[284] Based on the above analysis, this action should be regarded as an indirect way to simplify services provision among Switzerland and the EU MS even

[283] C-330/03, *Colegio* [2006] ECR I-801.

[284] See http://www.bbt.admin.ch/themen/01105/01150/01152/index.html?lang=de.

further. Obviously, one of the challenges relating to the cross-border provision of services at the bilateral level is monitoring the 90-day rule.[285]

Before the adoption of Directive 2005/36, the ECJ case-law suggests that in cases of trans-frontier provision of services where recognition of professional qualifications was at stake, the Court would examine any restrictions not under Directives 89/48 or 92/51, but under the relevant Treaty provisions of the freedom to provide services. For instance, in *Commission v Italy*, the Court found that an Italian measure prohibiting patent agents from other MS to supply their services to Italy unless they enrol on the domestic register, whereby such registration was subject to an aptitude test, was inconsistent with the freedom to provide services. That was especially so because the professional aptitude test required for the compulsory enrolment of patent agents on the Italian register did not differentiate between providers of services whose professional competence and qualities were subject to scrutiny in the home MS and those who have not been subject to such scrutiny.[286]

Nevertheless, in the case of Switzerland, this safety valve does not exist, which means that one has in principle to roll back to the provisions of the Agreement and most prominently the non-discrimination principle enshrined therein. In a recent case brought before the Swiss Federal Court, at stake was whether an experienced German laboratory doctor could be regarded as having an equivalent education and vocational training level when compared to Swiss laboratory doctors.[287] The relevant Swiss authority (*Schweizerischer Verband der Leiter medizinisch-analytischer Laboratorien-FAMH*) answered the question in the negative. The Court took issue with this approach. Whereas this specific profession does not appear in the list of professions set out in Annex III of the Agreement, Swiss law should be interpreted in accordance

[285] Cf. Bundesamt für Berufsbildung und Technologie (BBT), 'Übernahme der Richtlinie 2005/36/EG in der Anhang III des Abkommens über die Freizügigkeit vom 21. Juni 1999 – Bericht zu den Ergebnissen der Anhörung', March 2008.

[286] C-131/01, *Commission v Italy* [2003] ECR I-1659, para. 30.

[287] BGE 133 V 33.

with the meaning and spirit (*Sinn und Geist*) of the Agreement. The Court found that the FAMH Guidelines cannot be interpreted in a manner that disadvantages a professional coming from an EU country.

Thus, if professional experience is regarded as an element that outweighs the lack of vocational training, both Swiss and EU laboratory doctors should be able to benefit from such a rule. Furthermore, the Swiss Federal Court referred to the relevant ECJ case-law suggesting that, in similar situations, the competent national authorities have to take into account and compare all diplomas, knowledge and abilities as well as training and professional experience when examining the matter of equivalence with domestic counterparts. Only if they are of the view that no equivalence is established can they require that the applicant adduce evidence showing that he or she in fact has the necessary qualifications and experience.[288]

One cannot conclude the current discussion without mentioning that, pursuant to Article 18 of the Agreement, any amendment of Annex III is subject to an expedited procedure managed by the Joint Committee, which can have immediate effect upon decision by that body, i.e. without any ratification by the Contracting Parties of the Agreement. Thus, the Agreement does leave room for a simplified synchronization of the systems of professional qualifications applicable by the Contracting Parties at any moment in time.[289]

Additionally, one should not lose sight of the fact that the sectoral directives mentioned in Annex III to the Agreement do comprise provisions regulating the temporary provision of services and thus, in a given case an adequate legal analysis of a factual situation cannot be made without reference to the relevant sectoral directive. For instance, in the case of lawyers, Directive 77/249 which aims to facilitate the free provision of legal services within the EU should be consulted. It

[288] The Court referred here to the ECJ decisions in *Hocsman*, *Vlassopoulou* and *Dreessen*. Ibid, at 36.

[289] For instance, such amendment occurred through the Decision 1/2004 of the Joint Committee.

follows that the courts in that case (and the ECJ or the Swiss Federal Court, in the last instance) will have recourse to the text of the relevant Directive.[290]

THE PARTICULAR BUSINESS SERVICES SUB-SECTORS UNDER REVIEW

XIV. Introductory remarks

Business services play a key enabling role in improving firm competiveness and the economy wide performance of any nation. Business services are typically provided to other enterprises (but also to public administrations), and are often supplied via complex production processes that increasingly reveal supply chain characteristics akin to manufactured products. Several business services, such as legal, engineering or architectural services, are also supplied to households. There are over 22 million persons employed and more than 4.4 million enterprises active in the EU providing business services, accounting for around 20% of both totals in services.[291] In terms of value-added, the business services sector is the largest within the EU-27's non-financial business economy. Nearly 70% of persons employed in the sector are concentrated in five EU MS: Germany, France, Italy, Spain and the United Kingdom.

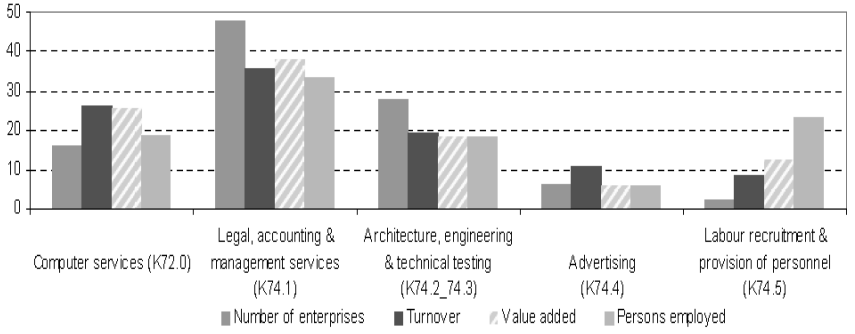
In several business services, sub-sectors such as legal services or advertising contribute more to value-added of the overall sector than to their share in aggregate employment. This reflects high labour productivity and the peculiarities of certain sub-sectors. For instance, advertising is essentially a distributive activity with a high level of turnover and high sales relative to personnel costs. Professional services contribute over 31% of all business services value-added, but only 23% of total

[290] Cf. BGE 132 II 135, at 140.

[291] Note that business services (NACE K72 and K74.1-74.5) for the purposes of European statistics include: computer-related activities; legal, accounting, bookkeeping and auditing activities, tax consultancy, holdings (including management activities of holdings); architectural and engineering activities and related technical consultancy; technical testing and analysis; advertising; and labour recruitment and provision of personnel.

workforce.[292] Among the EU MS that have registered the fastest growth in business services in recent years can be found several newly acceding countries (i.e. the Baltic states, Romania and Bulgaria) together (prior to the financial crisis) with Ireland, Portugal, Luxembourg and Austria.[293]

Figure 4. Subsector contributions to business services total: Number of enterprises, turnover, value added and number of persons employed, EU-27, 2005 (%)



Source: Eurostat (SBS - Annual)

The sector's growth is driven by strong export demand, while innovations in ICT increase opportunities for further development and export growth. As noted earlier, widespread recourse to outsourcing has also contributed greatly to the rapid growth of the sector, as businesses increasingly realize the benefits that they can seize by buying business services by specialized enterprises instead of producing them in-house. That said, certain service activities are more readily exportable than others. This is due to the fact certain activities are more inherently sellable through electronic

[292] See Eurostat, *European Business – Facts and Figures: 2009 Edition*, p. 503.

[293] See P. Alajääskö, 'Main features of EU-27 Business services' Eurostat Statistics in focus 101/2008, p. 5.

means and do not require commercial presence (or require only limited presence) nor thorough knowledge of the export market, its laws or preferences. This is, for instance, the case with computer services and increasingly with some professional services, education or health care services. The same goes for various back-office support and so-called knowledge services such as research and development.

The EU Services Directive, which had to be transposed to the legislations of all MS by the end of 2009, is also expected to enhance competitiveness and growth in the sector.[294] According to the Directive, the mutual evaluation and screening of domestic legislations which may still impede trade in services are to be conducted and reported with a view to eliminating them. Thus, a fairly thorough re-assessment of laws affecting trade in services is taking place in the EU at present and should be expected to bear fruit in the coming years. The Commission has a central supervisory role in this respect.

There remain substantial differences in terms of regulation across EU MS despite important sectoral and horizontal initiatives undertaken in recent years. It is commonplace that governments tend to strictly regulate several service industries in order to pursue an array of objectives, both economic and non-economic. In the former category, governments routinely intervene to address problems associated with market failures, asymmetric information,[295] monopoly or oligopoly, public goods and negative externalities, including the protection of intellectual property. This category of distortions also embodies technical issues, e.g., scarcity of radio frequency spectrum and integrity of networks. Among the non-economic objectives are matters of distributional justice and equity considerations including consumer

[294] Recall, however, that temporary employment agencies are excluded from the scope of the Services Directive.

[295] Information plays a more central role in services than in goods. The nature of the services supply and the direct contact involved between supplier and consumer generate significant risks, as well as outcomes that are not easily reversible for consumers who lack information about the skills that the service supplier has. See UNCTAD and World Bank, '*Liberalizing International Transactions in Services: A Handbook*' (New York and Geneva: United Nations, 1994), at 40.

protection, ethical and adequate professional conduct issues, or ensuring professional competence and the integrity of the profession.

Thus, regulation in service industries is widely perceived as a justified instrument of public policy and as a prerequisite for the efficient and socially acceptable delivery of the service concerned. In many instances, however, the powers of regulators are so extensive and the pressures of special interest groups so weighty that domestic regulation turns out to be a well-known tool to protect private interests rather than to pursue the public interest. This may be more likely to occur in cases of self-regulation by private associations where incumbents may have strong incentives to foreclose competition and deter new entry by both foreigners and nationals. The above observations suggest that it is usually difficult to discern precisely where legitimate regulation ends and undue protection of domestic service industries against foreign or domestic rivals begins and a more careful case-by-case analysis may be warranted in a given instance.

Although the policy instruments that affect international trade in services may be akin to (or produce the same effects as) those used in the goods context, consisting of measures such as subsidies, taxes, quotas, and technical standards, the most important barriers in the services context are generally embedded in arbitrary, non-transparent and/or unduly burdensome regulations imposed by domestic regulatory institutions or authorities, and focused on the local provision or consumption of services. In service industries, due to the lack of extensive standardization, the object of regulation is concentrated not only on services *stricto sensu* but also on producers/service suppliers. Legislations often set out rules relative to the qualities of the service supplier. On the other hand, the content of the service itself is rarely stipulated. Consequently, not only can the regulatory authorities control the entry of producers/suppliers in the industry, but also their conduct once they are allowed to enter the domestic industry. Indeed, many of the most effective barriers to international transactions in the service sector concern both pre-

establishment and post-establishment issues affecting the movement of capital and labour.

In the case of professional services, an important sub-sector of business services, regulatory diversity, including at the sub-national level, may create further challenges for service suppliers. Professional service regulations may differ substantially among the various professions (and indeed across jurisdictions) based on manifold public policy considerations, but also long-standing traditions kept by professional associations. This sector displays restrictive regulatory measures ranging from burdensome entry requirements (e.g. licensing restrictions or onerous procedures) to sometimes prohibitive post-entry requirements such as restrictions (or even outright prohibitions) on advertising; fixed or recommended minimum or maximum prices; reserved tasks; or mandatory business structures and multidisciplinary practices. This study's focus on impediments to the provision of services of brief duration rather than barriers to establishment implies that the latter fall outside its purview.

The heterogeneity of every single sub-sector from MS to MS leads to disparities in growth, development and prospects for the business sector as a whole. At the same time, it also has a very important impact on the decision of every foreign service supplier to supply services on a cross-border basis. More specifically, along with business factors, the nature of a given domestic regulatory framework affects the patterns of supplying a given service.[296]

For individual service suppliers or small and medium-sized companies (SMEs), opaqueness of a given regulatory regime may act as a deterrent to the provision of services even in a cross-border manner. An intrinsic peculiarity of the service sector within the EU is also that about 90% of all SMEs in the EU are active in

[296] See, generally, Delimatsis, above note 98, p. 70.

this sector. In addition, more than 50% of EU business service suppliers are SMEs.[297] SMEs will most typically think twice before they engage in any activities of cross-border nature.[298] Alternatively, they may opt for cooperation agreements with domestic counterparts in case of clients that are active beyond the domestic market.

For large business service suppliers, the lack of transparency of a given regulatory framework may lead them to opt for cross-border supply of services if they believe that they need to first learn the market. If the market is relatively important and the supplier is export-oriented, then establishment through a branch or subsidiary would be most likely the option to choose, as it would give effective access on equal terms with domestic competitors.

Having said this, it is clear that not all business services are prevented from going internationally due to such barriers. For instance, in several business service sub-sectors such as accounting and auditing, taxation, engineering-related consultancy or architectural services, or IT consultancy, there are service suppliers that operate internationally. On the flip side, there are also suppliers who prefer to focus on the Swiss market and thus their business plan does not entail seeking access to EU markets.

XV. Empirical results relative to the study – Challenges in getting feedback and political economy considerations

This study has attempted to map barriers perceived or encountered by Swiss exporters of business services on a temporal basis (i.e. non-established). As indicated earlier, in cases of cross-border services supply that does not exceed 90 days of actual work per year, the Agreement sets out an outright prohibition against any restriction,

[297] See Eurostat, *Europe in Figures – Eurostat Yearbook 2010*, p. 380.

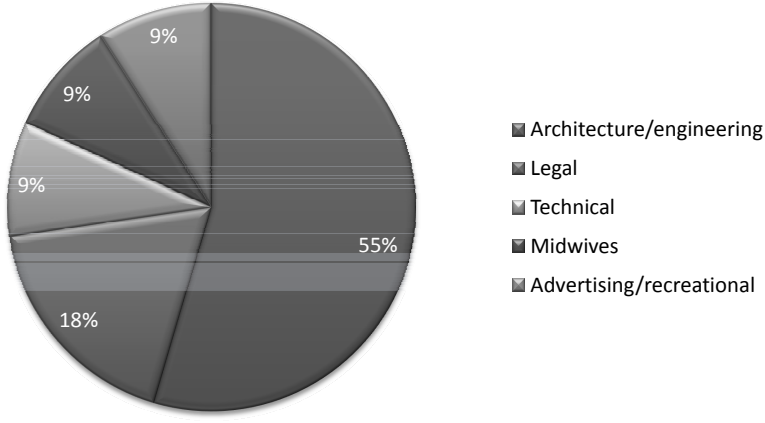
[298] See Trade Policy Review of the European Union, above note 10, p. 130, at fn 148.

irrespective of whether the service is delivered by a legal or a natural person. During the 90-day period, the host MS cannot impose on Swiss service suppliers (legal or natural persons) who are nationals of one Contracting Party less favourable conditions vis-à-vis its own nationals. In addition, a valid identity card or passport clearly indicating the nationality of its holder suffices for the provision of services not exceeding the 90-day limit.

As noted at the beginning of the study, our initial aim was to focus on selected business services sectors, more particularly professional services and other business services which might be of particular interest to Swiss service suppliers desiring to deliver their services in an EU MS. These include legal, accounting and auditing, engineering, architectural, technical testing and analysis services, computer-related services, electrical installation and maintenance services, sport-related services (eg. ski instructors, mountain guides) and certain health-related services such as those supplied by nurses or midwives. In Appendix II, a list of the professional associations and individual companies contacted can be found.

We identified over 30 Swiss professional associations and later eleven individual companies or natural persons (1 advertising/recreational; 2 legal; 1 midwife, 6 architecture- and engineering-related, 1 technical services) the input of which could be used to pinpoint specific barriers that hinder cross-border delivery of services by Swiss service suppliers within the EU. The companies we chose were mostly medium-sized (ie between 100 and 250 employees with a turnover exceeding 1 million Swiss Francs), while individual suppliers revealed minor numbers. The countries where the medium-sized companies were active were not limited to the immediate 'neighbours' of Switzerland, but their activities cover many EU MS, including the newly acceding MS.

Figure 5. Individual companies and natural persons, per sector



Please read this figure clockwise

Despite numerous attempts (mailings, e-mails, phone calls, demands for interviews), we received very limited feedback from the professional associations. In fact, the professional associations we contacted[299] do not collect information on export barriers that their members may be facing when they supply their services in the EU. On the other hand, individual companies and service suppliers were fairly reluctant to share information with us at first blush. Confronted with such widespread reluctance or endogenous lack of streamlined information, a decision was taken to proceed through phone conversations with individual companies and service suppliers and anecdotal evidence garnered from any relevant source, including newspapers; academic articles; or previous studies on related subjects. At a minimum, professional associations were so kind to share with us the contact details of their members as well as their views as to whom we should contact. Thus, even if information about barriers is not collected, professional associations appear to know

[299] See Appendix II.

which companies or natural persons are export-oriented. This is, to our eyes, an inherently contradictory situation which nevertheless may highlight the lack of financial resources within professional associations so that insufficient information about export barriers is collected.

Overall, the response rate was disappointing, i.e. below 20%. To our utmost surprise, there is a manifest disconnect between Swiss professional associations and business service suppliers (natural or legal persons) when it comes to the notification of market access barriers that Swiss service suppliers face abroad and more specifically within the EU. Business service associations collect no information on this score nor have they established any internal mechanism where potential barriers could be notified. The secretariats of such associations do not collect information or complaints from their members relating to foreign trade barriers systematically. Nor have we come across any research from those associations attempting to map the landscape of brief-duration service delivery in the EU or at least the four EU markets that Switzerland shares its borders with – or, in fact, service delivery in general.

At the same time, Swiss service suppliers may not be convinced that notifying any barriers they face in an EU MS market would improve the situation. However, our understanding does not suggest that they believe the markets to be sufficiently open or largely trouble-free. Whereas the way that professional associations and individual service suppliers think about the EU markets may seem rather parochial, one should also keep in mind the largely atomized nature of the sector.

At the governmental level, no systematic collection of such information by service providers occurs. From a political economy perspective, this apparent lack of information flow and communication among associations, individual service suppliers and the competent Swiss authorities affects the advocacy of such activities vis-à-vis regulators and negotiators in that it weakens their voice and ultimately their

participation in the determination of negotiating and policy-making objectives and priority setting that governmental authorities typically make. Indeed, the *raison d'être* of the establishment of professional associations in the first place is to strengthen lobbying channels so that governmental policies are aligned with the interests of a given profession or business grouping. It appears that there is an urgent need for the creation of a coalition of service industries *à la US*, which will mediate information between industry, associations and governmental authorities, including SECO. From our research, it is not evident at all that associations like Economiesuisse assume such a role to date. This observation raises troubling questions as to how the Swiss government formulates current policies in the service sector which may satisfy the industry, although the industry itself is silent as to the export barriers that it faces. Of course, it is possible that SECO receives information through industry channels that allow it to formulate offensive and defensive strategies vis-à-vis the EU, but we were unable to identify them.

It seems that, even if the relevant Swiss associations may be more proactive with respect to the formulation of internal policies, this does not hold for *external* policies. This may be interpreted to mean that Swiss service suppliers in business services are export-averse and, in fact, primarily concerned with the defence or maintenance of domestic market shares. However, the available statistics that we discuss in the introduction of the study appear to suggest otherwise. Alternatively, it may reflect the fact that export-oriented Swiss service suppliers internalize any costs of doing business and find ways of circumventing barriers that hinder the supply of their services within the EU. This may be through:

(a) cooperation with EU counterparts;

(b) recourse to legal assistance to solve problems with governmental authorities or private bodies (in case of self-regulation);

(c) compliance to the requirements that the authorities impose even if they are burdensome or inconsistent with the Agreement; or, more radically,

(d) establishment. As noted earlier, this may be due to reasons unrelated to the magnitude or severity of the market barriers. For instance, establishment may be justified by the importance of the market and by the need for greater proximity with clients so as to tailor service offerings to specific needs. In addition, it can be the result of sector peculiarities. Take for instance the accountancy sector. The structures of the remaining 'Big 4'[300] accountancy firms more closely resemble those of franchising networks. In this sector, KPMG International, a Swiss cooperative, has recently become the largest accounting firm in the European continent.

Our research suggests that all of the four options above are actually at play in one way or another. Notably with regard to option (a) relating to cooperation with EU counterparts, we found that in certain services sectors such as legal services or engineering services when big projects may be at stake, even strong players in the Swiss market will not typically follow a 'go-alone' policy to secure access to a given EU MS market, but will seek expertise locally and negotiate cooperation agreements, which may actually evolve over time.[301] Indeed, larger Swiss law firms acknowledge that, to date, they prefer to cooperate on a given case with a EU MS law firm rather than move to supply legal services on their own or through an established presence. This may, however, not be the case with individual lawyers who run their own firms, although no evidence of this was found.

---

[300] Pricewaterhouse Coopers; Deloitte; Ernst & Young; KPMG.

[301] Quite remarkably, we did not receive any explicit complaints on prohibitive procurement practices in the engineering sector when it comes to cross-border delivery of services. In this regard, it would be interesting to examine the effect of the bilateral agreement on government procurement. Should this absence of complaints be taken to mean that, as a result of the bilateral agreement, Swiss firms no longer suffer any disparate effect when competing in the public markets? A SECO study suggests that this actually is the case. See Peter Balastèr and Jan Schüpbach, 'Weitgehende Liberalisierung des öffentlichen Beschaffungswesens gegenüber EU-Mitgliedstaaten', Volkwirtschaft, March 2011.

As far as lawyers are concerned, it bears mention that, since the EU directives apply pursuant to Annex III to the Agreement, Swiss lawyers may be affected by the same barriers that hamper access to a given EU MS by other MS lawyers as well.[302] In that case, Switzerland may expect to benefit indirectly from the infringement proceedings that the European Commission initiates *ex officio*. Again, such case-law may be more relevant for purposes of establishment than for the free provision of services. The fact that such case-law may be subsequent to the conclusion of the Agreement is irrelevant, as it elaborates and specifies EU legislation that was adopted prior to its conclusion. Legal services is a very important sub-sector of professional services and has greatly benefitted from the globalization of business.[303] This has led to the creation of law firms which, even if established in a given jurisdiction, may deal predominantly with the law of other jurisdictions or international law in general. Furthermore, it is no coincidence that every new Member that joined the WTO in the aftermath of the Uruguay Round, including China, inscribed in its Schedule of Commitments liberalization commitments in legal services.

The legal sector has experienced strong growth in recent years, following the growth of international trade and investment activity and the development of new fields of practice, notably in the area of business and commercial law. Switzerland has undertaken several steps in recent years towards more openness in legal services, also driven by the Agreement. In addition, legal advice is not regulated in Switzerland. For the time being, however, it seems that the Swiss market for lawyers

[302] It is worth noting that EU law does not regulate the conditions for the exercise of the legal profession across the EU MS. These conditions fall within the exclusive competence of MS and differ from one MS to another. Hence, while the abovementioned EC directives set out the conditions in which a lawyer qualified in one MS can practise his profession in another on a permanent basis, this lawyer, once established, is obliged to comply with all the rules and regulations of the host country.

[303] For a more detailed analysis, see P. Delimatsis and S. Gandhi, 'Trade in Services within a Prospective India-EU Trade and Investment Agreement: The Case of the Legal Sector', ICRIER Discussion Paper, June 2008.

has not faced undue pressure from foreign competition (which may be explained by the size of the market, although there are exceptions such as financial law or trade law) nor have Swiss law firms made significant export-oriented moves.

In more generalized terms, our research suggests that export-oriented Swiss service suppliers are already satisfied if they are not discriminated against when compared to other EU service suppliers, be it newcomers or incumbents. Indeed, most authorities of the EU MS consider Swiss service suppliers within the same category as EU and EEA service suppliers, for simplicity reasons. Hence, regulatory enforcement tends to proceed on largely non-discriminatory lines, benefiting Swiss firms indirectly.[304] At the same time, it is noteworthy that several service suppliers participating in the survey did not seem to acknowledge the importance of the bilateral agreements in achieving non-discrimination. It appears that awareness-raising activities explaining the possibilities that the bilateral agreements bring with are apposite.

Less favourable conditions may apply to Swiss service suppliers in those EU MS with which Switzerland shares its borders. For several of the service suppliers being questioned during this study, Germany, France or Italy, for instance, seem to be more formalistic and more prone to impose restrictions on Swiss firms, but the magnitude of their respective markets may make worthwhile the effort to still get access to these markets. At the same time, smaller Swiss service suppliers seem to be primarily affected, as the bigger suppliers manage to enter such markets and internalilze regulatory compliance costs with relative ease. This may be affecting the export propensity of SMEs. In addition, complaints regarding the lack of regulatory transparency of certain procedures relating to government procurement that may affect Swiss engineering-related service suppliers or even subsidization of domestic competitors eg with regard to energy projects, are registered.

[304] This, however, does not seem to be the case for medical services, where the EU legislation is more advanced (for instance, with regard to patient mobility) than the one agreed upon in the Agreement.

One of the barriers that, although origin-neutral, may have a disparate impact on foreigners who try to enter a given EU MS market for the first time, relates to the set of restrictions on advertising. This is one of the trade-restrictive measures which has raised a fair amount of controversy in the EU and is now addressed by the EU Services Directive.[305] Nevertheless, Swiss service suppliers cannot invoke the provisions of this Directive,[306] but may merely rely on the Agreement, more particularly Articles 17 and 18 of Annex I to the Agreement, with admittedly limited chances of success.

However, restrictions do not only relate to commercial communications of professionals such as lawyers, but our observation is meant to also cover here advertising services. In this respect, our survey suggests that when advertisers cross borders with their equipment, there may be burdensome declaration procedures due to the sometimes extremely expensive equipment that they are carrying, which however is essential for the effective supply of their services abroad.[307] This barrier puts an accent on the linkage between goods and services and demonstrates how regulation of goods trade may severely hamper effective access in services.

---

[305] See Delimatsis, above note 183.

[306] The fact that the Services Directive does not apply does not necessarily reduct the ambit of rights and obligations that Swiss service suppliers have. For instance, with regard to the freedom to provide legal services, the Services Directive provides in Article 17 that the freedom to provide services does not apply to matters covered by the Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services in a cross-border manner. This latter directive allows EU lawyers to deliver cross-border services of a temporary nature in other MS under their home-country professional title. It does not tackle the issues of establishment or recognition of qualifications (which are covered by the Directive 98/5). This directive also specifies that judicial activities and representation of a client before public authorities should be pursued in an MS pursuant to the obligations that lawyers established in that MS abide by. For instance, when the service supplied cross-border involves litigation, the host MS may require that the visiting lawyer work together with a local lawyer. Lawyers exercising their right to provide services on a temporary basis are also required to respect the rules of professional conduct of the host MS. This obligation, however, applies only to activities that relate to the representation of a client in legal proceedings or before public authorities of the host MS.

[307] Such a complaint deserves to be furhter examined, as normally countries have an ATA carnet system in place allowing for the temporary duty-free entry of professional equipment.

In a study relating to competition in professional services within the EU,[308] one of the barriers that the European Commission put an accent on were linguistic and cultural differences. Indeed, one of the factors that may deter other EU suppliers to supply their services in the big EU markets is language.[309] Business services are manifestly very sensitive to linguistic differences.[310] Swiss multilingual tradition and cultural characteristics give to Swiss service suppliers comparative advantages that many EU service suppliers do not have. Thus, it is not surprising that none of the service suppliers participating in the study mentioned any substantial socio-cultural barriers.

Rather, a concern that ranks high among the interviewees is price-based competition, especially in a period of rapid and sustained appreciation of the Swiss franc vis-a-vis the Euro. This may severely affect profit margins and consequently export behaviour. It bears noting that these same service suppliers tend to consider the Swiss market as being highly competitive and vibrant. It is merely that once companies, especially SMEs, become more outward-oriented towards European markets that they realize that competition is much fiercer than expected.

Other important barriers resulting from our research relate to the role of professional associations. For technical professions such as engineering or architectural services, local registration with domestic professional bodies, often via vague procedures, can be problematic, as undue delays may arise, which postpone the delivery of services. As noted earlier, EU secondary legislation prohibits such impediments. Notably, Directive 2005/36 outlaws such registration procedures when they artificially delay or create needless costs for service suppliers who are willing to

[308] European Commission, 'Report on Competition in Professional Services', COM(2004)83, 9 February 2004.

[309] See Centre for Strategy and Evaluation Services, above note 141, p. 55.

[310] OECD, 'OECD Experts Meeting on Business Services – Towards a Services Trade Restrictiveness Index (STRI)', TAD/TC/SXM(2008)1, 4 September 2008, para. 12.

exclusively provide services on a temporary basis.[311] However, for technical professions where health and safety considerations are common such as engineering or medical services, identifying delays can become challenging.

A related barrier that was referred to during our study had to do with the absence of sufficient connections to local service suppliers who could work as intermediaries in securing access to a given market. In our view, this illustrates the need for bottom-up co-operation among professional associations. In the EU, professional associations are more powerful and assertive/pro-active due to the need to be more outspoken with respect to lobbying vis-à-vis the EU institutions and agencies and the impact of EU policies on domestic legal orders. Thus, coalitions of associations in Brussels do get involved with the everyday work of the European Commission relevant services (for instance, the DG Internal Market or DG Trade) and compete in the market for voice to ensure that their interests will be served and concerns heard.

The fact that technical professions face relatively greater hurdles may also reflect the rather fragmented nature of the market for such services *within* Switzerland, with business ranging from independent specialists to considerably larger firms.[312] Other than architects, who enjoy automatic recognition pursuant to Annex III of the Agreement,[313] professionals in these sectors may be suffering from this fragmentation which affects competition in their professions, the power and relevance of their professional associations, or the protection of vested interests at a cantonal level. Professional titles such as 'architect', 'engineer' or technician' may not

[311] See also N. Gammenthaler, 'Richtlinie 2005/36/EG über die Anerkennung von Berufsqualifikationen: Implikationen für die Schweiz', *Schweizerisches Jahrbuch für Europarecht 2009/2010*, 323, at 332.

[312] See WTO, *Trade Policy Review – Switzerland*, WT/TPR/S/208/Rev.1, 2009, at 134.

[313] Note, however, that the EU did have difficulties in recognizing certain Swiss degrees in architecture. See A. de Chambrier, 'Les professions réglementées et la construction du marché intérieur – Rapport préparatoire à la révision de la LMI', January 2004, p. 48.

be regulated and protected in some cantons.[314] This hinders competition within the domestic market and negatively affects the competitiveness of Swiss professionals vis-à-vis their European counterparts. The prospect of adopting Directive 2005/36 will certainly bring about several changes in those sectors and will call for more (rather than less) regulation in these sectors, especially because of safety considerations.[315] As noted earlier, the adoption of the PQD would greatly facilitate cross-frontier provision of services supplied by Swiss service suppliers within the EU MS markets.[316]

Similar types of problems confront Swiss ski instructors and mountain guides when they attempt to deliver services abroad. In Switzerland, the profession of ski instructor is regulated, as is that of mountain guide.[317] However, for the recognition of qualifications, it is only in the case of mountain guides that a federal authority is competent for the recognition of professional qualifications (BBT). Otherwise, the recognition of qualifications of ski instructors occurs at the cantonal level.

Diversity in the regulation of mountain sports (regulation at the federal and sub-federal level; collective regulation of activities as opposed to separate regulation of activities) may lead to unjustified market access restrictions. In a recent case brought by the European Commission against France before the ECJ,[318] at stake was whether France violated its EU obligations (Directive 92/51, in particular) by not

[314] Ibid.

[315] Bundesamt für Berufsbildung und Technologie (BBT), above note 260.

[316] Cf. SECO, 'Bericht zur Dienstleistungsliberalisierung in der Schweiz im Vergleich zur EU', 2005, at 50. Such an adoption may be delayed, as the European Commission has recently found that perhaps a new, simplified system on the recognition of qualifications is needed. Thus, Swiss authorities may decide not to act before the European Commission brings forward its thoughts about modifying the PQD in the context of the Single Market Act.

[317] For a list of the regulated professions in Switzerland, see http://www.bbt.admin.ch/themen/01105/01107/index.html?lang=fr&download=NHzLpZeg7t,lnp6I0NTU042l2Z6ln1ae2IZn4Z2qZpnO2Yuq2Z6gpJCDeX59gWym162epYbg2c_JjKbNoKSn6A--.

[318] See C-200/08. It is worth noting that the case was removed from the registry as France ultimately modified its relevant legislation.

allowing foreign snowboard instructors to exercise their profession in France. This was so because, according to French law, the exercise of this profession was reserved to holders of a French alpine ski instruction certificate or equivalent which nevertheless had to include proof of qualifications in both ski and snowboard. This reveals the current diversity that exists within Europe as to the regulation of winter sports instruction. In some MS such as Germany, Spain or Sweden, alpine ski instruction and snowboard instruction are treated as two separate professions. In other MS, like Italy, Austria, France and the UK snowboard instructors need to be in the possession of a ski instructor qualification. In the latter case, problems arise when the regulating State precludes any possibility of *partial* access. That is, not allowing a snowboard instructor to exercise only this part of the wider profession of alpine ski instructor. Just as in the *Colegio* discussed earlier, Advocate General Sharpston suggested that this can violate EU law only where the two professions (alpine ski instructor *versus* snowboard instructor) are objectively dissociable in the host MS.

CONCLUSIONS

This study aimed to describe the current state of play of cross-border trade in business services within the framework of the bilateral relationship between Switzerland and the EU. It demonstrated that significant parts of the EU internal market rules and logic should not be taken as automatically transposable to a situation involving a Swiss service supplier. This is because the Agreement does not establish a regulatory framework that may be comparable to the EU internal market or the EEA. Having said this, it would be erroneous to argue that the Agreement has not improved the conditions governing access to the EU market for Swiss service suppliers, in particular the provision of services of brief duration – at least, for those suppliers who have the capacity and willingness to get involved in cross-border supply of their services. Obviously, the observation of several Swiss suppliers

participating in the survey that they cannot compete on price when exporting to the EU leads us to believe that Swiss firms tend to compete more on quality than on price within the EU market. However, our limited sample and low response rate cannot allow us to generalize such a finding.[319]

Again, our survey suggests that getting the necessary input and raw material from business service providers and professionals directly is extremely challenging. The reason for this is not any distrust or reluctance vis-à-vis the researchers, but rather that no systematic and regular collection of such information is made by firms and, even more surprisingly, by industry associations. Professional associations appear strangely indifferent to the collection of such information and obviously rely on evidence collected by Swiss governmental authorities and agencies. As noted in the previous section, this may affect their participation in the formulation of governmental trade policies that directly affect them.

The business services sector is a very diverse one, with activities and companies of very different size and structure. In addition, some services within this sector are more apt to be exported than others. Furthermore, an assessment of the overall state of the art with regard to barriers that may violate the Agreement becomes more challenging once one attempts to focus on laws, regulations and administrative provisions that may be justified by an overriding requirement of the type that the ECJ has accepted over the years such as the protection of workers; the protection of the social security system and the prevention of fraud, the protection of the recipient of the service through professional rules or professional secrecy.[320] Importantly, however, the Agreement does not include a proportionality test, which is, as discussed earlier, the most important litmus test that the ECJ applies to strike down national measures that restrict free movement within the EU. Thus, judicial

[319] It bears noting that the issue of outsourcing services in the EU in order to be more competitive in the *Swiss* market did not constitute part of this study.

[320] See Section A.V.

review may be much less interventionist when compared to the current fairly solid body of case-law that the ECJ has delivered. However, proportionality is relevant indirectly through the secondary law to which mention is made in the Agreement and its Annexes and the case-law delivered by the ECJ prior to the conclusion of the Agreement.

At a minimum, our study suggests that the creation of platforms where Swiss service suppliers can notify the barriers that they face when they attempt to deliver services within the EU (or in third country markets where barriers may be even more likely to arise) on a temporary basis is necessary. Such platforms can be electronic and be managed by the respective professional association or even the competent governmental authority. One would also expect that those activities that include large companies in terms of employees and turnover would already be aware of the importance of collecting this type of information on both exports and imports of services. The absence of such information to date undermines the representativeness and accuracy of the sample survey used in this study and is a caveat that the reader of this study should constantly take into account.

More crucially, this shortcoming has inevitable effects on the determination of the political agenda and the setting of priorities by the political organs in their trade relations with the EU. In addition, such behaviour is paradoxical if one considers the insistence of professional associations on self-regulation at the domestic level. Taking the example of the EU, we see a new governance trend in moving towards more deference to decisions and rules created by professional associations. In this respect, one noticeable example is the mandate for the creation of pan-European professional codes of conduct (CoC) by professional associations.

Generally, Swiss professional associations do not seem to be actively involved. However, this is a very important development within the EU legal order; indeed, a paradigm shift underlining the changing nature of regulatory intervention

at the EU level is currently underway. Initially voluntary, the CoC that will be created out of this process will be transposed at the national level and gradually become binding, thereby ensuring a minimum level of homogeneity and adequate professional conduct across the Union when it comes to issues relating to ethics, professional secrecy and integrity, impartiality, business structure or advertising.

Due to the growing internationalization of the professions and the subsequent relativization of borders and jurisdictions,[321] along with the admittedly patent failure of EU institutions in creating a genuine internal market for business services, a bottom-up policy encompassing low-level politics and private rulemaking comes to the forefront with a view to ensuring openness, competitiveness and at the same time better services to consumers. Previously, self-regulation and rules included in a CoC were regarded as potentially leading to market foreclosure, as incumbents had the tools to protect their interests and income. Indeed, economic theory further demonstrates that delegating regulatory authority, ie granting to a professional body a monopoly right to self-regulate the pursuit of a professional service and thus allowing it to restrict entry to the profession, would generate important economic rents in the form of excess revenues for the incumbents. Prices in this case will be higher without there being any assurance of quality improvement. For instance, in *Cipolla*, the Commission argued that no causal link had been established between the setting of minimum levels of fees and a high qualitative standard of legal services.[322] More generally, in several instances, professional bodies have incorporated in their CoC various restrictions relating for instance to advertising or price-fixing and linked such restrictions to the proper conduct of the profession or consumer interests. [323]

---

[321] cf with respect to legal services, C-193/05, *Commission v. Luxembourg* [2006] ECR I-8673, para. 45.

[322] Joined Cases C-94/04 and C-202/04, *Cipolla* [2006] ECR I-11421.

[323] See, more recently, the Commission Decision of 24 June 2004 on the recommended prices for Belgian architects, case COMP/38.2549.

More than ten years after the signature of the Agreement, one can still argue that the bilateral relationship in this area remains in its infancy. Significant changes to the regulation of services within the EU such as the PQD or the Services Directive have occurred, but the EU still strives for the creation of a genuine market for services. This clearly affects Swiss exports to the EU. Whereas Swiss business service suppliers do not appear to regard this as unduly worrisome for the time being, as the Swiss services market is still very vibrant, the time may have come to start reflecting more resolutely on the scope for greater services export opportunities that are present in the EU market, as in some business services the domestic market may reach saturation in the medium term.

REFERENCES

Books, articles and contributions to edited volumes

L. Adamczyk, 'The Agreement on the Free Movement of Persons and its Potential Impact on Direct Taxes Systems of EU Member States' 35:3 *International Tax Review* (2007) 183.

P. Alajääskö, 'Main features of EU-27 Business services' Eurostat Statistics in focus 101/2008.

P. Balastèr and J. Schüpbach, 'Weitgehende Liberalisierung des öffentlichen Beschaffungswesens gegenüber EU-Mitgliedstaaten', Volkwirtschaft, March 2011.

C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, 2nd edition (Oxford University Press, 2010).

C. Barnard, 'Unravelling the Services Directive' 45 *Common Market Law Review* (2008) 323.

S. Bielecki and S. Gori,'EU27 international trade in services declined in 2009 following the onset of the global financial crisis', Eurostat Statistics in Focus 37/2010.

A. Biondi, 'Recurring Cycles in the Internal Market: Some Reflections on the Free Movement of Services' in A. Arnull; P. Eeckhout; and T. Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs,* 229 (Oxford University Press, 2008).

I. Borchert and A. Mattoo, 'The Crisis-Resilience of Services Trade', World Bank Policy Research Working Paper No 4917, April 2009.

S. Breitenmoser, 'Sectoral Agreements Between the EC and Switzerland: Contents and Context' 40 *Common Market Law Review* (2003) 1137.

R. de Bruyn; H. Kox and A. Lejour, 'The trade-induced effects of the Services Directive and the country of origin principle', CPB document no. 108 (February 2006), at: http://www.cpb.nl/sites/default/files/publicaties/download/trade-induced-effects-services-directive-and-country-origin-principle.pdf (last visited 10 December 2010).

A. de Chambrier, 'Les professions réglementées et la construction du marché intérieur – Rapport préparatoire à la révision de la LMI', January 2004.

T. Cottier and E. Evtimov, 'Probleme des Rechtsschutzes bei der Anwendung der sektoriellen Abkommen mit der EG' in T. Cottier and M. Oesch (eds), *Die sektoriellen Abkommen Schweiz-EG* (Stämpfli, BTJP, 2002).

P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999).

M. Cremona and B. de Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing, 2008).

P. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (Oxford University Press, 2007).

_____, 'The EU Services Directive and the Mandate for the Creation of Professional Codes of Conduct' in I. Lianos and O. Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge University Press, 2011)

_____, "Thou shall not…(dis)trust": Codes of conduct and harmonization of professional standards in the EU' 47:4 *Common Market Law Review* (2010) 1049.

_____ and S. Gandhi, 'Trade in Services within a Prospective India-EU Trade and Investment Agreement: The Case of the Legal Sector', ICRIER Discussion Paper, June 2008.

C.-D. Ehlermann and G. Campogrande, 'Rules on services in the EEC: A model for negotiating world-wide rules' in E.-U. Petersmann and M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Kluwer Law International, 1988).

A. Epiney and P. Zbinden, ‚Arbeitnehmerentsendung und FZA Schweiz – EG: Zur Tragweite und Auslegung der Dienstleistungsfreiheit im Freizügigkeitsabkommen Schweiz – EG', Jusletter of 31 August 2009.

D. Edward and N. Nic Shuibhne, 'Continuity and Change in the Law Relating to Services' in A: Arnull; P. Eeckhout, and T. Tridimas (Eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008).

N. Gammenthaler, 'Richtlinie 2005/36/EG über die Anerkennung von Berufsqualifikationen: Implikationen für die Schweiz', *Schweizerisches Jahrbuch für Europarecht 2009/2010*, 323.

V. Hatzopoulos and T. Do, 'The case-law of the ECJ concerning the free provision of services: 2000-2005' 43 *Common Market Law Review* (2006) 923.

G. Hufbauer and R. Baldwin, 'The Shape of a Free Trade Agreement between Switzerland and the United States – A Report by the Institute for International Economics', 2005.

F. Jacobs, 'The Evolution of the European Legal Order' 41 *Common Market Law Review* (2004) 303.

H. Jarass, 'A Unified Approach to the Fundamental Freedoms' in M. Andenas and W.-H. Roth (eds), *Services and Free Movement in the EU Law* (Oxford University Press, 2002).

W. Kälin, 'Die Bedeutung des Freizügigkeitsabkommens für das Ausländerrecht' in T. Cottier and M. Oesch (eds), *Die sektoriellen Abkommen Schweiz-EG* (Stämpfli, BTJP, 2002).

M. Klamert, 'Way to go? – More on the Services Directive and the Fundamental Freedoms' 64 *Zeitschrift für öffentliches Recht* (2009) 335.

F. Maiani, 'Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe"', EUI MWP 2008/32, European University Institute, 2008.

A. Mattoo; Randeep Rathindran and Arvind Subramanian, 'Measuring Services Trade Liberalization and Its Impact on Economic Growth: An Illustration' 21:1 *Journal of Economic Integration* (2006) 64.

M. Monti, 'A New Strategy for the Single Market at the Service of Europe's Economy and Society', Report to the President of the European Commission (Monti Report), 9 May 2010.

C. Nufer, 'Bilaterale Verhandlungen wie weiter? Liberalisierung der Dienstleistungen zwischen der Schweiz und der EU: Gewinner und Verlierer aus Schweizer Sicht', Basler Schriften zur europäischen Integration No 79, 2006.

A. Lazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union' 45 *Common Market Law Review* (2008) 1433.

S. Prechal, *Directives in European Community Law – A Study of Directives and their Enforcement in National Courts* (Clarendon Press, 1995).

M. Quinn and N. MacGowan, 'Could Article 30 Impose Obligations on Individuals' 12 *European Law Review* (1987) 163.

J. Rogers, 'From "Civilian Power" to "Global Power": Explicating the European Union's "Grand Strategy" Through the Articulation of Discourse Theory' 47(4) *Journal of Common Market Studies* (2009) 831.

P. Oliver and W.-H. Roth, 'The Internal Market and the Four Freedoms', 41 *Common Market Law Review* (2004) 407.

J. Snell, *Goods and Services in EC Law – A Study of the Relationship Between the Freedoms* (Oxford University Press, 2002).

E. Stein, 'Lawyers, Judges, and the Making of Transnational Constitution' 75(1) *American Journal of International Law* (1981) 1.

B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999).

<u>*WTO, OECD, UNCTAD, Eurostat and European Commission Documents*</u>

European Commission, *Completing the internal market*, White Paper, COM(85)310 final, June 1985.

European Commission, 'New European Labour Markets, Open to All, with Access for All', COM(2001) 116 final, 28 February 2001.

European Commission, 'The State of the Internal Market for Services', COM(2002) 441 final, 30 July 2002.

European Commission, 'Internal Market Strategy – Priorities 2003-2006', COM(2003) 238, 7 May 2003.

European Commission, 'Report on Competition in Professional Services', COM(2004) 83, 9 February 2004.

European Commission, 'Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services', Commission Staff Working Document, COM(2005) 405 final, 5 September 2005,

European Commission, 'Handbook on Implementation of the Services Directive', Office for Official Publications of the European Communities, 2007.

European Commission, 'User Guide – Directive 2005/36/EC', available at: http://ec.europa.eu/internal_market/qualifications/docs/guide/users_guide_en.pdf.

Eurostat, *European Union international trade in services – Analytical Aspects: Data 2003-2007* (2009 edition).

Eurostat, *European Business – Facts and Figures: 2009 Edition*.

Eurostat, *Europe in Figures – Eurostat Yearbook 2010.*

OECD, 'Managing Request-Offer Negotiations Under the GATS: The Case of Legal Services', OECD Trade Policy Working Paper No.2, TD/TC/WP(2003)40/FINAL, 14 June 2004.

OECD, 'OECD Experts Meeting on Business Services – Towards a Services Trade Restrictiveness Index (STRI)', TAD/TC/SXM(2008)1, 4 September 2008.

OECD, *Economic Survey: Switzerland*, 2009.

UNCTAD, *E- Commerce and Development Report 2003* (United Nations Publication, 2003).

UNCTAD and World Bank, '*Liberalizing International Transactions in Services: A Handbook*' (New York and Geneva: United Nations, 1994).

WTO, *Trade Policy Review – European Communities*, WT/TPR/S/177, 22 January 2007.

WTO, *Trade Policy Review – Switzerland*, WT/TPR/S/208/Rev.1, 2009.

WTO, *Trade Policy Review of the European Union*, WT/TPR/S/214/Rev.1, 8 June 2009.

WTO, 'Cross-border Supply (Modes 1 and 2)', Background Note by the Secretariat, S/C/W/304, 18 September 2009.

WTO, 'Legal Services', Background Note by the Secretariat, S/C/W/318, 14 June 2010.

WTO, *International Trade Statistics 2010.*

Swiss Authorities Documents

Bundesamt für Berufsbildung und Technologie (BBT), Neue europäische Richtlinie über die Anerkennung von Berufsqualifikationen (RL 2005/36/EG) – Erläuternder Bericht (Anhörung), 2006.

Bundesamt für Berufsbildung und Technologie (BBT), 'Übernahme der Richtlinie 2005/36/EG in der Anhang III des Abkommens über die Freizügigkeit vom 21. Juni 1999 – Bericht zu den Ergebnissen der Anhörung', March 2008.

SECO, 'Bericht zur Dienstleistungsliberalisierung in der Schweiz im Vergleich zur EU', 2005.

Other

Centre for Strategy and Evaluation Services, 'Barriers to Trade in Business Services – Final Report', commissioned by the European Commission, January 2001.

Copenhagen Economics, 'The Economic Importance of the Country of Origin Principle in the Proposed Services Directive', 2005, available at: http://www.copenhageneconomics.com/Admin/Public/DWSDownload.aspx?File=%2fFiles%2fFiler%2fPublikationer%2fCountry_of_origin_principle.pdf (last visited 10 December 2010).

ValueNotes Outsourcing Weekly, Legal Outsourcing hype: can India deliver; 6 October 2006: Vol. III, No. 40.

APPENDIX I: THE TREATY OF THE FUNCTIONING OF THE EUROPEAN UNION – RELEVANT PROVISIONS

TITLE IV

FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1

WORKERS

Article 45

(ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 46

(ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 47

(ex Article 41 TEC)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 48

(ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self- employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

CHAPTER 2

RIGHT OF ESTABLISHMENT

Article 49

(ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 50

(ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;

(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;

(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or

firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 51

(ex Article 45 TEC)

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

Article 52

(ex Article 46 TEC)

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

Article 53

(ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

Article 54

(ex Article 48 TEC)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 55

(ex Article 294 TEC)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

CHAPTER 3

SERVICES

Article 56

(ex Article 49 TEC)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 57

(ex Article 50 TEC)

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 58

(ex Article 51 TEC)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 59

(ex Article 52 TEC)

1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 60

(ex Article 53 TEC)

The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 61

(ex Article 54 TEC)

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.

Article 62

(ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

APPENDIX II. LIST OF PROFESSIONAL ASSOCIATIONS AND INDIVIDUAL COMPANIES THAT WERE CONTACTED FOR THE PURPOSES OF THIS STUDY

Felix Meier, Fotosolar	contact@fotosolar.ch
Irmgard Beerli, Midwife, Grabs	i.beerli@bluewin.ch
Itten Brechtbühl Architekten	j.kutter@ittenbrechtbuehl.ch
Schweizer Hebammenverband	d.guettinger@hebamme.ch
Amstein Walthert	irina.zgraggen@amsteinwalthert.ch
Lenz&Staehelin (Law)	Benoit.Merkt@LenzStaehelin.com
Vischer Anwälte (Law)	bfchrist@vischer.ch
Basler & Hofmann (Engineering)	info@baslerhofmann.ch
Preisig AG (Sanitary, Heating)	info@preisig.ch
Gruner (Engineering)	ruedi.marty@gruner.ch
Kellerhals/Haefeli Geologen	nfo@k-h.ch
AF-Colenco AG	colenco-info@afconsult.com
Schweizerische Akkreditierungsstelle SAS	jeannine.zeidguy-fluri@sas.ch
Vereinigte Schausteller-Verbände der Schweiz	praesident@vsvs.ch

Begleitschutzgewerbeverband	info@begleitschutzgewerbe.com
Dentalhygiene	info@dentalhygienists.ch
Bergführerverband	sbv@awww.ch
Verband schweizerischer Verkehrsingenieure	info@svi.ch
Schweizerische Vereinigung Beratender Ingenieurunternehmungen	usic@usic.ch
Verband Agrar- und Lebensmittelingenieure	svial@svial.ch
Schweizerischer Ingenieurverband	info@swissengineering.ch
Berufsverband für Fachleute der Bereiche Bau, Technik und Umwelt	contact@sia.ch
Pflege	admin@spitexch.ch
Schweizerische Vereinigung für Radiologie	info@svmtra.ch
Vereinigung für Ergotherapie	evs-ase@ergotherapie.ch
Chiropraktoren-Gesellschaft	mail@chirosuisse.ch
Schweizerischer Treuhandverband	info@treuhandsuisse.ch

Treuhandkammer	dienste@treuhand-kammer.ch
Verband Schweizerischer Patent- und Markenanwälte	mail@vsp.ch
International Patent and Trademark Office	info@ipto.ch
Schweizerischer Anwaltsverband	info@swisslawyers.com
Economiesuisse	jan.atteslander@economiesuisse.ch
Industrie- und Handelskammer Freiburg im Br.	melanie.schwarzer@freiburg.ihk.de

-

APPENDIX III: THE QUESTIONNAIRE SENT TO PROFESSIONAL ASSOCIATIONS AND COMPANIES

QUESTIONNAIRE – SECO STUDY ON THE SWISS-EU CROSS-BORDER TRADE IN BUSINESS SERVICES AND MOVEMENT OF SELF-EMPLOYED PROFESSIONALS

Undertaken by the World Trade Institute, Bern and Tilburg University, the Netherlands

Part I: Company/Association details[1]

1 What is the name of the company/association?

2. How long has your company/association been operating?

3 How many people does your Company/Association employ? How many members does your Company/Association have?

- ☐ Less than 10
- ☐ Between 10 and 20
- ☐ Between 20 and 40
- ☐ Between 50 and 100
- ☐ Between 100 and 250
- ☐ Over 250

4. What's your company's turnover for the last two financial years? Please express the turnover in Swiss Francs

- ☐ Below 200000 CHF
- ☐ 200000-400000 CHF
- ☐ 400000-800000 CHF
- ☐ 800000-1.2m CHF
- ☐ Over 1.2 m CHF

5. What is the ***main*** business service your company provides? Please tick **<u>one box only</u>**

- ☐ Information technology consultancy
- ☐ Legal services
- ☐ Accounting or auditing services
- ☐ Technical testing
- ☐ Engineering-related services
- ☐ Computer Services
- ☐ Medical Services
- ☐ Recreational services

[1] If applicable, the term should be regarded as also covering natural persons (eg. Self-employed, individual or contractual service suppliers).

PLEASE NOTE: THE REST OF THIS QUESTIONNAIRE RELATES ONLY TO YOUR MAIN BUSINESS SERVICE!

Part II: Competitive situation in your market

6. How would you describe competition in your domestic market? Please tick one box

□ (a) Not very competitive – one or two firms dominate the market
□ (b) Quite competitive – there is fair competition but not very intense
□ (c) Very competitive – many firms have entered/may enter the market

7. What type of competitors does your company face in its domestic market? Please tick the appropriate box

□ (a) Most or all competitors are domestic
□ (b) The market is open with both domestic and EU firms competing
□ (c) The market is open with both domestic and non-EU firms competing
□ (d) The market is open with domestic, EU and non-EU firms competing
□ (e) Most competitors or the most important ones are European
□ (f) Most competitors or the most important are non-European

8. If you deliver services to EU markets please indicate how competitive your main markets in these countries are compared with your home market

□ Less
□ Similar
□ More
□ Don't know/not relevant

9. If you deliver services in Italy, Germany, Austria and France, please indicate how competitive your main markets in these countries are compared with your home market.

France	Germany	Austria	France	East-European country(ies)	Other[2]
Less	Less	Less	Less	Less	Less
Similar	Similar	Similar	Similar	Similar	Similar
More	More	More	More	More	More
Don't know/not relevant	Don't know/not relevant	Don't know/not relevant	Don't know/not relevant	Don't know/not relevant	Don't know/not relevant

NOTE: If you deliver services in other EU markets please indicate it and note the situation of competition vis-à-vis your domestic market!

[2] Please specify.

10. If you deliver services to other EU markets, please indicate how prices in your home market for the type of service you provide differ from typical prices for the same type of services in your main market(s) elsewhere in the EU. Please consider prices before VAT!

Prices are generally higher in home market

□ Up to 10%
□ Up to 20%
□ Over 20%

Prices are generally lower in home market

□ Up to 10%
□ Up to 20%
□ Over 20%
□ No difference
□ Don't know/NA

11. What has been the impact of the Swiss-EU bilateral agreements on competitive conditions? Please tick the appropriate boxes for (a) your home market and (b) your export market

□ (a) Many firms have entered the market from EU countries
□ (b) Price competition has become more intense
□ (c) We have expanded our range of services
□ (d) We have improved the quality of our services
□ (e) We have been able to reduce our costs by buying inputs at a lower price
□ (f) We have been able to reduce our costs by increasing sales
□ (g) We have had to modify our structures to adapt to new competitive conditions
□ (h) The Swiss-EU bilateral agreements had no significant impact on competition

Part III: Business services in other countries

12. To what extent is your company involved in exporting business services to clients in other EU countries? Please tick the box best describing your company's activities:

We have never tried to sell services to clients in other EU countries	
We considered selling services in other EU countries but after investigation did not go ahead	
We have sold services to clients in other EU countries in the past but do not do so now	
We have sold services to clients in other EU countries in the past and continue to do so now	

13. At the moment, which method(s) does your company use to deliver services to other EU countries:
- delivers services directly from your home country (A)
- delivers services locally by sending a team from your home country (B)
- delivers services through a subsidiary, sister company or local agent (C)

Please identify the three EU countries where your company has the most or most important clients, indicating in each case how services are delivered using the above code:

	A	B	C		A	B	C
Austria				Germany			
BeNeLux				Italy			
UK				France			
Poland				Spain			
Other Eastern Europe				Portugal			

14. What was the value of sales in the past year by your company (including sales by subsidiaries or local intermediaries) to clients in other EU countries as a percentage of the company's overall turnover?

□ 1-10%
□ 10-25%
□ 25-50%
□ Over 50%

Part IV: Barriers to trade in business services

14. What sort of barriers does your company face in delivering services in the EU-Market?

□ Barriers to selling services from your home base
□ Barriers to setting up a local operation in an EU country
□ Barriers of socio-cultural nature.
□ Other barriers – Please specify: .....
.....
.....
.....
.....

15. What sort of barriers does your company face in delivering services directly from the home base or by using a team sent there? Please rank each of the following factors on a scale where 1=very important and 3= not important (leave the box(es) empty if not relevant)

□ Requirement to obtain local registration with a professional body
□ Requirement to have a specific legal form
□ Requirement to meet specific financial criteria
□ Not possible to supply services without being represented by a local agent
□ Lack of mutual recognition of national professional qualifications
□ Requirement to meet restrictive local labour employment regulations
□ Requirement to have a local presence in order to provide after-care services
□ Difficulty in supplying services because of distance-related costs
□ Discriminatory tax on services delivered across borders
□ Don't know/NA

16. How important are market-related and cultural barriers to selling business services in EU countries when delivering services from your home base or sending a team from there?
1– Very important; 3–Not important (leave the box(es) empty if not relevant)

Socio-cultural factors
□ Differences in local traditions make it difficult to sell appropriate services
□ Differences in commercial practices, eg need to pay commission to locals
□ Need to work in local language makes it difficult to do business
□ Planning and zoning restrictions making it difficult to enter market

Market-related factors
□ Requirement to have a local track record to compete with local suppliers
□ Subsidized local providers put non-national providers at a disadvantage
□ Unacceptable delays in payment eg because of regulations, banking practices
□ Complexity of dealing with foreign legal systems and contracting procedures
□ Restrictions on cross-border marketing and the use of international brand names
□ Inadequate protection of intellectual property rights

Administrative barriers
□ Inadequate protection of intellectual property rights
□ Absence of transparency, ambiguous or arbitrary procedures
□ Imposition of national standards, testing and certification rules

Barriers to procurement (including public procurement)
□ Difficulty in obtaining information on tendering opportunities
□ Exemption clauses in public procurement procedures
□ High administrative costs of bidding

17. Please use the space below to describe any other barriers to selling your services abroad, including any activity-specific barriers: ……
……
……
……

.....
.....

18. Which countries, in your opinion, present the most severe barriers to trade in services? Please rank the extent of these difficulties for each country
1=severe barriers 3= few barriers

□ France
□ Germany
□ Italy
□ Austria
□ Benelux
□ Poland
□ Spain
□ Other – Please specify:

19. Will the development of E-commerce reduce barriers to trade in services in the EU?

□ Yes □ No □ Don't know

20. Will the adoption of Euro from the new EU Member States help to reduce barriers to trade in services in the EU?

□ Yes □ No □ Don't know

21. In your view are new barriers to trade in services developing and adding to/replacing old ones?

□Yes □No □ Don't know

22. Overall do you think that barriers in the EU to trade in services have been increasing or decreasing after the Swiss-EU bilateral agreements?

□ Decreasing □ No change □ Increasing

23. Overall do you think that your co-operation opportunities with like service suppliers originating in the EU have improved?

□ Yes □ No □ Don't know

24. Do you think that the elaboration of Codes of Conduct for your business activity would improve your access to the EU markets?

□ Yes □ No □ Don't know

If yes, please specify any initiatives you have taken or invitations you have received from EU counterparts towards this direction: ……
……
……
……
……
……

25. From your experience, would you say that the treatment of Swiss legal persons within the EU is more favourable when compared to the treatment of natural persons?

□ Yes □ No □ Don't know

26. The fact that access to several professions is self-regulated within the EU makes access to these professions more difficult to foreclose competition?

□ Yes □ No □ Don't know/NA

Thank you for taking the time to answer this questionnaire! Please sign the questionnaire below.

Position:

Please provide your contact details. This will also allow us to send you your complimentary copy of our final report financed by SECO!

Tel:

Fax:

E-mail:

Signature:

Please use the space below for any additional comments.
……
……
……
……
……

In der Reihe „Strukturberichterstattung“ des Staatssekretariats für Wirtschaft sind seit 2000 erschienen:

1	Arvanitis, S. u.a. (2000) Die preisliche Wettbewerbsfähigkeit der schweizerischen Wirtschaftszweige	22.-
2	Arvanitis, S. u.a. (2001) Untersuchung der internationalen Wettbewerbsfähigkeit der schweizerischen Wirtschaftszweige anhand einer „Constant Market Shares“-Analyse der Exportanteile	18.-
3	Raffelhüschen, B. u.a. (2001) Zur Nachhaltigkeit der schweizerischen Fiskal- und Sozialpolitik: Eine Generationenbilanz (ohne Software GAP)	21.-
4	Arvanitis, S. u.a. (2001) Unternehmensgründungen in der schweizerischen Wirtschaft	26.-
5	Arvanitis, S. u.a. (2001) Innovationsaktivitäten in der Schweizer Wirtschaft. Eine Analyse der Ergebnisse der Innovationserhebung 1999	34.-
6	Crivelli, L. u.a. (2001) Efficienza nel settore delle case per anziani svizzere	26.-
7	Hollenstein, H. (2001) Die Wirtschaftsbeziehungen zwischen der Schweiz und Osteuropa	23.-
8	Henneberger, F. u.a. (2001) Internationalisierung der Produktion und sektoraler Strukturwandel: Folgen für den Arbeitsmarkt	21.-
9	Arvanitis, S. u.a. (2002) Finanzierung von Innovationsaktivitäten. Eine empirische Analyse anhand von Unternehmensdaten	22.-
10	Arvanitis, S. u.a. (2002) Qualitätsbezogene und technologische Wettbewerbsfähigkeit der schweizerischen Industriezweige. Beurteilung auf Grund der Export- bzw. Importmittelwerte und der Hochtechnologieexporte	18.-
11	Ott, W. u.a. (2002) Globalisierung und Arbeitsmarkt: Chancen und Risiken für die Schweiz	28.-
12	Müller, A. u.a. (2002) Globalisierung und die Ursachen der Umverteilung in der Schweiz. Analyse der strukturellen und sozialen Umverteilungen in den 90-er Jahren mit einem Mehrländer-Gewichtsmodell	24.-
13	Kellermann, K. (2002) Eine Analyse des Zusammenhangs zwischen fortschreitender Globalisierung und der Besteuerung mobiler Faktoren nach dem Äquivalenzprinzip	18.-
14	Infras (2002) Globalisierung, neue Technologien und struktureller Wandel in der Schweiz	28.-
15	Fluckiger, Y. u.a. (2002) Inégalité des revenues et ouverture au commerce extérieur	20.-
16	Bodmer, F. (2002) Globalisierung und Steuersystem in der Schweiz	22.-
17	Arvanitis, S. u.a. (2003) Die Schweiz auf dem Weg zu einer wissensbasierten Ökonomie: eine Bestandesaufnahme	28.-
18	Koch, Ph. (2003) Regulierungsdichte: Entwicklung und Messung	23.-
19	Iten, R. u.a. (2003) Hohe Preise in der Schweiz: Ursachen und Wirkungen	36.-
20	Kuster, J. u.a. (2003) Tourismusdestination Schweiz: Preis- und Kostenunterschiede zwischen der Schweiz und EU	23.-
21	Eichler, M. u.a. (2003) Preisunterschiede zwischen der Schweiz und der EU. Eine empirische Untersuchung zum Ausmass, zu Erklärungsansätzen und zu volkswirtschaftlichen Konsequenzen	34.-
22	Vaterlaus, St. u.a. (2003) Liberalisierung und Performance in Netzsektoren. Vergleich der Liberalisierungsart von einzelnen Netzsektoren und deren Preis-Leistungs-Entwicklung in ausgewählten Ländern	37.-
23	Arvanitis, S. u.a. (2003) Einfluss von Marktmobilität und Marktstruktur auf die Gewinnmargen von Unternehmen – Eine Analyse auf Branchenebene	23.-
24	Arvanitis, S. u.a. (2004) Innovationsaktivitäten in der Schweizer Wirtschaft – Eine Analyse der Ergebnisse der Innovationserhebung 2002	28.-
25	Borgmann, Ch. u.a. (2004) Zur Entwicklung der Nachhaltigkeit der schweizerischen Fiskal- und Sozialpolitik: Generationenbilanzen 1995-2001	20.-
26D	de Chambrier, A. (2004) Die Verwirklichung des Binnenmarktes bei reglementierten Berufen: Grundlagenbericht zur Revision des Bundesgesetzes über den Binnenmarkt	19.-
26F	de Chambrier, A. (2004) Les professions réglementées et la construction du marché intérieur: rapport préparatoire à la révision de la loi sur le marché intérieur	19.-
27	Eichler, M. u.a. (2005) Strukturbrüche in der Schweiz: Erkennen und Vorhersehen	23.-
28	Vaterlaus, St. u.a. (2005) Staatliche sowie private Regeln und Strukturwandel	32.-
29	Müller, A. u.a. (2005) Strukturwandel – Ursachen, Wirkungen und Entwicklungen	24.-
30	von Stokar Th. u.a. (2005) Strukturwandel in den Regionen erfolgreich bewältigen	22.-

31	Kellermann, K. (2005) Wirksamkeit und Effizienz von steuer- und industriepolitischen Instrumenten zur regionalen Strukturanpassung	22.-
32	Arvanitis, S. u.a. (2005) Forschungs- und Technologiestandort Schweiz: Stärken-/Schwächen-profil im internationalen Vergleich	25.-
33E	Copenhagen Economics, Ecoplan, CPB (2005) Services liberalization in Switzerland	31.-
34	Arvanitis, S. u.a. (2007) Innovationsaktivitäten in der Schweizer Wirtschaft - Eine Analyse der Ergebnisse der Innovationsserhebung 2005	34.-
35/1	Brunetti, A., und S. Michal (eds.) - 2007 - Services Liberalization in Europe: Case Studies (vol. 1)	37.-
35/2	Brunetti, A., und S. Michal (eds.) - 2007 - Services Liberalization in Europe: Case Studies (vol. 2)	26.-
36/1	Balastèr, P., et C. Moser (éd.) - 2008 - Sur la voie du bilatéralisme: enjeux et conséquences (vol.1)	38.-
36/2	Balastèr, P., et C. Moser (éd.) - 2008 - Sur la voie du bilatéralisme: enjeux et conséquences (vol. 2)	41.-
37	Kellermann, K. (2007) Die öffentlichen Ausgaben der Kantone und ihrer Gemeinden im Quervergleich	25.-
38	Ecoplan (2008) Benchmarking: Beispiel öffentlicher Regionalverkehr	15.–
39	Filippini, M. & M. Farsi (2008) Cost efficiency and scope economies in multi-output utilities in Switzerland	18.–
40	Kuster, J., und H.R. Meier (2008) Sammlung von Altpapier durch die Gemeinden - statistische Benchmarking-Methoden im Test	12.–
41	Frick, A. (2008) Benchmarking öffentlicher Leistungen anhand des Fallbeispiels "Berufsbildung": Vergleich der kantonalen Ausgaben für die Berufsbildung	14.–
42	Schoenenberger, A. e.a. (2009) Efficacité technique des exploitations forestières publiques en Suisse	25.-
43	Arvanitis, S. u.a. (2008) Innovation und Marktdynamik als Determinanten des Strukturwandels	14.–
44/1	Worm, H. u.a. (2009) Evaluation Kartellgesetz: Volkswirtschaftliche Outcome-Analyse	28.-
44/2	Hüschelrath, K. u.a. (2009) Evaluation Kartellgesetz: Fallstudien zu den Wirkungen des Kartellgesetzes	36.-
44/3	Baudenbacher, C. (2009) Evaluation Kartellgesetz: Institutionelles Setting Vertikale Abreden Sanktionierung von Einzelpersonen Zivilrechtliche Verfahren – with an English summary	36.-
44/4	Heinemann, A. (2009) Evaluation Kartellgesetz: Die privatrechtliche Durchsetzung des Kartellrechts	22.-
45	Hulliger, B. u.a. (2009) Erste Auswirkungen der Abschaffung der Buchpreisbindung - Technischer Bericht und Vertiefung	22.-
46	Arvanitis, S. u.a. (2010) Innovationsaktivitäten in der Schweizer Wirtschaft - Eine Analyse der Ergebnisse der Innovationsserhebung 2008	33.-
47/1	Arvanitis, S. u.a. (2011) Exportpotenziale im Dienstleistungssektor (Band 1)	31.-
47/2	Moser, P. u.a. (2011) Exportpotenziale im Dienstleistungssektor (Band 2)	16.-
47/3	Delimatsis, P. (2011) Exportpotenziale im Dienstleistungssektor (Band 3)	25.-

Eidgenössisches Volkswirtschaftsdepartement EVD
Staatssekretariat für Wirtschaft SECO
Direktion für Wirtschaftspolitik

Holzikofenweg 36, 3003 Bern
Vertrieb: Tel. +41 (0)31 324 08 60, Fax +41 (0)31 323 50 01, 04.2011 100
www.seco.admin.ch, wp-sekretariat@seco.admin.ch
ISBN 978-3-905967-03-6