

Preface: Object of the Book and Methodology

A. The importance of services and the relevance of studying their regulation

‘The Single Market has been, and remains, the cornerstone of Europe’s integration and sustainable growth. But this major European project requires renewed political determination so that it can fulfil all its potential.’¹ If the above statement, by the President of the EU Commission, holds true, then it is worth asking ‘what is there in the single market?’. The shortest answer to this question would be ‘services’.² Over 70 per cent of member states’ GDP comes from the provision of services.² About the same percentage accounts for the actual level of employment in services,³ while the numbers climb to over 95 per cent when it comes to the creation of new employment. What is more, the development of the service sector corresponds to a steady trend: ‘while in the manufacturing industry production rose at an annual rate of 0.3 per cent over the period 2000–2008, in services, the annual turnover growth rate varied from 1.7 per cent in “hotels and restaurants” to 6.7 per cent in “water transport”’.⁴

Any initiative to re-launch the single market, therefore, bears essentially on services. Such a re-launch seems all the more necessary in view of the fact that cross-border provision of services accounts for only 5 per cent of the EU’s GDP, compared with 17 per cent for manufactured goods traded within the single market.⁵ On a different measure, services account for only 24 per cent of total EU trade.⁶

¹ Mission letter from the President of the European Commission to Professor M. Monti, Pres (2009) D/2250, entrusting Professor M. Monti with the preparation of a Report on the future of the Single Market. The result of this was the Report, ‘A New Strategy for the Single Market’ (9 May 2010), available at <http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf> (last accessed on 17 November 2011).

² See eg Monteaudo, J., and Diexr, A., ‘Economic Performance and Competition in Services in the Euro Area: Policy Lessons in Times of Crisis’ European Economy Occasional Papers No. 53/2009, EU Commission/DG Economic and Financial Affairs, available at <http://ec.europa.eu/economy_finance/publications/publication15841_en.pdf>, at 22 (last accessed on 17 November 2011); as it shall be explained in ch 1, statistical data about services is highly contestable; therefore, on a different (slightly predated) count, services account only for 54 per cent of EU GDP and 67 per cent of employment. See also Communication COM (2004) 83 final, ‘Report on Competition in Professional Services’, at 6.

³ Ibid.

⁴ Ibid, at 10.

⁵ Communication COM (2010) 608 final, ‘Towards a Single Market Act: For a Highly Competitive Social Market Economy—50 Proposals for Improving Our Work, Business and Exchanges with One Another’, at 3–4.

⁶ House of Lords, Inquiry into Re-launching the Single Market—Written Evidence (22 October 2010), at 2, available at <<http://www.parliament.uk/documents/lords-committees/eu-sub-com-b/singlemarketinquiry/singlemarketwe221010.pdf>> (last accessed on 20 November 2011).

Therefore, to anyone wondering why the provision and trade of services matter for the EU, over 50 years after the foundations of the single market were laid by the Rome Treaty, the short answer would be ‘it’s the economy, Stupid’.⁷ However, as M. Monti observes, there is more than the economy: the integration project itself is at stake, since the single market represents its foundation.⁸

Nonetheless, both the economic and the integration objectives can be questioned today, since there is both an ‘integration fatigue’ and, especially since the 2008 crisis, a ‘market fatigue’, too.⁹ In addition, the financial crisis prompted the realization that the internal market, in general, and the market for services, in particular, may not be pursued on purely market terms. The issue of efficiently regulating the internal market once again became paramount. The more so, since the economic sector most severely hit by the crisis has been services.¹⁰ Turning this observation on its head, it has been observed that ‘improving the economic performance of services is not only important for long-term growth, but this is also essential in a period of economic crisis’.¹¹ This is so, for at least four reasons: a. since services account for an important share of household expenditure, lower prices of services help preserve the purchasing power of consumers and to cushion the impact of the crisis on the most vulnerable segment of the population; b. services contribute to a large extent to the adjustment capacity of the European economy because they have large interactions with manufacturing, as suppliers (utilities) or users (tourism) of intermediate inputs, and because they are a vector of technology diffusion (ICT services); c. as many services are labour intensive, well-functioning services can more easily absorb workers affected by restructuring; d. most reforms needed to improve the functioning of services’ markets do not involve an upfront budgetary cost.¹² Moreover, it is now sufficiently documented, on economic grounds, that the quality and content of regulation have a direct bearing on economic growth.¹³

Interest in the way the internal market is being regulated is not new; instead, it has been pervasive since the publication of the 1962 General Programmes.¹⁴ The 1985 White Paper on ‘Completing the Internal Market’¹⁵ initiated a sustained

⁷ James Carville, Bill Clinton’s political strategist in the 1992 election, placed a sign over his desk in the Little Rock headquarters: ‘It’s the economy, Stupid!’. For a campaigner fixed on a need for a central theme, the sign encapsulated a pointed response to the question ‘What is the campaign about?’.

⁸ Monti Report, 2010, n 1.

⁹ *Ibid.*

¹⁰ Monteagudo, J., and Diexr, A., 2009, n 2, at 6.

¹¹ *Ibid.*, at 7.

¹² *Ibid.*

¹³ See eg Blankart, C., Baake, P., and Jansen, C., ‘Growth and regulation’ in Galli, G., and Pelkmans, J. (eds), *Regulatory Reform and Competitiveness in Europe, 1: Horizontal Issues* (Cheltenham/Northampton: Edward Elgar Publishing, 2000) 40–80; and much earlier, Hindley, B., and Smith, A., ‘Comparative Advantage and Trade in Services’ (1984) 7 *The World Economy* 369–89; the latter authors, however, insist more on the role of regulation for the promotion of R&D and of innovation.

¹⁴ General Programmes for the suppression of restrictions to the freedom of establishment and free provision of services [1962] OJ 2/36 and 2/32, respectively.

¹⁵ White Paper COM (1985) 310 final, ‘Completing the Internal Market’.

reflection on the best way to regulate the internal market. This led to the successful achievement (overall) of the '1992' objective of a fully operational internal market. Thereafter, an important body of sector-specific hybrid and experimental regulation followed, aimed at adapting traditionally monopolistic network-based activities to the internal market requirements. The horizontal 1997 'Single Market Action Plan'¹⁶ and the 1999 'Financial Services Action Plan'¹⁷ were intended to give a fresh push to market integration. Then, a few months after the 2000 Lisbon summit had recognized the importance of services for the achievement of the set goals (a competitive market with high employment and sustainable environment-friendly development), the Commission put forward 'An Internal Market Strategy for Services',¹⁸ and two Communications on business-related and professional services,¹⁹ which were to set the scene for the first ever horizontal 'Services Directive'.²⁰ This has been the single most disputed text of secondary legislation ever to be adopted by the EU legislature and has been drastically amended during the negotiation process—the Parliament has proposed over 300 amendments to the text submitted to it by the Commission. In the form finally adopted, the Services Directive imposes a set of procedural rules (securing self-discipline and cooperation between national administrations), but very few, if any, substantive rules.²¹ This may explain the fact that, as the deadline for the Directive's implementation was expiring, the Commission tried to revitalize the internal market and commissioned the Monti Report.²² On the basis of this Report, the Commission published, on October 2010, its Communication 'Towards a Single Market Act', whereby it puts forward some 50 actions for the short and medium term, which could re-launch the European economy.²³

¹⁶ Commission Communication of 4 June 1997 Action plan for the single market CSE (97)1 final, available at <http://ec.europa.eu/internal_market/strategy/docs/plan_en.pdf> (last accessed on 17 November 2011).

¹⁷ Commission Communication of 11 May 1999, 'Implementing the Framework for Financial Markets: Action Plan COM(1999) 232 final'.

¹⁸ Communication COM (2000) 888 final, 'An Internal Market Strategy for Services'.

¹⁹ Communication COM (2003) 747 final, 'The Competitiveness of Business-Related Services and their Contribution to the Performance of European Enterprises', and Communication COM (2004) 83 final, 'Report on Competition in Professional Services', respectively.

²⁰ European Parliament and Council Directive 2006/123/EC on services in the internal market [2006] OJ L376/36.

²¹ See in more detail, the discussion in ch 6.

²² Monti Report, 2010, n 1.

²³ Communication COM (2010) 608 final, n 5. Following the suggestions made in the Monti Report, the Commission shifts back from the term 'internal market' to 'single market'; in this respect, Professor M. Monti thinks that 'From a conceptual and communication point of view, "single" seems more appropriate than "internal". Firstly, citizens of any EU country are likely to understand the term "internal market" as referring to their own domestic market, rather than the EU-wide market. Secondly, when used with non-European interlocutors, the expression European "internal market" may convey a flavour of closure, of "fortress Europe", that in general is far from reality and that it is not in the EU's interest to nurture. Thirdly, "single" is a more committing description. In fact, the market for any particular good or service within the EU is "internal" by definition, but requires actions by policy makers and market participants, if it is to be really "single", rather than fragmented' (Monti Report, 2010, n 1, at fn 1).

Among these proposals, an important proportion is vertical in nature and directly concerned with specific service activities (transport, e-commerce, business-related services, banking, etc), others touch in a horizontal way upon the way services are provided (posted workers, public procurement), while others affect the inputs used for service production (copyrights, standards, authentication, and network security). Moreover, the vast majority of the second half of the proposals, under the general title 'Restoring confidence by putting Europeans at the heart of the single market', concerns services almost exclusively. Out of the 50 proposals put forward by the Commission in its 2010 Communication, very few do not have a bearing, direct or indirect, on the provision of services.

In addition, the importance of services as the driving force of the internal market is being acknowledged by the Commission itself in its 'Europe 2020' Communication:

'The single market was conceived before the arrival of Internet, before information and communication technologies became the one of the main drivers of growth and before services became such a dominant part of the European economy. The emergence of new services (eg content and media, health, smart energy metering) shows huge potential, but Europe will only exploit this potential if it overcomes the fragmentation that currently blocks the flow of on-line content and access for consumers and companies.'²⁴

It is, therefore, no exaggeration to state that the recent upsurge for the internal market constitutes, in fact, an effort to complement and push further the substance-less Services Directive.

Indeed, since the Classic Community Method (CCM) has reached its limits in the field of services (through the issuance of the Services Directive) without delivering the desired outcomes, and given that the economic conjecture in Europe demands some coordinated action in order to foster production and competitiveness in the area of the EU's comparative advantage, namely the provision of services, the quest of alternative or complementary means of regulating services becomes paramount. The ambition of the present book is to contribute to this debate.

This objective becomes all the more intriguing, since a brief examination of the legislation enacted so far in the field of services shows that the EU has been extremely timid in the area, especially if compared with the field of goods. With the notable exception of the Services Directive, the EU has legislated on a sector-specific, often uncoordinated, sometimes even experimental manner, and has lacked a solid intellectual background of guiding principles, as well as of legislative techniques.²⁵

The legislative inertia has been compensated for, to a large extent, by the judiciary, who gradually developed a very important body of core principles. Indeed, there is no way one can study the rules applicable to the provision of

²⁴ Communication COM (2010) 2020, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth', at 20.

²⁵ See the overview of existing legislation provided in ch 6.

services in the EU without paying due attention to the judgments of the Court of Justice of the EU (CJEU). Contrary to what happens in most other areas of the law, where the legislature sets some basic principles to be subsequently interpreted/applied by the courts, in the field of services, it has been the Court that set the principles: the Posted Workers Directive, the Services Directive and the recent Patients' Rights Directive²⁶ all provide examples where the legislature has intervened *ex post* in order to consolidate, codify, rationalize, and, often, restrict the scope of principles and rules introduced by the Court.²⁷ Indeed, on some occasions, the Court has gone so far as to provoke hostile reactions, from both scholars and the general public.²⁸ It is submitted that the Court's well-intended activism in favour of the free movement of services has reached its limits and that any further step towards the more integrated and competitive market economy that the EU badly needs must now be made in a constitutionally more orderly way; concerns about legitimacy, coherence, and efficiency plead in favour of less casuistic and more coordinated forms of regulation. The relative failure of the CCM, witnessed by the complex and timid text of the Services Directive, calls for the study of alternative regulatory means and methods.

The timing of this book is also relevant. By virtue of the screening exercise orchestrated by the Services Directive, the member states have communicated to the Commission some thousands of measures which (may) obstruct trade in services. Going through all these measures will put the Commission, for the first time ever, in a position to grasp the regulatory needs and difficulties in this area of the law. Therefore, in the years to come the Commission is likely to put forward more and more focused regulatory proposals for the free provision of services; the Services Directive itself provides for fresh initiatives. In order for such initiatives to make sense, however, a thorough understanding of the legal position pertaining to services and of the various regulatory options available is crucial.

B. Structure of the book—methodology

In order to provide such an understanding, it is necessary first to establish the basic principles governing the provision of services within the EU, as they have been

²⁶ Proposal for a Directive COM (2008) 414 final, on the application of patients' rights in cross-border healthcare.

²⁷ European Parliament and Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1; European Parliament and Council Directive 2006/123/EC on services in the internal market [2006] OJ L376/36; Proposal for a Directive COM (2008) 414 final, n 26. For these, see the discussion in ch 6.

²⁸ See eg Scharpf, F., 'The Only Solution Is to Refuse to Comply with ECJ Rulings' (2009) 4:1 *Social Europe J* 16, also available at <<http://www.social-europe.eu/2009/04/interview-the-only-solution-is-to-refuse-to-comply-with-ecj-ruling>> (last accessed on 17 November 2011) calling for civil disobedience to the Court's case law, after the *Viking* and *Laval* judgments, for which see in ch 5 (Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767).

developed by the Court, then to look at the way in which these have been put to work by the legislature, and thereafter, to examine the extent to which alternative ways of regulation could be used to achieve comparable objectives.

More specifically, the structure of the present book develops as follows: Chapter 1 is intended to offer a basic literature review on the two overarching themes of the book, namely *services* and *regulation*. Chapter 2 delves into the legal definition of services under EU law, by examining the core question ‘what is in a market?’ and how the boundaries between market and non-market activities are drawn within the EU; by the same token, the concept of services of general (economic) interest is explored. Chapters 3 and 4 look into the concept of restrictions to the free provision of services and to justifications for such restrictions. Chapter 5 briefly examines the various areas ‘regulated’ through case law, while Chapter 6 looks on the manifestations of legislative initiative in the area of services. Chapter 7 explores how private regulation has been used for regulating services and examines the limitations thereof. Chapter 8 turns to non-regulatory means of regulating services, such as the Open Method of Coordination (OMC), the powers given to various EU agencies, to national regulatory authorities, and to networks thereof. Chapter 9 concludes with some speculative thoughts on the way ‘new governance’ could be effectively used in order to promote trade in services. Chapter 10 summarizes the previous chapters and gives an insight into future directions.

The approach followed is both positivist and normative. The author’s intention has been that these two aspects are present in every single chapter of the book: a description of the legal situation and of the relevant literature is, ideally, followed by normative thoughts on how things could be made to work. Moreover, the structure of the book is intended to convey a dynamic paradigm, since the first chapters are more positivist and oriented to past experience, while the later ones are more normative and provide an outlook on the future.

In the effort to build these two approaches, the analysis has ‘trespassed’ into sciences of which the author has much less mastery than of law: this applies to the use of basic statistics and to the extensive references to political and administrative science work. Both experiments have been extremely rewarding experiences to the author, and, hopefully, will not prove catastrophic for the relevant sciences nor for the readers.

The book’s venture into statistics has been prompted by the observation made above that, in the field of services more than in relation to any other EU fundamental freedom, the Court has played a major role in setting the applicable principles. The original idea has been that, if further regulation in the field of services is to be proposed, the wealth of the Court’s case law should be studied, not only in terms of the principles established, but also in terms of the areas of economic activity touched and of the kinds of restrictions identified. In other words, in order to single out the areas in which future regulation may be necessary and the kinds of restrictions it is to face, one needs to look into the experience so far. The Services Directive was intended to be a step in this direction; instead, the lack of a comprehensive quantitative study of the Court’s case law, the important exceptions and exclusions foreseen already in the draft Directive as put forward by Commissioner Bolkestein (the Bolkestein

draft) and, of course, the highly unsatisfactory text which ensued from the CCM decision-making process, underlined all more graphically the need for a fresh study of the relevant case law. With the above in mind, a quantitative study of the full body of cases concerning services was undertaken, covering the relevant case law since the beginning of the EEC in 1958;²⁹ the quantitative study covers the period to June 2009.³⁰ The study is intended to be as complete as possible; it does not purport, however, to be fully exhaustive, as many cases having some impact on trade in services primarily concern other areas of EU law (the other freedoms, citizenship, competition law, transport, flanking policies, etc) and are difficult to pick up in a comprehensive manner. Instead of proceeding in some requalification leading to yet another classification of existing case law, the collection of cases taken in the study is based on the classifications of the EUR-Lex database combined with those of the Court (interestingly the two do not fully correspond): all cases which appear under the category 'services' in the two EU databases have been included. The corpus has been further enriched, on the judgment of the author, with a few cases recorded under different headings which are, nonetheless, highly relevant to the area of services.

In the first count, the study covered only those cases in which the Treaty provisions on services are applied, alone or together with some rule of secondary legislation. Cases which exclusively concern the application of some Regulation, Directive, or Decision in the area of services have been left out. Both preliminary rulings (Article 267 TFEU) and proceedings against member states (Article 258 TFEU) have been included. A total of 283 cases have been recorded.³¹ These have been used in various classifications. It is worth noting that out of those cases, almost half (125) have been delivered by the Full Court or, after the entry into force of the Nice Treaty, the Grand Chamber of the Court of Justice, typically with the intervention of numerous member states.

While the quantitative study does not go beyond the end of June 2009, the law and corresponding bibliography in this book is up to date as of the end of December 2010.

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²⁹ Interestingly enough, though, the first services case only reached the Court in 1974 (Case 155/73 *Giuseppe Sacchi* [1974] ECR 409).

³⁰ This study would not have been possible without the precious help of Diane Grisel, a College of Europe alumna and PhD candidate at the University of Geneva. The relevant database has been developed jointly and has been fleshed out essentially by her relentless efforts. We are jointly responsible for any errors or misrepresentations made therein.

³¹ See Appendix, Case Law Processed in the Spreadsheet.

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