Chapter 1:

Upgrading trade in services: the struggle to move forward

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1. Introduction

The services sector is the biggest contributor to the Gross Domestic Product (GDP) of the EU. It currently amounts to 70% of the EU's GDP.[1] Worldwide 65.1% of the GDP could in 2017 be attributed to the services sector.[2] Liberalization of trade in services is for the EU, internally and externally, therefore an important goal. Besides the importance of services in the global economy in general, and the EU in specific, emphasis is often placed on the potential gains that can still be achieved through liberalization. Trading services internationally is complicated, as service provision tends to be subject to heavy regulation at the national level, which moreover differs significantly between states.[3] Differences in regulation leads to trade barriers and this means that streamlining regulation indeed leads to the emphasis on potential gains to be achieved through services liberalization. This book provides various viewpoints on the EU's efforts in upgrading trade in services, both internally, and with the rest of the world.

When discussing both EU internal and external service trade liberalization, it is helpful to refer to a two-step process. This has to do with the fundamental difference between the level of liberalization reached within the EU internal market and that reached in the General Agreement on Trade in Services (GATS) and various Free Trade Agreements (FTA). First comes the opening of a service market to international competition, the actual right to provide a service across

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1 European Commission, 'Single Market for Services', available at https://ec.europa.eu/growth/single-market/services_en (accessed 5 February 2019).

2 World Bank, 'World Development Indicators: Structure of Output', available at http://wdi.worldbank.org/table/4.2 (accessed 5 February 2019).

3 P. Sauve and M. Roy, Research Handbook on Trade in Services (Edward Elgar Publishing 2016), 161; P. Stoll, 'Setting the Scene' in: T. Rensmann (ed) *Mega-Regional Trade Agreements* (Springer 2017), 7.

a border. What happens after may be referred to as the 'behind the border' issues, borrowing terminology used in international trade law. In this book the terms direct (access to markets) and indirect (behind the border) liberalization are also used. Diploma recognition, the requirement of national legislation to conform with some form of proportionality test (removing unnecessarily restrictive regulations), the application of labour legislation or the rights for family members to join the service provider in the host state are all examples of such behind the border issues. From an EU perspective, the first step is no longer really an issue due to the level of market integration within the EU. Yet, at the international level, the actual opening of services markets is still an important part of negotiations. The chapters on EU law in this book reveal just how detailed and complicated service trade liberalization becomes when truly aspiring a competitive level playing field. At the global level economic development and policy choices are far more divers. This has a clear consequence when trying to reach agreement on behind the border issues, as the manner in which services can be traded across borders, the modes of supply, cause services to impact on various policies at the national level. For instance, Mode 1 involves telecommunications networks, Mode 3 involves foreign direct investment and Mode 4 affects migration policies.[4] Considering the growing importance of services for the economy, the high potential gains and its impact on various policies, it should not be surprising that liberalizing trade in services is an actual topic which receives significant attention.

2. Services in the EU: the intriguing interplay between liberalization regulation

The services sector in the EU is subject to an intriguing interplay between liberalization and regulation. This becomes apparent in light of, amongst others, the digital economy. The expanding scope of the concept of "services"[5] and the introduction of new types of services[6], both particularly due to the digitalization process, have raised challenges for regulators and legislators.[7] The interplay

4 M Fiorini and B Hoekman, *Services Market Liberalization, Economic Governance and Trade Agreements*, workshop paper (Structural Reforms and European Integration, London School of Economics 2017), available online: http://www.structural-reforms.eu/workshops/session2/Fiorini-Hoekman-EU-services-trade-integration-governance-April-2017.pdf, 1 (accessed 9/3/2019).

5 Joined Cases C-360/15 and C-31/16 *X BV and Visser Vastgoed Beleggingen v. Raad van de gemeente Appingedam* [2018] ECLI:EU:C:2018:44. For a discussion on this case see also C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, 'State of the Art and Prospective Directions in the Digitalisation of Economic Law', in J.M. Veenbrink, A. Looijestijn-Clearie & C.S. Rusu (eds), *Digital Markets in the EU* (Wolf Legal Publishers 2018), 28-30 and Chapter 2 by S. de Vries.

6 C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, note 5, 4-7.

7 See for developments at EU level C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, note 5, 9-28.

between liberalization and regulation becomes apparent in light of these contemporary challenges. Nevertheless, this interplay is nothing new. The Court of Justice, for example, has consistently engaged in a balancing exercise between liberalization on the one hand, and thus protecting the (economic) internal market, and regulation on the other hand. By expanding the scope of the free movement provisions from merely a prohibition of discrimination to a prohibition of all restrictions to access to the market, the Court of Justice seems to, at first sight, favour liberalization. The establishment of a restriction of the free movement rules seems to be superfluously when an economic activity is in any way regulated by a Member State. Any rule regulating an economic activity could thus be regarded as a restriction of the free movement provisions. The shift to the market access restrictions was intended to liberalize markets. The introduction of market access approach led the Court of Justice to also introduce the so-called Rule of Reason in its case law, thereby granting Member States the right to regulate markets when there are overriding reasons in the general interest. In this book multiple developments in the services sector in the EU are discussed. Sybe de Vries refers to contemporary challenges within the broader framework of the services sector (Chapter 2), whereas Johan Wolswinkel focuses specifically on the Services Directive and the expansion of this Directive by the Court of Justice (Chapter 3). In this part two developments are discussed. The Commission has proposed multiple legislative actions in order to regulate the services sector. Some of these initiatives will briefly be discussed first (2.1), after which the focus will shift to case law of the Court of Justice (2.2). The Luxembourg Court has substantially expanded the concept of services, and thus the free movement of services, thereby making the regulation of services by Member States subject to the EU proportionality test.

2.1 Initiatives by the Commission

The last of couple of years, multiple initiatives are developed by the Commission to (further) liberalize or regulate the services sector in the EU. Liberalization is for instance ensured by the proposal for a directive to introduce a proportionality test before the adoption of regulations of professions by Member States.[8] Conversely, the proposal for a regulation on the screening of foreign direct investments is intended to regulate these investments in companies which are of strategic interest to Europe.[9] In both cases, the Commission attempts to fine-

8 Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions, OJ 2006, L173/25.

9 Regulation (EU) 2019/... of the European Parliament and of the Council of ... establishing a framework for the screening of foreign direct investments into the Union, 20 February 2019, PE-CONS 72/18.

tune the balance between a free (liberal) market and regulation on the basis of public interests. In this subparagraph, reference is made to four developments, namely (i) the Digital Single Market Strategy (DSM Strategy), (ii) the screening of Foreign Direct Investments (DSI), (iii) the Posted Workers Directive, and (iv) the Directive on a proportionality test before adoption of new regulation of professions.

The DSM Strategy of the Commission is to let business and customers fully benefit from the digitalised economy. The Commission made the DSM Strategy a top priority in 2015.[10] As the Commission asserted in its mid-term review of the DSM Strategy: "A fully functional Digital Single Market could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs."[11] While such figures are clearly estimates, it is apparent that liberalization of the Digital Single Market will benefit the economies in the European Union. In 2017, three key areas in which EU regulation was necessary were identified. The data economy, cybersecurity and the area of online platforms were seen to be of crucial importance to ensure a fully developed DSM.[12]

The first area mentioned is the data economy. The General Data Protection Regulation was adopted on 27 April 2016 and is applicable in the EU since the 25th May of 2018.[13] This GDPR protects personal data by imposing strict requirements on companies and other organisations. Protection of personal data is thus ensured. Conversely, there are also voices which argue that a fifth fundamental freedom should be introduced in the EU, namely the free movement of non-personal data.[14]

The second key area mentioned by the Commission in its mid-term review is the area of cybersecurity. It has been argued that the Commission merely took a piecemeal approach up till now in this area, which led to inconsistent security

10 European Commission, A Digital Single Market Strategy for Europe, (Communication) COM(2015) 192 final. For more information on the DSM, see also C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, note 5.

11 See European Commission, 'Digital Single Market: Commission calls for swift adoption of key proposals and maps out challenges ahead' (2017), available at http://europa.eu/rapid/press-release_IP-17-1232_en.htm (accessed 8/2/2019).

12 Ibid.

13 See Article 99 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016, L119/1.

14 See for more information S. de Vries, Chapter 2. In Chapter 2 reference is also made to a proposal of the Commission for a Regulation on the Free Flow of Non-Personal Data.

obligations.[15] Review of the multiple measures taken in this area might create more clarity for undertakings, which could lead to an enhanced digital market.

Lastly, the Commission emphasized that certain unfair trading practices by digital platforms should be tackled. Regulation might be needed to challenge these practices. However, there are also authors which mention that competition law might already have sufficient tools to solve problems in this market.[16] The Commission, nevertheless, does see some transparency problems in this market which might not be solved by the competition law rules. It therefore proposed a Regulation on promoting fairness and transparency for business users of online intermediation services.[17] This Regulation tries to open up the digital platform market by imposing transparency obligations on digital platforms. Political agreement between the Council and European Parliament was reached on the 19th of February 2019.[18]

The second development to turn to is the screening of FDI's. In September 2017, the Commission proposed a Regulation which could strengthen the screening processes of FDI's by Member States.[19] The Commission was of the opinion that regulation was needed in this regard. As Juncker mentioned in reaction to the political agreement reached on the 20th of November 2018:

Europe must always defend its strategic interests and that is precisely what this new framework will help us to do. This is what I mean when I say that we are not naïve free traders. We need scrutiny over purchases by foreign companies that target Europe's strategic assets. I commend the European Parliament and the EU governments for reaching this agreement in such a swift manner.[20]

15 P.T.J. Wolters, 'Private Law Cyber Security Obligations in the Digital Single Market', in J.M. Veenbrink, A. Looijestijn-Clearie & C.S. Rusu (eds), *Digital Markets in the EU* (Wolf Legal Publishers 2018), 4-7.

16 V.I. Daskalova, 'Oneerlijke *platform-to-business*-handelspraktijken: oude kwesties, nieuwe regelgeving' (2018) 66 Tijdschrift voor Europees en economisch recht 12; S. O'Keeffe and B. Noé, 'Digital Markets in the EU: The Importance of the Footloose Consumer', in J.M. Veenbrink, A. Looijestijn-Clearie & C.S. Rusu (eds), *Digital Markets in the EU* (Wolf Legal Publishers 2018), 4-7.

17 European Commission, 'Proposal for a Regulation of the European Parliament and the Council on promoting fairness and transparency for business users of online intermediation services', COM(2018) 238 final.

18 See European Commission, 'Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices' (2019), available at http://europa.eu/rapid/press-release_IP-19-1168_en.htm (accessed 22/2/2019).

19 European Commission, 'Proposal for a Regulation of the European Parliament and the Council establishing a framework for screening of foreign direct investments into the European Union', COM(2017) 487 final.

20 European Commission, 'Commission welcomes agreement on foreign investment screening framework' (2018), available at http://europa.eu/rapid/press-release_IP-18-6467_en.htm (accessed 22/2/2019). (italics added).

The European Union is not naïve and thus does not rely solely on liberalized markets. Regulation is sometimes needed to challenge the excesses on the market.
European Parliament officially approved the adoption of this Regulation on the 14th of February 2019.[21] Some Member States have mechanisms to prevent foreign direct investments when such an investment is to the detriment of essential security interests. The proposed Regulation grants the Commission the power to issue opinions regarding such investments and it establishes mechanisms for cooperation between Member States and Member States and the Commission.[22] It grants the power to Member States to maintain or create procedures for the screening of FDI's, as long as those procedures do not discriminate and are transparent.[23] The Regulation also provides a list of factors and effects of FDI's which Member States (and the Commission) may take into account.[24] This is not an exhaustive list. A duty to inform the Commission and the other Member States of the screening of an FDI is introduced.[25] Other Member States and the Commission may submit opinions on allowing the FDI. These comments should be given "due consideration",[26] but will not take away the power to independently reach a decision on allowing the FDI. A similar regime applies when a Member State is not screening an FDI.[27] This could probably lead a Member State to change its policy in relation to the screening of the FDI. It could thus mean that the FDI is indeed screened or that the screening procedures in general are broadened to meet concerns of other Member States or the Commission. As the Commission asserted in its explanatory notes to the proposal:

Affected Member States may provide comments and the Commission may address comments to a Member State in which a foreign direct investment is planned or is completed, even if that Member State does not maintain a screening mechanism or does not conduct a screening of that investment. In such a case, that Member State may consider these comments and opinion in its broader policy making.[28]

21 European Parliament, 'EU to scrutinise foreign direct investment more closely' (2019), available at: http://www.europarl.europa.eu/news/en/press-room/20190207IPR25209/eu-to-scrutinise-foreign-direct-investment-more-closely (accessed 22/2/2019).
22 Article 1 of Regulation (EU) 2019/..., note 9.
23 Article 3(1) and (2) ibid.
24 Article 4 ibid.
25 Article 6 ibid. Article 9 ibid asserts which information needs to be provided to the Commission and the other Member States.
26 Article 6(9) ibid.
27 Article 7 ibid.
28 See the explanatory notes on the cooperation mechanisms in the Proposal for a Regulation on FDI's, note 19. (underlining added)

Nevertheless, the Regulation merely contends that a Member State not screening an FDI should give comments of other Member States or the Commission "due consideration".[29] When an FDI affects the interests of the Union, the Member State where the FDI is planned or completed shall take "utmost account" of the opinion of the Commission.[30] Some other rules in this Regulation concern e.g. confidentiality requirements[31] and the creation of contact points per Member State.[32]

The third area where the Commission saw the need to intervene in the market is the area of the posted worker. The posting of workers falls under the free movement of services. A posted worker provides on behalf of an undertaking a service on a temporary basis in the host Member State and, as such, does not integrate in the labour market of that host Member State. The premises of this aspect, although legally correct, could, in practice on the work floor, be challenged though. Case law of the CJEU is said to have "foster[ed] a system of *unequal* pay for equal work."[33] Furthermore, decisions of the CJEU "are suggested to have fostered a system whereby foreign service providers are able to compete unfairly with their domestic counterparts on a national market, circumventing wage demands and employment conditions that are applicable to domestic undertakings."[34]

The reliance on the free movement of services to post workers in other Member States led to social dumping.[35] It appeared to be difficult to balance the dual economic and social aims of the European Union. The (old) Posted Workers Directive was mainly interpreted by the Court of Justice in light of its economic goals set as such by the Union legislator. As Barnard mentioned: "*Laval* shows that the [old] Posted Workers Directive is primarily a measure to facilitate free movement of services and not a measure to realize social-policy objectives."[36] The Commission in the past also advocated liberalization in this area instead of regulation.[37] The 1996 Posted Workers Directive indeed also led to deregulation

29 Article 7(7) Regulation (EU) 2019/..., note 9.
30 Article 8(2)(c) ibid.
31 Article 10 ibid.
32 Article 11 ibid.
33 D. Carter, 'Equal pay for work in the same place? Assessing the revision of the Posted Workers Directive' (2018) 14 Croatian Yearbook of European Law & Policy 14, 45.
34 Ibid, 32.
35 Ibid, 63; C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (OUP 2016), 423-424; M. Bernaciak 'Social dumping: political catchphrase or threat to labour standards?' (2012), Working Paper 2012.06 European Trade Union Institute, par. 1.2-1.3.
36 Barnard, note 35, 424. See also Zahn (2017), p. 195.
37 J. Cremers, J.E. Dølvik & G. Bosch 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007), 38 Industrial Relations Journal 6, 539.

instead of regulation. However, it became clear over the recent years that it was time to intervene once more in this sensitive area.[38] The Commission itself also saw the need of changing the 1996 Posted Workers Directive. In 2016 it acknowledged that "[t]he 1996 Posting of Workers Directive establishes a structural differentiation of wage rules applying to posted and local workers which is the institutional source of an un-level playing field between posting and local companies, as well as of segmentation in the labour market".[39] The new Posted Workers Directive was adopted on 28 June 2018 and contains three main changes to the old regime, namely:

- application to posted workers of all the mandatory elements of remuneration (instead of the "minimum rates of pay");
- application to posted workers of the rules of the receiving Member State on workers' accommodation and allowances or reimbursement of expenses during the posting assignment;
- for long-term postings (longer than 12 or 18 months), application of an extended set of terms and conditions of employment of the receiving Member State.[40]

The need for regulation of posted workers was thus necessary to challenge the excesses of the liberalization of the services sector, although it is questioned whether this new Directive balances the need to protect workers and the economic goal of the freedom to provide services sufficiently.[41]

The fourth example for the need of regulation can be found in the adoption of Directive 2018/958.[42] The Professional Qualifications Directive was updated in 2013.[43] During the creation of this Directive, it became apparent that Member States encountered quite some difficulties in assessing whether to recognise professional qualifications obtained in another Member State. This showed "an

38 See for a detailed account of the underlying issues: S. Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules* ***(Brill Nijhoff 2017), p173-189.***

39 European Commission Staff Working Document, 'Impact Assessment accompanying the Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services', SWD(2016) 52 final, 10.

40 European Commission, 'Posted Workers. Revision of the Posting of Workers Directive', available at https://ec.europa.eu/social/main.jsp?catId=471 (accessed 22/2/2019).

41 See e.g. Carter, note 33, 66-67.

42 Note 8.

43 Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ 2013, L 354/132.

underlying problem concerning how the need for regulation [of a profession by a Member State] and its effects on the broader business environment are evaluated".[44] Directive 2018/958 therefore introduces a requirement for Member States to conduct a proportionality test before regulating a certain profession. This Directive in general codifies case law by the Union Courts. Member States could regulate a profession when they have a legitimate reason to do so[45] and as long as the measure is "suitable for securing the attainment of the objective pursued and does not go beyond what is necessary to attain that objective".[46] The Directive does exceed, however, case law of the Court of Justice by outright prohibiting all forms of discrimination on the basis of nationality when regulating a profession.[47] Member States are still allowed to regulate access to professions as long as they properly explain why such a (non-discriminatory) restriction would be justified. This Directive therefore favours liberalization as a basic value, whereas regulation is still allowed under strict conditions. The approach in this Directive is in this regard similar to the approach taken by the Union Courts.[48]

It thus becomes apparent that the Commission and the Union legislator see a need for intervention in the liberalized services market in the EU. The DSM Strategy, the screening of FDI's and the new Posted Workers Directive show that non-economic considerations form reasons to regulate the services market. The new Directive on the proportionality test for regulation professions, even though focusing mainly on liberalization, emphasises the need for Member States to regulate professions when it is in the public interest. Complete liberalization is, as Juncker mentioned, a "naïve" aspiration. The need for regulation is a necessary correction mechanism used to intervene in specific sectors when the need arises.

44 Explanatory Memorandum to European Commission, 'Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions', COM(2016) 822 final, par. 1.

45 Article 6(1) Directive 2018/958, note 8. Article 6(2) ibid provides a non-exhaustive list of justification grounds, whereas paragraph 3 of the same article asserts that economic reasons can never form a justification ground.

46 Article 7(1) ibid. Paragraph 2 ff refer to factors which Member States need to take into account when conducting this proportionality assessment.

47 Article 5 ibid.

48 *Infra* par. 2.2.

2.2 Case law developments

The Court of Justice has been a protagonist of liberalization and therefore also of opening up the national markets. Two developments can exemplify this focus by the Luxembourg Court on liberalization.

The first, not so new, development is the choice of the Union Courts to extend the non-discrimination approach to all restrictions to access to the market.[49] In turn, Member States received the right to justify such restrictions under strict conditions when there are overriding reasons in the general interest. The restrictions case law of the Court of Justice shows that liberalization is the basic value in the EU. Regulating markets is only possible when it is in the public interest and when it is proportionate. The strong emphasis on liberalization was slightly corrected by the Court of Justice under the free movement of goods by excluding selling arrangements from the scope of the free movement of goods.[50] In *Alpine Investment,* the Court did not find a need to extend the case law on selling arrangements to the services area.[51] It thus appears that *Keck* is not extended to the free movement of services.[52] There are, however, also authors who argue that *Keck* did find its way to the free movement of persons (and thus including services). As Barnard mentions: "[R]ules which merely *structure the market* on which [...] people carry out their economic activities do not generally breach the Treaty. They are the rules of the game, to which all of those conducting their activities in the state must comply."[53] These rules are thus no restrictions to access to the market and therefore fall outside the free movement provisions. This could, according to Barnard, indicate that *Keck* has found its way to the free movement of services. Nevertheless, this does not abrogate from the fact that the focus of the Union Courts still seems on the abolishment of all barriers in the EU, unless they can be justified under strict conditions.

Another example where the Court seems to focus on liberalization is the far-reaching interpretation of the concept of an economic activity, and thus of a service. The definition of an economic activity under the free movement of services is even applied in a broader manner than under the competition law area. As Van de Gronden points out, "[w]hen it comes to social security,

49 This happened already in Case 8/74 *Dassonville* [1974] ECLI:EU:C:1974:82, for the free movement of goods, and was in later case law extended to the other fundamental freedoms.

50 Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECLI:EU:C:1993:905.

51 Case C-384/93 *Alpine Investments* [1995] ECLI:EU:C:1995:126, par. 33-38.

52 See also J. Stuyck, 'Is Keck still alive and kicking?', (2012) Revue Européene de Droit de la Consommation (2), par. IV(A).

53 Barnard (2016), note 35, 224.

strikingly, no convergence can be discerned between the EU competition rules and free movement law".[54] In competition law entities engaged in a social security scheme are under certain circumstances not regarded as undertakings, since they do not provide an economic activity.[55] In free movement cases, the Court of Justice has accepted that these entities are providing an economic activity and thus a service.[56] The broad interpretation of an economic activity under the free movement of services means that many activities fall under Article 49 and 56 TFEU and, for example, the Services Directive. An example of the broadening scope of the free movement of services can be found in the *Visser Vastgoed* case.[57] In this case, the Court of Justice considered the retail of goods through brick-and-mortar stores to fall under the free movement of services.[58]

The combination of broadening the scope of the free movement of services, using Union legislation to further deregulate markets, and, when there is no Union legislation, applying the restrictions approach, emphasise the focus on liberalization.

2.3 The interaction between liberalization and regulation

The Union Courts seem to favour liberalization over regulation, although Member States might still regulate when it is in the public interest to do so and when it is proportionate. Overall though, many sectors are subject to liberalization. Liberalization is thus the basic norm in EU law. This has led to problems, which the Union legislator seems to be tackling on a sector specific basis. It does lead to an *ex post* system where the legislator only acts when there are problems. The legislative initiatives of the Commission do show that the Union is not naïve in its liberalization and thus recognises the need to intervene in some sectors when problems arise. The aforementioned discussion, although by far exhaustive, does show the intriguing interplay between regulation and liberalization in the EU.

54 Van de Gronden, 'Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?', (2018) 41 World Competition 2, 208.

55 Ibid, 208-210.

56 Ibid, 208-209.

57 *Visser Vastgoed*, note 5.

58 Ibid, par. 91. For a discussion on this case see also J. van Wolswinkel in Chapter 3 and C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink (2018), note 5, 29-30.

3. Upgrading trade in services outside the EU: diversity in moving ahead

As explained above, the fact that services tends to be subject to varying forms of national regulations complicates its liberalization.[59] With greater diversity, this becomes more difficult. As such, the multilateral negotiations concerning services liberalization are facing severe difficulties.

3.1 Deepening liberalization?

The complexity to address the behind the border issues is nothing new in the field of international trade law. The initial effectiveness of the General Agreement on Tariffs and Trade (GATT) and the achievement of reducing most border tariffs to less than 5% has led to the surfacing of the issue of non-tariff barriers.[60] In the multilateral trading system, these issues are mostly left unaddressed in relation to services. As an example, agreement on the provision in GATS which should deal with the issue of non-discriminatory regulation addressing the quality of the service (qualification requirements, technical standards and licencing) was not reached. The result is a rudimentary provision, ineffectively addressing domestic services regulation, and a mandate to negotiate disciplines intended to reach agreement amongst World Trade Organization (WTO) Members at a later stage.[61] Similarly, government procurement, subsidies and emergency safeguard measures are all matters left unfinished from an international rules perspective due to a lack of agreement. For each of them, the GATS contains a negotiating mandate.[62] Other unresolved matters can be found in the so-called Singapore issues, referring to transparency in government procurement, trade facilitation, trade and investment and trade and competition. Finally, the issue of labour standards, highly relevant in relation to trade in services, is formally left to the ILO, which essentially entails that disagreement on the matter amongst WTO Member States remains without signs of progress.[63] These matters reveal a deep division amongst WTO Members. Very generally phrased, in essence developed states seek to include these matters into the WTO framework

59 M. Krajewski 'Services Liberalization in Regional Trade Agreements: Lessons for GATS "Unfinished Business"?' in: L. Bartels and F. Ortino *Regional Trade Agreements and the WTO Legal System* (OUP 2006), 178. See also Pipidi-Kalogirou, chapter 5, 71-72.

60 Stoll, note 3, p 7.

61 Article VI GATS, see for a detailed account: Delimatsis 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10 Journal of International Economic Law, 8, 36-37.

62 See extensively Krajewski, note 59, 178.

63 S. Turnell 'Core labour standards and the WTO' (2001) 0103 Macquarie Economic Research Paper, 5, see for an overview Tans, note 17, par 1.2.3.

(providing deeper legislation) whereas developing states do not.[64] To this must be added that WTO negotiations are based on a package deal, agreement must be reached on all issues as all Members ultimately must provide their consent to the result of a negotiation round. It is apparent that services are interesting to the EU (and other developed countries). Yet, WTO negotiations concern trade in goods, including sensitive topics such as agricultural and textile products, as well. The topic of intellectual property (IP) is also part of the WTO framework. In other words, one cannot pick and choose that which is most interesting (services) and refuse to contribute to liberalization in other areas (textile, agriculture). And even in relation to service liberalization itself, naturally there is a strong tendency to focus on that which is interesting, to the detriment of the modality of trade in services that is of interest to others. To provide a clear and very relevant example, developed states obviously have an interest in Mode 3 (commercial presence), whereas developing states are demandeurs of Mode 4 (services trade involving movement of persons). Be it disagreement on reaching deeper or wider integration, the end result is the Doha Round negotiations are referred to as having reached a stalemate, being comatose, catatonic or simply dead.

The stalemate at the WTO level has consequences. For the EU, and many other states, the effort to liberalize trade in services has mainly shifted from the multilateral level to pluri- or bilateral negotiations.[65] If we only take services trade liberalization into account, then it is indeed easy to conclude that the lack of movement at the WTO negotiations has led states to focus on negotiations in an easier setting.[66] Yet, as extensively described by Melo Araujo, this shift is not just related to a lack of momentum, as this lack of momentum is the result of the just described fundamental divide between WTO Members.

3.2 MFN, the you are my More Favoured Nation principle?

The liberalization landscape has undergone a major change, as numerous bilateral or plurilateral FTAs are now in force or being negotiated. Regional Trade Agreements (RTA) are nothing new and the adoption of such was already

64 B.A. Melo Araujo, The EU deep trade agenda: law and policy (Oxford University Press, 2016), 1.

65 Stoll, note 3, 4; Keijzer, Martino and Quintavalla, chapter 4, 55.

66 Tans, note 38, 17; Stoll, note 3, 4.

regulated in the GATT 1947.[67] In essence, there is nothing 'wrong' with this form of legitimate deviation from the WTO's Most Favoured Nation (MFN) principle.[68] The evident example here being the EU itself, which, without the exception to WTO MFN for enhanced regional integration, would be in conflict with this principle. However, both the scale and the sheer numbers of RTAs *is* new. For trade specialists, the terms RTAs and proliferation may simply be merged in dictionaries.[69]

Continuing this contribution from a services perspective only, the EU alone is involved in an ever increasing number of such FTAs.[70] Negotiations on Mega-regional FTAs are ongoing as well, for instance the Trade in Services Agreement (TiSA, involving 23 states, counting the EU as one), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPATPP, involving 11 states, predecessor of the TPP from which the US withdrew) and the Regional Comprehensive Economic Partnership (RCEP, involving 16 states). Many states are involved in more than one FTA, for instance Canada and the EU are signatories of the Comprehensive Economic Trade Agreement (CETA) and both involved in the TiSA negotiations.

It is evident that the EU and Canada have found it far easier to negotiate on a bilateral basis. The end result, the Comprehensive Economic and Trade Agreement, or CETA, indeed reduces barriers to trade between these two kindred spirits to a greater extent than reached at the Uruguay Round. Besides increased market access for services, various additional issues, which proved too difficult to resolve at the multilateral level, are included.

67 Stoll, note 3, 16. The terminology used here is Regional Trade Agreement and Free Trade Agreement. Regional Trade Agreement refers in general to a bilateral or plurilateral trade agreement that liberalizes trade in goods or goods and services more extensively in conformity with the WTO rules. Free Trade Agreements is the specific term used for such agreements if they also include liberalization of services trade. Mega-Regional Trade Agreements is a term reserved for Free Trade Agreements which can be said to take liberalization of trade to a new level, both in terms of ambition and trade coverage. As such, the economies involved in such Mega-Regionals, are significant in size (EU, US, China) and, or number (for example involving 16 states), see Stoll, note 3, 4-5.

68 Article XXIV GATT and Article V and V*bis* GATS.

69 This phenomenon, and whether it is 'positive' or 'negative' and from who's perspective has been extensively discussed in the literature, see for a discussion on the question whether regional integration is a 'building block or a 'stumbling block' for multilateral liberalization: B Hoekman and M Kostecki *The Political Economy of the World Trading System* (OUP, 2001), 34-68. That terminology was already used by Bhagwati in 1991, J. Bhagwati *The World Trading System at Risk* (Princeton University Press, 1991), 77.

70 See for a rather complicated overview: European Commission, 'Negotiations and Agreements' available at: http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated (accessed at 9/3/2019) and European Commission, 'Free Trade Agreements', available at: http://trade.ec.europa.eu/tradehelp/free-trade-agreements (accessed at 9/3/2019). The EUs terminology alone is complex, referring to Association Agreements, Free Trade Agreements and Deep and Comprehensive Free Trade Agreements.

3.3 Service trade liberalization in detail, complex is the word

The second part of this book provides an interesting overview, revealing the difficulties in moving ahead at the multilateral level by discussing what is happening at the bilateral and plurilateral level. An overview of several issues that CETA does address, the manner in which deeper liberalization in relation to services trade may develop, is highlighted. This may also be relevant in relation to a future EU-UK agreement. The combined chapters certainly demonstrate just how complex international trade liberalization is becoming.

The chapter written by Keijzer, Martino and Quintavalla aptly shows that the EU may have underestimated the complexity of FTAs in practice. Implementing FTA obligations impacting on corporate law (specifically, the right of establishment for corporations) leads to complications due to the complex web of competences existing between the EU and its Member States. One of the complexities of liberalizing trade in services, and what needs to be done to overcome this complexity is addressed in chapter 5, containing Pipidi-Kalogirou's contribution on the approach adopted in CETA. As stated there, the liberalization of trade in services requires both direct (market access) and indirect (behind the border issues) liberalization. Taking regulatory cooperation as the topic, Pipidi-Kalogirou describes the novel approach adopted in CETA to deal with indirect liberalization, as CETA moves beyond references to international standards and pursues a high level of transparency, participation and ultimately increased regulatory coherence. In chapter 6 of this book, McCormack-George addresses a second of these beyond the border problems, the recognition of professional qualifications. Providing an overview of the rules on this issue in the GATS and in CETA, the chapter is revealing in relation to another of the contemporary international trade issues, as it reflects on a possible post-Brexit UK-EU trade agreement. His case study on medical professions provides fertile ground to explore the issue of qualification recognition. Taking a different perspective, the final chapter by Tans discusses the mobility of service suppliers. Mode 4 complements the here described picture of the difficulties states face when trying to liberalize trade in services, as this form of services trade impacts on the sensitive policy areas of labour regulation and immigration. The chapter on Mode 4, similar to the chapter written by Keijzer, Martino and Quintavalla, suggests that FTAs may in practice prove to have unforeseen impact at the national level, leading to problems when implementing such agreements.

3.4 As complex as it gets

The complexity of liberalizing trade in services is a PhDs dream and a student's nightmare. To say that trade rules which are binding on states are starting to overlap is an understatement. The EU is bound to trade rules at the multilateral level *vis-à-vis* Canada, but also through the CETA. If the TiSA is concluded successfully, their trade relationship will be bound by no less than three trade agreements. Readers are recommended to search for figures online depicting the network of regional trade agreements globally.[71] The overlap between WTO rules and FTAs has already led to problems, for instance in relation to an overlap in dispute settlement.[72] The field of international trade liberalization has already become tremendously complex.[73] FTAs, even those recently signed by the EU, differ to a lesser and greater extent. The CETA and the CARIFORUM agreement are indeed similar when it comes to service trade liberalization, but they are far from the same. Market access varies considerably, and provisions addressing the same obligation (national treatment for example) in the agreements differ considerably.[74] This discussion of the 'fragmentation' of international trade law too is nothing new.[75] However, these slight (and not so slight) variations are arguably getting out of control. The CETA and CARIFORUM agreements are already differing to a remarkable degree, and adding the India – Korea Comprehensive Economic Partnership to the mix underlines the point.[76] A shift in perspective may provide a new viewpoint supporting this statement, a viewpoint that will become apparent from chapter 4 and 7 in this book. It is one thing to study GATS and FTAs at the international level. Yet, the scale of the fragmentation phenomenon, combined with the complexity of the topic becomes truly daunting when one starts looking at the practical implementation of trade obligations at the national level.[77]

What we are witnessing is an increase in the complexity of rules as well as an increase in overlap of these rules. These rules are subject to dispute settlement,

71 See also the slide 'Spaghetti Bowl effect' in Tans presentation, held before the WTO Members during the thematic seminar 'Mode 4 at Work, 10 October 2018, available at: https://www.wto.org/english/tratop_e/serv_e/mode_4_at_work_e/tans.pdf. Note that the fifth picture included is a child's drawing, not an overview of trade agreements.

72 For an overview of examples and solutions offered in the literature (based on the *Softwood Lumber* cases, the Brazil and Argentina poultry dispute and *Mexico-Soft Drinks*), see Stoll, note 3, 12-13.

73 Krajewski, note 59, 175; Stoll, note 3, 3 and 6.

74 S. Tans 'Trade Commitments in GATS, EU – CARIFORUM and CETA, and the Inclusion of Blanket References to Entry, Stay, Work and Social Security Measures' in: S. Carrera, A. Geddes, E. Guild and M. Stefan (eds) *Pathways toward Legal Migration into the EU* (Centre for European Policy Studies 2017), 152-154.

75 Stoll, note 3, par 5.2.

76 Presentation Tans, note 71.

77 See in particular the final conclusion in Tans, note 17, par 7.6.2.

at the multilateral level, and at FTA level as FTAs include dispute settlement as well (provided that no fork in the road clause is included). Each case will find the heart of the FTA rules to be based on the rules adopted within the multilateral framework, but with additions, or variations. This should affect the outcome. Moreover, FTAs often allow the cosignatory states to comment on, or adapt decisions taken by adjudicating bodies as adopted within that FTA. Now add a multinational service provider to the mix. On a less serious note, perhaps that is the reason that direct effect of FTAs is consistently ruled out. It would indeed explain the consistent adoption of new trade rules and the consistent refusal to grant possibilities to rely on these rights for those for whom they are intended, the ones that utilize liberalization in practice.[78]

4. Complexities in trade liberalization

The discussion above, albeit far from exhaustive, shows the complexities in trade liberalization in EU law and international law. EU law is further developed, although is still searching for a way to balance socio-political goals with liberalization of trade. At the international level a greater range of diversity in relation to socio-political goals plays a role, thereby hindering a further going liberalization at the multilateral level. Moreover, as shown above, the lack of progress on a worldwide level has led to the creation of multiple RTAs, which create a 'spaghetti bowl' of agreements. The contributions in this book discuss multiple aspects and problems encountered in trade liberalization within the EU and on the international level, thereby attempting to contribute to deeper services integration without losing sight of socio-political goals.

78 During the conference leading to this book, Elspeth Guild referred to the oddity of FTAs consistently providing rights for private parties while at the same time such agreements frantically prohibit any possibility to rely on such rights.