

The year 2010 is approaching and the Lisbon strategy will have to be replaced by a new strategy. The Foreign Ministry has asked the National Board of Trade to discuss ideas for external commercial policies to support the reforms carried out domestically to increase growth. This can be called an “external dimension” of a new strategy. For this purpose we have written eight reports, covering a range of areas, and a summary. You can find it all at www.kommers.se/trade&growth

Both external trade in services and competition in the internal EU service market are crucial to future growth. However, several barriers to trade remain in the EU, both for EU-based suppliers and for those from third countries. This results in less than full competition on the Internal Market. High barriers also remain in many of the EU's major trading partners

Several proposals are put forward in this paper on how to enhance external trade in services, and thereby increase service competition in the EU. They build on suggestions made previously or on measures that have been developed for the Internal Market. Some measures can be implemented by the EU unilaterally, whereas others need cooperation between the EU and third countries, which can be implemented through bilateral trade agreements or regulatory dialogues.

1. Measures in the EU (similar commitments would also be desirable in third countries, at least in the EU's major trading partners)

- **Within the framework of the helpdesk for trade and investments in the EU, information should be provided on rules and regulations governing delivery of services in the EU Member States, including those governing temporary movement of natural persons. The helpdesk could also aid third country companies to complete procedures and formalities necessary to obtain authorisations needed for market access.**
- **Directed towards all third countries, the EU could introduce automatic granting of authorizations, necessary for market access, in cases where a competent authority fails to respond or take decisions on applications.**
- **Introduce requirements for *ex ante* notifications, to all third countries, of national proposals for new technical requirements on service providers.**

2. Measures for deeper cooperation between the EU and third countries

- **Explore the possibilities of introducing a requirement, on a best endeavour basis, on administrative cooperation with third country authorities before national authorities take action to restrict the movement of services.**
- **National standardization organisations should be invited to provide the services industry with more information about the benefits of standards to promote trade in services and to encourage the services industry to actively participate in the standardisation process.**
- **Explore the possibilities of negotiating bilateral or regional arrangements with third countries to ensure regulatory conformity with EU rules on services. Such arrangements would secure mutual access to the other's services market.**

3. New ways to negotiate multilateral commitments in trade in services

- **The EU should lead the discussion on new ways to negotiate further and deeper multilateral services liberalisation post-DDA. Negotiations could be sectoral and focus on market access or regulatory principles to strengthen competition in prioritized sectors. They could be initiated either by ministerial decisions or use the yet untried negotiation method developed in the “modalities for autonomous liberalization”.**

Contents

1. Introduction	5
<i>1.1 The importance of trade in services for the EU</i>	<i>5</i>
<i>1.2 The situation for trade in services today</i>	<i>5</i>
<i>1.3 What could be done to enhance competition and trade in services? </i>	<i>8</i>
2. Measures in the EU	10
<i>2.1 Improving transparency for services suppliers</i>	<i>10</i>
<i>2.2 Automatic granting of authorizations in certain cases</i>	<i>15</i>
<i>2.3 Pre-empting the emergence of barriers to trade in services</i>	<i>16</i>
3. Measures for deeper cooperation between the EU and third countries	17
<i>3.1 Administrative cooperation between competent authorities</i>	<i>17</i>
<i>3.2 Voluntary standards and other mechanisms</i>	<i>18</i>
<i>3.3 Bilateral or regional arrangements to promote trade in services through regulatory conformity</i>	<i>19</i>
4. New ways to negotiate multilateral commitments in trade in services.....	21

1. Introduction

1.1 The importance of trade in services for the EU

In 2006, services represented 27% of total EU exports and 22% of imports.¹ As services represent around three fourths of GDP and employment in the EU, there appears to be a great unexploited potential for international trade in services. To some extent the low proportion of services in total can be explained: certain services are not very “tradable” for technical reasons and there are cultural and linguistic barriers to others.

The Commission communication *Global Europe* states that services is one of the keys to EU competitiveness and an area of European comparative advantage with the greatest potential for growth in EU exports².

Improving the situation in key service sectors will have positive spill over effects in the economy as a whole since many services are used in the production of both goods and other services. Examples are transport, logistics, financial services, telecommunications and legal services. Liberalisation resulting in lower prices and improved variety of choice will benefit industrial as well as private consumers of services.³

1.2 The situation for trade in services today

The situation in the EU

The quality of an economy’s internal rules matters both for internal competitiveness and for trade with third countries. Firms surviving a highly competitive home market can also be successful in a global arena.⁴ One OECD study even finds that regulatory conditions in the home market matter *more* for export performance than conditions in the importing market in some business services and in financial services.⁵

¹ If intra-EU trade is included, the figures are lower – 22% of total exports and 19% of imports. Source: *WTO International Trade Statistics 2007*. The figures only include cross-border trade, i.e. not the other three modes of delivery. .

² Together with knowledge, innovation, intellectual property and the efficient use of resources.

³ One study finds that countries that fully liberalise the telecom and financial sectors will experience growth rates that are up to 1.5 percentage points higher than rates in other countries. (Mattoo, Aaditya, Randeep Rathindran & Arvind Subramanian (2006) “Measuring services trade liberalization and its impact on economic growth: an illustration”. *Journal of Economic Integration* 21: 64-69)

⁴ The positive influence on trade of competitive home markets has been shown in Sébastien Miroudot, Enrico Pinali and Nicolas Saunter “The impact of pro-competitive reforms on trade in developing countries”. *OECD Trade policy Working Paper* no 54, 15 June 2007. TD/TC/WP(2006)31/FINAL.

⁵ Henk Kox and Hildegunn Kyvik Nordås “Services trade and domestic regulation”. *OECD Trade policy Working Paper* no 49, 14 February 2007,

The EU is a rather open market in services compared to many other major markets in the world.⁶ The liberalisation, simplifications and rules harmonisation within the EU also benefit third-party firms and thus competition. However, there is room for improving the climate further and the same applies to third countries, the EU's trading partners.

The scope of the Treaty in relation to third country companies

The central principle governing the Internal Market for services is set out in the Treaty on the European Union (articles 49 and 50). It guarantees companies established on the Internal Market the right to provide services on the territory of another EU Member State. Article 43 spells out the principle of freedom of establishment on the Internal Market.

Service providers and service recipients established outside the EU can not *a priori* rely on the Treaty to base a claim to the right of free movement. However, companies from third countries can, *indirectly*, benefit from free movement on the Internal Market if they establish an independent legal person in a Member State according to the legal requirements of that state. Once firmly established as a company under, for example German law, the company can access the national markets of other Member States on the same conditions as any other German company.

Obstacles to trade in the Internal Market

In 2002, the European Commission identified a number of obstacles that hampered trade in services on the Internal Market.⁷ These obstacles existed despite the fact that the Member States already share a supra-national legal order in the field of services. The report later formed the basis for the Commission's proposal for a directive on services in the Internal Market. Among the identified obstacles were:

- Lack of easily accessible, clear and correct information regarding national requirements to enter a market.
- Lack of transparency regarding which authorizations were needed to access the national markets and how these authorizations could be obtained.
- Lack of administrative cooperation between the competent authorities in the Member States that often resulted in misapplication of Community law whereby the service provider unfairly was burdened with proving his right to access the national market.

TD/TC/WP(2006)20/FINAL.

⁶ The National Board of Trade has previously found that the EU is probably more open than Canada and Japan in services, and in many sectors also more open than the US. The National Board of Trade (2005) "Open for Business? A comparative analysis of the trade policies of the European Union, the United States, Canada and Japan"

⁷ COM (2002) 441 final.

- Insufficient knowledge among competent authorities about the content and proper application of Internal Market rules.
- Lack of legal certainty as a result of non-transparent processing of applications for national authorizations. The fact that applications for authorizations often took very long time to process was also part of the problem in this context.

The Services Directive in relation to third country companies

The EU Services Directive was adopted in December 2006⁸ and will have to be transposed by Member States by the end of 2009. It seeks to *coordinate* – not harmonize – national rules in order to reduce the barriers to trade identified by the Commission. The directive aims to improve the competitiveness not just of service enterprises, but also of the European industry as a whole. It will remove discriminatory barriers, cut red tape, modernise and simplify the legal and administrative framework and make national administrations co-operate more efficiently and systematically.⁹ It will also strengthen the rights of users of services.

Much like the Treaty, companies from third countries that do not constitute a legal entity within the Community cannot rely *directly* on the Services Directive in order to access the Internal Market. The reason is a matter of jurisdiction as well as a matter of hierarchy of norms. The Services directive is a piece of secondary legislation based on the Treaty and applies therefore only to companies established within the Internal Market. The situation is made clear in recital 36¹⁰ of the directive and in article 1 which stipulates that the directive applies to service providers established in a Member State. However, again, as soon as a company from a third country has established itself through a legal person within a Member State it may *indirectly* benefit from the directive.

If the Services Directive is correctly implemented and applied in the Member States it therefore will solve most of the barriers in the Internal Market, but the barriers will remain for third country service providers not yet established in the EU.

⁸ Directive 2006/123/EC

⁹ Using the IMI (Internal Market Information system).

¹⁰ “*On the other hand, the concept of a provider should not cover the case of branches in a Member State of companies from third countries because, under Article 48 of the Treaty, the freedom of establishment and free movement of services may benefit only companies constituted in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community.*” (emphasis added)

The Commission has also made efforts outside the Services Directive for improving EU coordination, competitiveness and effectiveness in various service sectors, for example in retail financial services¹¹ and health care services¹². There are also initiatives to coordinate rules regarding labour migration to the EU, for example regulations for intra-corporate transferees.¹³

The situation in third countries

Substantial barriers to service trade remain in many of EU's key trading partners. To improve the opportunities for European exporters, the EU is a main *demandeur* for ambitious results in regards to international service trade liberalisation. The goal is pursued both in the WTO Doha negotiations, and bilaterally in new free trade agreements with partners in Asia, the Mediterranean and Latin America.

EU interests also extend to better regulation and transparency in services, in order to underpin market access. One part of this is negotiating multi-lateral disciplines on domestic regulation in services within the DDA to add to and complete the current GATS provisions on transparency and domestic regulation. The bilateral trade agreements also include regulatory provisions.

1.3 What could be done to enhance competition and trade in services?

In this paper, the Board makes a number of suggestions for further efforts to reduce these various obstacles to trade in services, thus benefiting the EU economy. Some of them are measures that the EU can take unilaterally. Similar efforts could be desirable in third countries, at least in our major trading partners. Other measures require cooperation between the EU and third countries, possibly in bilateral, regional or multilateral contexts. Finally, we suggest measures to improve results in the WTO negotiations.

¹¹ See Commission Staff Working Document "Initiatives in the area of retail financial services". Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A single market for the 21st century* (COM(2007) 724 final).

¹² In September 2006, the Commission issued a "Consultation regarding Community action on health services" (SEC (2006) 1195/4), inviting input from members and stakeholders for how to handle health services on the European level. Replies have been collected, but there is as yet no follow-up.

¹³ See Communication from the Commission on a "Policy Plan on Legal Migration" SEC(2005)1680 and the Commission proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (2007).

Our proposals build mainly on suggestions made previously or on measures that have been shown to work in the EU or elsewhere, thus building on previous research and best practices.

In the case of features used in the EU, focus is on those that seek to *coordinate* – not harmonize – national rules in order to abolish barriers to trade. These do not require participating countries to share a supra-national common legal order and could therefore very well be employed in order to enhance trade between third countries and the EU. They have worked as tools to facilitate intra-EU trade and there is no obvious reason why they should not have the same positive effects on trade between the EU and third countries. Relevant coordinating tools are primarily found in the Services Directive which contains a number of instruments that can be used between the EU and other countries as benchmarks to increase international trade, even though they have been devised solely for the Internal Market:

- Single points of contact (articles 6-8)
- Administrative cooperation (articles 18, 28-31 and 35)
- Notification of national proposals containing technical rules (article 15.7)
- Grant of authorisation in the case of failure to respond by a competent authority (article 13.4)
- Improving quality and comparability between services and service providers (article 26¹⁴)
- Developing common codes of conduct among professional organisations in order to facilitate trade in services (article 37)

While our focus is on regulatory coordination, from an economic perspective we also make some suggestions in a more long-term perspective. Legally remote but interesting measures are those that extend the legal effects of the Treaty and the Services Directive to third countries in order to include modes of supplying services on a temporary basis without a previous establishment in a Member State.

¹⁴ Member States shall, with a view to ensure the quality and comparability of services and of their provision, in cooperation with the Commission promote: i) the introduction of certification and assessment by independent accredited bodies or drawing up their own quality charter or participation in quality charters or labels drawn up by professional bodies at Community level, ii) information of the significance of quality labelling existing in the Member States, iii) *inter alia*, professional bodies to cooperate at Community level in order to promote the quality of service provision, especially by making it easier to assess the competence of a provider, iv) information on the significance of certain labels and the criteria for applying labels and other quality marks relating to services can be easily accessed by providers and recipients, and v) the development of European standards.

There are several instruments at hand in order to promote measures to improve trade with partner countries. Currently, the EU has bilateral agreements in force with a number of countries in Latin America, Africa, the Mediterranean region and Eastern Europe. These agreements have provisions for revising and strengthening cooperation where both parties so agree. There are also a number of trade agreements being negotiated at the moment. The Commission already plans to further strengthen regulatory cooperation in these agreements, especially with regard to neighbouring countries, but also elsewhere.¹⁵

Several of the EU's partners in these agreements are of limited economic interest to European industry. With some of our largest trading partners – the US, Japan, Canada, China and Russia – there are instead various forms of dialogues and forums in place to foster closer cooperation.¹⁶ They are not aimed at negotiating market access, but at exploring deeper integration through regulatory convergence, where possible. Just like the bilateral trade agreements, these dialogues may be used as vehicles for some of the measures proposed below.

2. Measures in the EU

2.1 Improving transparency for services suppliers

Transparency is a key principle for good regulatory practice. It is also an important tool in preventing unnecessary barriers to trade in both goods and services. With transparency, importers and exporters will get accurate information on opportunities and costs associated with trading, which contributes to more efficient markets. Transparency is also an important factor in determining a country's attractiveness to foreign investors.¹⁷

¹⁵ The strategy includes several instruments such as convergence towards EU rules, agreement on common principles, regulatory dialogues, problem-solving mechanisms and increased regulatory transparency. See Commission Staff Working Document "The external dimension of the single market review", p 10. Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A single market for the 21st century* (COM(2007) 724 final).

¹⁶ The Transatlantic Economic Council (USA); EU-Japan Regulatory Reform Dialogue; Canada-EU Trade and Investment Enhancement Agreement; negotiations on a new Partnership and Co-operation Agreement with China; and a Road map on the common economic space between EU and Russia.

¹⁷ Kox and Nordås (2007) *op cit* p. 30. Zdenek Drabek and Warren Payne "The impact of transparency on foreign direct investment", *WTO Staff Working Paper* ERAD-99-02 (November 2001). Measuring the impact of regulatory transparency on foreign direct investment, Drabek and Payne find that non-transparency imposes additional costs on businesses, reduces predictability and can hinder cross-border mergers and acquisitions.

Problem description – general

International obligations on transparency in services are inadequate, as is compliance.¹⁸ Transparency could also be much better in the EU, regarding publication of relevant laws, regulations, and administrative requirements relating to services.

Currently, it is not always easy to access the relevant information. Barriers to trade are all non-tariff barriers, which by nature are less transparent than tariffs. Finding information can also be complicated due to the fact that services can be delivered through four different modes: movement of the service, movement of the consumer, movement of the firm (commercial establishment), or movement of the individual service supplier (temporary movement of natural persons). The different modes are sometimes regulated separately. Another difficulty can be that important regulations for the EU market may be found both on Community and Member levels.

The GATS obliges Members to create national contact and enquiry points, but they are aimed at other Member governments only, not at the private companies that actually trade. The points appear to be little used and not effective in promoting transparency.¹⁹ Other transparency measures in the GATS are not very helpful either.²⁰

Problem description – temporary movement of natural persons

Transparency is important for all modes, but in the current situation the problem is perhaps most acute for temporary movement of natural persons – both for commercial reasons and due to current information deficits.

¹⁸ See Keiyo Iida and Julia Nielson (2003) “Transparency in domestic regulation: practices and possibilities” in Aaditya Mattoo & Pierre Sauvé (eds) *Domestic regulation and service trade liberalization*, The World Bank; and OECD (2000) “Strengthening Regulatory Transparency: Insights For The GATS From The Regulatory Reform Country Reviews” TD/TC/WP(99)43/FINAL, p. 16.

¹⁹ There may be practical difficulties relating to the range and diversity of issues in services trade. Most of the points refer to a contact within a ministry for trade or external relations – not to experts on national legislation.

²⁰ See Iida and Nielson (2003). Members in general rarely notify the WTO of significant regulatory changes (GATS article III.3). Only eight EU Member States notified something between 1995 and 2007. The national schedules of specific commitments on market access and national treatment in different service sectors rarely, if ever, reflect the real regulatory situation.

Temporary movement is of great importance to high-income countries like those in the EU. There are substantial flows of personnel from and among high-income countries as well as potential for further facilitating such flows.²¹ European service suppliers have strong offensive interests in securing more market access and more transparent information systems abroad as well as at home.²² It is also of interest from the point of view of European governments as the demographic changes will lead to relatively fewer workers as well as increased demand for health care services in the growing group of elderly citizens. Employers within certain sectors or professions are already finding it difficult to recruit, and others may soon find themselves in the same situation?.²³ Larger flows of temporary movement can be one way to alleviate labour shortages.

The problem is that information for temporary movement of natural persons is difficult to come by – partly because it is not harmonised between EU Member States and partly because it touches on sensitive issues related to migration, labour markets and national security generally.

Furthermore, temporary movement is generally regulated by migration law rather than by trade or investment laws. In Sweden, for example, the applicable rules are found in laws on migration and labour and some of them are only readily available in Swedish.

The Swedish system for entry for natural persons is in many ways more liberal than the Swedish commitments under the GATS. However, the terminology used in the system is not consistent with that of the GATS. No distinction is made between temporary service delivery vs. access to the employment market, nor between service and non-service activities – distinctions that are central in the GATS. Even in cases where Swedish categorizations are almost consistent with those of the GATS, different terms are used. This “terminology gap” coupled with more liberal existing regimes than the committed ones can also be found in other EU Members as well as in many other countries.²⁴ This contributes to the lack of transparency.

²¹ OECD (2003) “Service Providers on the Move: The Economic Impact of Mode 4”, TD/TC/WP(2002)12/FINAL, pp. 15-16.

²² Services being characterised by high income-elasticity and difficulty of substituting capital for labour, the main way for companies to adjust to shifts in demand is through labour force flexibility. For an international company, transferring personnel between countries can help smooth fluctuations in demand in different markets. Temporary movement also tends to generate new FDI flows. It is furthermore a fact that for highly skilled people there is now an international job market where companies need to be able to compete. (OECD 2003, p 20, *op cit.* See also European Services Forum: Fourth ESF position paper on the temporary movement of persons, 11 April 2005)

²³ See ”Arbetskraftsinvandring till Sverige – förslag och konsekvenser”. *Slutbetänkande av Kommittén för arbetskraftsinvandring*. Stockholm 2006. SOU 2006:87, p. 78f.

²⁴ See e.g. case studies of Australia, Canada, Germany and the US in Aaditya Mattoo & Antonia Carzaniga (eds) *Moving people to deliver services*. The World Bank, 2003.

The proposal

Within the framework of the helpdesk for trade and investments in the EU, information should be provided on rules and regulations governing delivery of services in the EU Member States, including those governing temporary movement of natural persons. The helpdesk could also aid third country companies to complete procedures and formalities necessary to obtain authorisations needed for market access.

Removing the obstacle of “lack of information” about Internal Market rules as well as requirements on authorisations that exist under national law in the Member States is an important step to open up the Internal Market to increased services competition. Another report in our series is about an “EU Helpdesk for Trade and Investments”²⁵ and proposes a helpdesk aimed at facilitating trade and increasing transparency for European importing companies and third country exporters. This proposal is intended to work within the same framework, but gives specifics on what would be interesting information to provide in relation to services.

Firstly, information should be provided on all modes of delivery. As described above, it is important to provide information on migration rules that relate to temporary movement of services suppliers. Information should describe visa rules²⁶, requirements for work permits, necessary documentation, place, times and fees for applications, permitted length of stay, possibility of extension, sectors where any specific conditions apply, rules regarding spouses or families, possibility of appeals and contact points for further questions. If there are economic needs tests or labour market tests in place, their criteria, procedures and objectives ought to be described.²⁷

It may be politically sensitive to include migration rules in this kind of trade instrument. However, due to its central commercial role and neglected potential so far, we consider it important to treat temporary movement of services suppliers like any other trade issue, and not separately as today.

²⁵ For this report and the others in the series “The contribution of trade to a new EU growth strategy”, please see www.kommers.se/trade&growth

²⁶ Visa issues are not a part of GATS or bilateral agreements on trade in services but factually a constraining factor for businesses, especially when there is lack of clarity and certainty in the rules (OECD 2003, p 15-16). It would be good practice to provide this information, although members have no international commitments to do so.

²⁷ See suggestions in Iida and Nielsen (2003), *op cit*.

Secondly, it would be important to have translations, at least of the most important documents, e.g. into at least one of the WTO's official languages – English, French or Spanish.²⁸

Thirdly, in line with the contact points established under the EU Services Directive, the helpdesk might also be used for helping third country companies to complete procedures and formalities necessary to obtain authorisations needed to gain market access in a Member State of the EU.²⁹ This would be very helpful for third country companies exporting to the EU as well as for those established in the Internal Market.

Fourthly, it may be necessary to have a network of national contact points for services in the Member States to complement the central one. A central helpdesk can provide information on Community law and certain requirements in the Member States. For questions regarding specific national or local requirements for authorisations to provide services, the central helpdesk should be able to signpost the company to a national contact point. There are two reasons for such a set-up. One is that existing EU legislation is mainly in the form of directives, which may be implemented somewhat differently in different states. Another is that some rules in the EU Member states are outside the harmonised area of law, but could still cause market access barriers. It might then be unfeasible to provide information on all systems in one helpdesk.

Our idea is not new. It has been promoted by the OECD which has commended the practice of some OECD countries to maintain a central code of all relevant regulations and disseminate this code electronically to all interested parties on a government-operated website.³⁰ Similar ideas have also been brought forward several times in the WTO.³¹

²⁸ By contrast, in Sweden today important documents such as the guidelines on work permits issued by the Unemployment Office are only readily available in Swedish.

²⁹ According to article 6.1(a), single contact points shall ensure that it is possible for providers to complete “all procedures and formalities needed for access to his service activities, in particular, all declarations, notifications or applications necessary for authorisation from the competent authorities (...).

³⁰ OECD 2000 *op cit.*

³¹ E.g. that Members should find a “common, practical and effective way to improve the information related to their horizontal mode 4 commitments” and that “members should provide certain information on a voluntary, rather than a responsive, basis and the information provided would be available to all members, including their trade policy officials and business people”. “Proposal on transparency of horizontal mode 4 commitments” Communication from Canada to the Council for Trade in Services, Special Session, 21 June 2005, TH/S/W/47. The submission includes a transparency template on what type of information could be supplied and how, both on a horizontal and a sectoral basis. Australia later tabled a submission which made use of the Canadian template (“Transparency template – Australia’s revised horizontal mode 4 offer” Communication from Australia to the Council for Trade in Services, Special Session, 30 June 2005, TH/S/W/48).

The helpdesk would allow the EU to lead by example in the field of transparency, and provide a model that could be an inspiration to our trading partners. The EU could promote it through regulatory dialogues or bilateral trade agreements. The idea could also be taken up in the WTO again, in or after the current round.

2.2 Automatic granting of authorizations in certain cases

Problem description

Service providers on the Internal Market have complained about the arbitrary use of powers by national competent authorities as well as indeterminate or excessively long periods before a response is given. The competent authority may fail to inform the applicant of the stages of due process, the estimated time it will take to process the application as well as the possible need to prolong the processing time. Such practices have particularly significant dissuasive effects on service providers wishing to develop their activities in a foreign market.

The proposal

Introduce automatic granting of authorizations, necessary for market access, in certain cases where a competent authority fails to respond or take decisions on applications.

In the Services Directive, a rule has been introduced for automatic granting of national authorisations in certain cases. It applies when a complete application from a service provider has been delivered to a competent authority in the host Member State, but the authority has failed to respond to it within the time period set or extended by the authority.³² This rule could be extended to apply to *all* applicants, notwithstanding their country of origin. It would improve legal certainty and facilitate establishment on the Internal Market.

The aim of the proposal is to remove the possible abuse of administrative power, not to deny competent authorities of their possibilities to perform effective market surveillance. The rule should for example not apply in cases where the applicant has provided the competent authority with an incomplete application. However, it is important for the competent authority to communicate with the applicant if the application is in any way incomplete.

Much like the helpdesk, this proposal could be unilaterally implemented by the EU, but should preferably also be adopted by trading partners.

³² Article 13.4

2.3 Pre-empting the emergence of barriers to trade in services

Problem description

Transparency is useful not only *ex post* (in relation to already established rules), but also *ex ante* – before new regulations are adopted. If interested persons are allowed to see and comment on national proposals it may pre-empt the adoption of rules that threaten to become new barriers to trade, something that is otherwise difficult to prevent.

Requirements to notify new regulatory proposals exist in several areas. Concerning goods, there is the WTO-TBT agreement where a duty to notify a proposal is triggered when the national proposal is deemed to have an effect on international trade or if the proposal deviates from international standards. On the EU Internal Market, a duty to notify technical requirements on goods is regulated by directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations. Directive 98/48/EC provides for a similar procedure in the area of “Information Society Services”.

In the Services Directive, a notification procedure covering services, falling within the scope of the directive, has been introduced.³³ Member States shall notify the Commission of any new laws, regulations or administrative provisions which set requirements that may hinder the provision of services, together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall however not prevent Member States from adopting the provisions in question after the consultations.

The proposal

Introduce requirements for *ex ante* notifications, to third countries, of national proposals for new technical requirements on service providers.

A system for notification of national proposals for *new* technical requirements on service providers as well as requirements on the content of the services themselves could be introduced between the EU and third countries, modelled after the procedure in the Services Directive. It could be applied unilaterally by the EU or constructed as a requirement bilaterally between the EU and our trading partners, at least the major ones.

³³ Article 15.7 of the services directive.

In the long run, it is also conceivable as a multilateral commitment. In the current DDA negotiations, there are discussions on whether to introduce an obligation for “prior comment” in regards to domestic regulation in services.

3. Measures for deeper cooperation between the EU and third countries

3.1 Administrative cooperation between competent authorities

Problem description

In the 2002 survey of the Internal Market, it was found that lack of administrative cooperation between the competent authorities in the Member States often resulted in situations where the service provider was unfairly burdened with proving his right to access the national market.

The Services Directive therefore introduced obligations on administrative cooperation³⁴ in certain cases where Member States wish to restrict the free movement of services in respect of a provider established in another Member State. In certain circumstances, the competent authority in the host country must exhaust the possibilities of administrative cooperation with the competent authorities in the Member State where the service provider is established (the home country), before adopting such restrictions. Only after administrative cooperation has proven insufficient or inadequate to settle the problem underlying the intent of the competent authority to intervene, an intervention against the service provider is possible.

In their communication with each other, EU competent authorities rely on an electronic system for information exchange (IMI) which allows them to communicate with each other through a database using their own native language.

The proposal

Explore the possibilities of introducing a requirement, on a best endeavour basis, on administrative cooperation with authorities in third countries before national authorities take action to restrict the movement of services.

³⁴ Articles 18, 28-31 and 35

The obligations on cooperation in the Services Directive are compulsory for EU Member states only. However, they could be introduced with third countries as well on a best endeavour basis, at least initially. Removing the burden of proof on service suppliers from third countries would facilitate their market access. Perhaps it would be possible for third countries on a sector by sector basis to be connected to the IMI system for information exchange between competent authorities and mutual assistance in market surveillance. The techniques employed in the IMI system allows for additional languages to be added.

3.2 Voluntary standards and other mechanisms

Problem description

Barriers to trade in services are often caused by the lacking comparability of the content of services and more specifically differing rules on the terms of service provision (how the services shall be provided, what they should contain, the rights of customers in case of disputes etc). This is partly due to a lack of standards for services. Standardisation in services has so far received much less attention than in goods and this might constitute a problem as services trade grows. There are indications related to goods trade that a lack of standards can cause obstacles to trade³⁵ as the transaction costs increase.

The proposal

National standardization organisations should be invited to provide the services industry with more information about the benefits of standards to promote trade in services and to encourage the services industry to actively participate in the standardisation process.

Ways to improve comparability between services are envisaged in the Services Directive through articles 26 and 37. Article 26 deals with standards. Insofar as the EU and its Member States have the ambition to develop European standards in the field of services, these standards should be modelled with a view of making them international standards. At the same time, European standards should be made with due consideration to or, when appropriate, by adoption of relevant international standards.

³⁵ Moenius (2003) finds that Japan has much fewer standards (for goods) than comparable countries. This, he shows, causes a rather large barrier to trade, reducing imports considerably.

Article 37 of the Services Directive states that Member states shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up, particularly by professional bodies, organisations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in other countries in the EU. Member States shall ensure that the codes of conduct are accessible at a distance, by electronic means. Similar arrangements as in the Services Directive article 37 could be made with third countries in order to facilitate international trade in services.

In view of the aims to achieve enhanced comparability between services as a means to promote trade, we propose that national standardization organisations should be invited to provide the services industry with more information about the benefits of standards and to encourage the services industry to actively participate in the standardisation process

3.3 Bilateral or regional arrangements to promote trade in services through regulatory conformity

Problem description

European Community law on services applies only to third country service providers that are already *established* within the EU. In the same way, EU service providers are required to establish themselves in a third country according to national law in order to be active there.

More openness both with regard to imports and exports of services would enhance trade and competitiveness worldwide.

The proposal

- **Explore the possibilities of negotiating bilateral or regional arrangements with third countries to ensure regulatory conformity with EU rules on services. Such arrangements would secure mutual access to the other's services market.**

Article 49 of the Treaty states that the Council may, acting by qualified majority on a proposal from the Commission, *extend the provisions in the Treaty's chapter on services to third country service providers that are established within the Community*. Extending legal effects in this way requires bilateral or plurilateral arrangements according to article 133 of the Treaty.

Agreements in the form of ACCAs³⁶ or PECAs³⁷ in the field of goods could serve as benchmarks also in the field of services. However, they must be tailored in order to cater for the special legal and practical pre-conditions for international service provision. For example, the ACCA and PECA arrangements on goods do not contain a prerequisite on establishment by the third country manufacturer in order to allow for free circulation of goods. In contrast, access for third country service providers requires that the company is established in the Community (article 49 of the Treaty). The same is as a rule required from service providers from the EU trying to access a third country market. A prerequisite in a bilateral agreement on primary establishment for the third country service provider, as stipulated in the second indent of article 49 of the Treaty, would not contribute to more international trade in services than what the Treaty already provides. A third country service provider can already establish itself under national law in a member state of the EU and thereafter access the Internal Market. Moreover, a requirement of primary establishment ignores the fact that modern service provision does not always require the personal presence of the provider. Examples of cases where services move across borders are online support services, call-centre activities, consulting services etc.

For these reasons, the option to promote trade through a model inspired by the ACCA and PECA arrangements should be legally explored also for services. It could be a complement in bilateral or regional agreements with third parties, providing for deeper and more complete market access than such arrangements usually result in. In order to be of any practical and economic added value for third country service providers, as well as for EU companies, the agreement would stipulate that the territories of the third countries that are parties to the agreements are to be considered as part of the Internal Market for the purposes of the agreement.³⁸

³⁶ ACCA: Agreements on conformity assessment and acceptance of industrial products. Such agreements are being discussed between the EU and neighbouring countries.

³⁷ PECA: Protocol to the Europe Agreement on Conformity Assessment. Such pre-accession agreements were concluded with all 12 EU candidate countries, except for Poland.

³⁸ See for comparison article 36.1 of the EEA agreement and article 29 in the EFTA agreement.

EU institutions such as the European Commission and the European Court of Justice do not have jurisdiction outside the EU. Much like the EFTA Court and the EFTA Surveillance Authority, special institutional arrangements would have to be set up. The proposal means that a third country would adopt, for a specific or a group of specific services sectors, the relevant “*Acquis Communautaire*”, including the existing and future jurisprudence of the European Court of Justice. However, this should not mean that possible future transgressions of the arrangement would be settled by the European Court of Justice. This would instead be the function of a joint institution (“Joint committees” etc.) for dispute settlement that would be set up for the purposes of the arrangement. This institution for dispute settlement would nevertheless have to take into account the jurisprudence of the European Court of Justice in order to ensure future conformity with Community law for the purposes of the bilateral arrangement.

4. New ways to negotiate multilateral commitments in trade in services

4.1 Problem description

Several studies find that high gains might be reaped from multilateral services liberalisation.³⁹ The highest gains would come in areas where the current barriers are high, such as in temporary movement of service suppliers.⁴⁰ New liberalizations would provide more opportunities for European exporters as well as importers, thus contributing to EU growth.

However, very little liberalisation has so far been offered in the DDA negotiations. Most participants have offered to bind current openness levels only – and often not even going as far as that.⁴¹ Many WTO Members acknowledge that the current method of negotiating is ineffective and resource-consuming. It is possible that new methods could improve the quality of commitments. After the Doha round, Members should engage in discussions on new ways to negotiate. As a main *demandeur* in services, the EU should take a lead in such a debate.

³⁹ See e.g. Bernard Hoekman (2006) “Liberalizing trade in services: a survey”. *World Bank Policy Research Working Paper* 4030, October 2006, and Philippa Dee & Kevin Hanslow (2002) “Multilateral Liberalisation of Services Trade”, *Productivity Commission Working Paper* 1619, Australia.

⁴⁰ Some studies show that liberalisation that leads to a 3% increase of temporary movement would lead to global gains of well above 150 billion USD per year. L. Alan Winters (2003) “The economic implications of liberalizing mode 4 trade” in Aaditya Mattoo & Antonia Carzaniga (eds) *Moving people to deliver services*. The World Bank, 2003.

⁴¹ The Chairperson of the Special Session of the Council for Trade in Services summarized in 2005 that, if current offers were put into effect, “few, if any, new commercial opportunities would ensue for service suppliers”. (WTO document TN/S/20). See also

4.2 The proposal

The EU should lead the discussion on new ways to negotiate further and deeper multilateral services liberalisation post-DDA. Negotiations could be sectoral and focus on market access or regulatory principles to strengthen competition in prioritized sectors. They could be initiated either by ministerial decisions or use the yet untried negotiation method developed in the “modalities for autonomous liberalization”.

Sectoral negotiations

Negotiations focussing on services, and only certain specific sectors at that, may yield more ambitious results than the DDA and Uruguay round practice of tying services to a large round of negotiations in all WTO areas of competence. A sectoral approach may allow for a more “technocratic” negotiation mode than today’s highly politicised climate. For countries with small capacity it may be easier to manage one sector at a time than all at once. In contrast to bilateral agreements, the resulting liberalizations would be on a most-favoured-nation (MFN) basis and have the potential to benefit all WTO Members.

There are no legal obstacles in the WTO to start such limited rounds. The decision would be taken by the Ministerial Conference in accordance with the normal principle of consensus.⁴² Sectoral service negotiations have taken place before, 1994-1997, concerning financial services, basic telecommunications, maritime transport services and temporary movement of service suppliers.⁴³

Martin Roy, Juan Marchetti and Hoe Lim: “Services liberalisation in the new generation of preferential trade agreements (PTAs): how much further than the GATS?”, *World Trade Review* (2007), 6:2, 155-192.

⁴² The Marrakesh Agreement Establishing the WTO, article IV.

⁴³ The common denominator was that commitments in the Uruguay round were considered inadequate by a large number of Members.

The sectoral negotiations were started through Ministerial Decisions.⁴⁴ They were open for all Members, but not everyone chose to participate. Any resulting commitments were extended to all Members pursuant to the MFN principle. The outcomes varied greatly between sectors. Negotiations on maritime transport failed entirely and those on temporary movement resulted in very few new commitments⁴⁵. However, results in the other two were substantial. 70 Members took new commitments in financial services, covering more than 95% of world trade. 69 Members made commitments in telecom, representing more than 91% of world telecom revenue.⁴⁶

For Members to be willing to make sectoral commitments on an MFN basis it seems necessary that a “critical mass” of countries is involved that reaches at least 90% of the market value in question. The same figure is found in the plurilateral Information Technology Agreement (ITA) in the WTO, which was set to come into force when Members representing approximately 90% of world trade had accepted to participate.

Industry support and connection to internal liberalisation efforts would probably be determining factors for whether this critical mass can be found. This could be seen in the negotiations on basic telecom and financial services. In these cases, countries were already reforming internally and would probably have continued to do so even without the GATS negotiations. Success in a post-DDA agenda might depend on finding the sectors that correspond to these conditions today and that are considered economically critical by a large enough group of countries.

To promote both EU imports and exports, negotiations should take place in sectors both where the EU is highly competitive and where we have need of more import competition. Choosing sectors by this criterion would also reduce the risk of only negotiating sectors of interest to developed countries, which might reduce pressure on these countries in coming rounds to negotiate developing country interests as well.

In another of the reports in our series on a new growth strategy⁴⁷ it is argued that priority could be given to negotiations in services related to information and communication technology and climate-friendly technology, as these are highly important for innovation.

⁴⁴ See collection of GATS decisions on

http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm#instruments

⁴⁵ Some improved access for independent foreign professionals in certain sectors, some extended durations of stay. Only 6 members took new commitments.

⁴⁶ The financial services were banking, insurance, securities and financial information. Source: WTO homepage, information on the Post-Uruguay round negotiations http://www.wto.org/english/tratop_e/serv_e/s_negs_posturuguay_e.htm#protocols

⁴⁷ See www.kommers.se/trade&growth

Credit for autonomous liberalisation

For sectoral negotiations to start, all Members must be willing to allow them, as the WTO takes decisions by consensus. If some Members should block such efforts, another way to start new negotiations could be to use the *Modalities for giving credit to autonomous liberalisation in services*.⁴⁸

Adopted by the WTO in 2003, the modalities have never yet been used. They provide a framework where Members that have liberalised trade in services of their own accord can seek “credit” for this from other Members. Credit means that these Members can ask for “payment” in the form of liberalisation in other Members or other Members refraining from pursuing a request towards the Member that has undertaken autonomous liberalisation.

The modalities can provide a vehicle for pursuing further commitments. Many Members, developing countries in particular, have made considerable unilateral liberalisations yet made weak offers in the DDA. There is therefore plenty of autonomous liberalisation to negotiate about and if credit is given in the form of new commitments, new liberalisations can be the result. It could work both in a sectoral or a cross-sectoral approach.

Pro-competitive regulation

Improvements in market access may prove meaningless for both foreign suppliers and domestic consumers if the regulatory regime does not support competition. Competition issues are often dealt with in bilateral agreements, but has mostly been absent from the multilateral arena.⁴⁹

One important exception is the Reference Paper for basic telecommunications which was adopted in 1997. It is a compilation of regulatory “best practice” principles to which Members may commit in whole or in part. It does not affect liberalisation *per se*, but it aims to ensure fair competition and may therefore underpin and strengthen existing levels of liberalisation. It includes provisions on competitive safeguards against dominant suppliers, interconnection, universal service obligations, licensing criteria, independence of the regulatory authority from all market participants and allocation and use of scarce resources.⁵⁰

⁴⁸ “Modalities for the treatment of autonomous liberalisation”. Adopted by the Special Session of the Council for Trade in Services on 6 March 2003. TN/S/6.

⁴⁹ There are provisions relating to competition in several WTO agreements (e.g. article 40 TRIPS on control of anticompetitive practices), but work in the special working group on trade and competition was discontinued after the Cancun ministerial in 2003.

⁵⁰ The reference paper thus deals with the *content* of regulations, in contrast to the horizontal disciplines on domestic regulations being developed in the DDA, pursuant to article VI.4 GATS, which have a “good governance” or procedural focus.

The reference paper has overall been a success story. Adherence is voluntary but strongly encouraged and quite successfully so.⁵¹ The paper has helped several countries commit to and implement the principles.⁵² On a global level, adopting the paper is associated with significant price reductions for mobile and local fixed line telecommunications.⁵³

There are several other sectors where sound regulatory principles may improve the market access situation, perhaps especially in other network industries. Suggestions have been made in the WTO for reference papers for the postal and courier sectors⁵⁴ and the energy sector⁵⁵. Transport, port services, broadcasting and financial services are other possible contenders.⁵⁶

To examine the extent to which the provisions in the telecom paper would be relevant in other sectors WTO Members might undertake a “sectoral testing exercise”.⁵⁷ It should focus on which provisions could be generalised and what would need to be added. In areas where other international organisations have significant competence Members should explore whether a close and mutually advantageous relationship between the organisations might be established.⁵⁸

⁵¹ In 1997, 63 out of 69 Members taking commitments in basic telecommunications also adopted the reference paper. Five other Members followed, and every new country that has acceded to the WTO since 1997 has also adopted the paper.

⁵² Miroudot, Pinali and Saunter (2007) *op cit*.

⁵³ Alexander Keck & Calvin Djiofack-Zebaze (2006) “Telecommunications services in Africa: the impact of multilateral commitments and unilateral reform on sector performance and economic growth”. *WTO Staff Working Paper ERSD-2006-10*.

⁵⁴ Communication from the European Communities and their member states: “Postal/Courier: Proposal for a Reference Paper”. TN/S/W/26, 17 January 2005.

⁵⁵ Communication from the United States: “Energy services”. S/CSS/W/24 (2000); Communication from Japan: “Negotiation proposal on energy services”. S/CSS/W/42/Suppl.3 (2001); Communication from the European Communities and their member states: “GATS 2000: Energy services”. S/CSS/W/60 (2001).

⁵⁶ See discussion in Miroudot, Pinali and Saunter (2007) *op cit*.

⁵⁷ Such exercises were undertaken during the Uruguay round to test whether certain GATT principles worked in the context of GATS or needed to be changed or added to. Roseman (2003) *op cit*, p 103.

⁵⁸ This would be similar to what exists between the WTO SPS agreement and international organisations such as the Codex Alimentarius Commission. Rickard Janda (2003) “GATS regulatory disciplines meet global public goods: the case of transportation services” in Aaditya Mattoo & Pierre Sauvé (eds) *Domestic regulation and service trade liberalization*, The World Bank. Janda stresses that in developing rules for international transport, the WTO would have to work very closely with the International Civil Aviation Union and the International Maritime Organisation.

How to move forward

The different options discussed above could be conceived of either separately or together. It would be possible to e.g. have a sectoral approach which is either mandated in the ministerial conference or which utilises the modalities for autonomous liberalisation to bind and improve market access. In these discussions serious consideration should be given to whether new documents on regulatory principles might be developed. It will depend on the outcome of the Doha negotiations whether it is most important to focus on market access or on regulation.

An idea for the future: a new negotiation framework

A common denominator for the options above is that they more or less stay within the current negotiation framework. They do not require any changes in the GATS and are therefore relatively feasible.

A more radical suggestion to make negotiations more effective is to abandon the current method for something more formula-based that would make services more closely resemble other market access negotiations. Kox and Lejour⁵⁹ suggest that services could learn from the approach used in the agricultural negotiations where various forms of domestic support have been investigated and sorted into different “boxes” depending on how much they affect trade. Negotiations are then mainly aiming at reducing the worst forms of subsidies and countries have an incentive to revise their subsidies so they can be put into less trade-restrictive boxes.

As barriers to service trade also are non-tariff based, they argue that this approach could be imitated. Regulations affecting services could be classified into four different boxes depending on whether they are discriminatory, are aimed at addressing national market failures and whether such failures have international dimensions:

1. A “red box” with obvious and intentional trade restrictions, such as price differentiation between domestic and foreign suppliers. This would be a priority area in negotiations.
2. A “brown box” with measures intended to address domestic market failures,⁶⁰ but where their trade impact is unintentional and sometimes unnecessary. Discussions should focus on how to implement a principle of least trade-distortion.

⁵⁹ Henk Kox and Arjan Lejour: “A different approach to WTO negotiations in services”. *CPB discussion paper* no 36, July 2004.

⁶⁰ Here defined as measures intended to address asymmetric information, externalities and the existence of set-up costs on production.

3. A “blue box” with measures that regulate a market failure on the national level even though international regulations would be more efficient. Standards for accountants are a case in point. The importance of correct accountancy regulation applies to all countries, but the standards can also affect trade. Negotiations should aim at encouraging conformity with international standards, not develop new standards as there are better forums for that.⁶¹
4. A “green box” that would be non-negotiable – measures where any trade restriction is accepted because of underlying important national policy objectives.

With this approach, Members could focus negotiations on the box(es) where the biggest and most “unnecessary” impacts on trade are found.

The downside is of course that agreeing on completely new negotiating modalities would also take a lot of time and effort. Even more so since the proposal does not differentiate between regulation that today falls under the general obligations in article VI (non-discriminatory domestic regulation) vs. under the specific obligations in articles XVI and XVII (market access and national treatment limitations). These different regulations are negotiated in completely different ways today. The first step would have to be a thorough investigation of the different regulations in existence – something that by itself may be positive, as it is generally recognised that there is too little information on specific barriers to service trade. While interesting, the idea upsets too much of the current GATS architecture to be feasible in a shorter run. We therefore draw attention to it for further discussion and inspiration rather than as a proposal for the EU to pursue in the near future.

⁶¹ The obvious difficulty is that there are very few international standards in services.

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