

STEFANO BATTINI – GIULIO VESPERINI
(EDITED BY)

*Global and European Constraints Upon
National Right to Regulate: the Services Sector*

Abstract

This volume brings together research aimed at shedding light on a general problem, by focusing specifically on the services sector. In the WTO system, the services sector is regulated by the General Agreement on Trade in Services (GATS); in the European system, it is regulated by a broad and complex body of rules, combining judge-made principles with those embodied in the secondary legislation, which codifies and applies these principles to different regulated sectors.

The general problem at the core of this study stems from the difficulty in striking a balance between two important needs. On the one hand, there is the need to recognise national authorities' right to autonomously regulate and govern in their own territory. On the other hand, there is the need to limit this power of autonomous regulation, mainly to protect the right of foreign economic operators to access the national market and function in conditions of equality with respect to all other operators.

This problem is addressed from the particular perspective of administrative law. The premise underlying the various contributions is that supranational (global and European) law constrains domestic regulation (and domestic administrations) largely through techniques and procedures drawn from administrative law. Sovereignty-limiting procedures developed by national legal systems in order to protect citizens have been readapted by supranational public powers to protect the rights of foreign economic operators and to realise the goal of market integration.

This administrative law perspective also gives shape to the structure of this volume, which is divided into three thematic areas. Each area corresponds to a category of constraints imposed by supranational administrative law upon States' right to regulate.

The first area is the law of administrative procedure: here, the supranational law regulates the national decision-making process, often through techniques and procedures that are inspired by, and then superimposed upon, national administrative procedure.

The second area is substantive administrative law, specifically the limits imposed by supranational administrative law upon the content of member States' regulatory decisions.

The third area regards the rules governing national public powers' transfer of their right to regulate, rather than the supranational check upon the exercise of this right. To further economic integration, supranational public powers may pressure States to transfer their power to regulate in their own territory in both a vertical and horizontal direction: vertically, to supranational institutions, through techniques of harmonisation; horizontally, to other States, through techniques of mutual recognition.

TABLE OF CONTENTS

STEFANO BATTINI – GIULIO VESPERINI, <i>Introduction</i>	1
BENEDETTO CIMINO, <i>Reasonableness, Impartiality, Objectiveness and Participation: the Gats standards</i>	10
GIULIANO FONDERICO, <i>Community standards of “Good administration” in the national regulation services</i>	40
MARIANGELA BENEDETTI – SABRINA QUINTILI, <i>Supranational Principles Governing National Authorities’ exercise of discretionary power</i>	77
SIMONA MORETTINI, <i>Community Principles affecting the exercise of discretionary power by National Authorities in the Service sector</i>	106
MAURIZIA DE BELLIS – ELISABETTA MORLINO, <i>Harmonisation and Mutual Recognition in the General Agreement on Trade in Services</i>	137
ALESSANDRO TONETTI, <i>Harmonisation and Equivalence in the European Services Regulation</i>	183

INTRODUCTION

STEFANO BATTINI AND GIULIO VESPERINI

SUMMARY: 1. Supranational limitations upon States' right to regulate: is there an administrative law of economic integration? - 2. Supranational procedural limitations: the principle of transparency - 3. Supranational substantive limitations: necessity, reasonableness and proportionality - 4. The transfer of the right to regulate: equivalence and harmonisation.

1. Supranational limitations upon States' right to regulate: is there an administrative law of economic integration?

The WTO and the European Union are public authorities empowered to integrate the national markets of their member States. Such integration inevitably creates a need to regulate the relationships between the different legal and administrative systems framing these national markets. The differences between national legal and administrative systems, and the protectionist behaviours that these differences sometimes conceal, can hinder integration. This motivates the search for international and supranational constraints upon national administrations and regulations.

This volume brings together research aimed at shedding light on a general problem, by focusing specifically on the services sector. In the WTO system, the services sector is regulated by the General Agreement on Trade in Services (GATS); in the European system, it is regulated by a broad and complex body of rules, combining judge-made principles with those embodied in the secondary legislation, which codifies and applies these principles to different regulated sectors.

The general problem at the core of this study stems from the difficulty in striking a balance between two important needs. On the one hand, there is the need to recognise national authorities' right to autonomously regulate and govern in their own territory. On the other hand, there is the need to limit this power of autonomous regulation, mainly to protect the right of foreign economic operators to access the national market and function in conditions of equality with respect to all other operators.

This problem is addressed from the particular perspective of administrative law. The premise underlying the various contributions is that supranational (global and European) law constrains domestic regulation (and domestic administrations) largely through techniques and procedures drawn from administrative law. Sovereignty-limiting procedures developed by national legal systems in order to protect citizens have been readapted by supranational public powers to protect the rights of foreign economic operators and to realise the goal of market integration.

This administrative law perspective also gives shape to the structure of this volume, which is divided into three thematic areas. Each area corresponds to a category of constraints imposed by supranational administrative law upon States' right to regulate.

The first area is the law of administrative procedure: here, the supranational law regulates the national decision-making process, often through techniques and procedures that are inspired by, and then superimposed upon, national administrative procedure.

The second area is substantive administrative law, specifically the limits imposed by supranational administrative law upon the content of member States' regulatory decisions.

The third area regards the rules governing national public powers' transfer of their right to regulate, rather than the supranational check upon the exercise of this right. To further economic integration, supranational public powers may pressure States to transfer their power to regulate in their own territory in both a vertical and horizontal direction: vertically, to supranational institutions, through techniques of harmonisation; horizontally, to other States, through techniques of mutual recognition.

Two contributions are dedicated to each of these three areas, which focus on the global and the European dimensions respectively. This study is structured to encourage a comparison between EU and WTO law, and to address the many interesting questions that this comparison raises. Most importantly, are there common principles and procedures? If so, might they be further extended and generalised to anchor a body of supranational law which constrains States in order to protect foreign economic operators and further the larger goal of market integration: in other words, is there an *administrative law of economic integration*? How does the supranational application of administrative law to States interact with and transform the more traditional national approach, whereby administrative law exclusively seeks to protect citizens? And more generally, how is the public, administrative law approach to the governing of international relations an important complement to traditional international law, insofar as it is based on private law concepts?

2. Supranational procedural limitations: the principle of transparency

A basic category of limitations upon States' right to regulate gravitates around the principle of transparency. This principle ought to be understood in its broadest sense, as ultimately coinciding with administrative procedural law taken as a whole. It includes, for example, due process principles of participation, duties to state reasons, and requirements of administrative simplification.

The principle of transparency was introduced into international trade law by Article X of the GATT, which strongly reflects the influence of American administrative law. Picking up on the American Administrative Procedure Act's distinction between rule-making and adjudication, Article X requires member States to publicise the measures of general application that affect international trade and administer them in a uniform, impartial and reasonable manner. These principles have been further extended by later agreements, like the GATS, as Benedetto Cimino explains in his contribution. With regard to rule-making, the duty to publicise measures of general application is extended in two ways. First, it comes to include duties

to notify the other member States, as well as duties to establish specific offices for providing information on the national law in force, both to other member States (enquiry points) as well as to private actors (contact points). Secondly, the duties of publication and communication come to overlap with participation, according to the logic of notice and comment, which is also drawn from American administrative law and recommended to the States, albeit with norms that do not have a fully binding character. Moreover, at the level of adjudication, the national administration is subjected not only to principles of reasonableness, objectivity and impartiality, but also to numerous, highly detailed rules, predominantly aimed at simplifying the authorisation procedures that condition the exercise of the free provision of services: these include a reduction in unnecessary administrative burdens and the certainty and the reasonableness of the time-limits for concluding the procedures.

To sum up, in addition to being subject to national procedural rules, national decisions affecting the free provision of services must also fulfil the requirements of a global law of administrative procedure. It is not easy to specify all of the implications of this phenomenon. Benedetto Cimino focuses on two in particular. The first is the virtuous cycle created by the interaction between national and global administrative law. The global law establishes a lowest common denominator of administrative protection to which national administrative laws must adapt; the internalisation of the global norms established to protect foreign operators incidentally benefits national operators as well. Thus, global administrative law can have the effect of raising the level of administrative protections recognised by States in relation to their own citizens. The second implication points in an opposite direction. By recognising foreign operators' (or the States that represent them) right to participate in national decision-making processes, national authorities (especially in less developed countries), expose themselves to the well-known risks of regulatory capture by foreign firms. This, argues Cimino, explains States' particular concern to avoid binding global norms requiring participation in rule-making procedures, as global administrative law could then pre-empt, or at least reduce, citizens' control over national institutions.

The body of Community principles addressed to national administrative proceedings in the area of services is very rich and articulated. Giuliano Fonderico argues that this can be roughly broken down into two structurally and functionally distinct bodies of law. The first one embodies the principles of "good administration" (such as transparency, the duty to state reasons, the right of defence and the predetermination of decision-making criteria), valid for all national proceedings for the regulation of services that may have prejudicial effects upon the full and effective enjoyment of Community freedoms, and especially upon the implementation of the principle of non-discrimination. These principles originate in the jurisprudence of the Court of Justice (which derives them from such basic Treaty principles as proportionality and non-discrimination), and are then further elaborated in the secondary legislation. In this way, Community law complements national administrative law in the area of services, but without

setting up a general model of administrative procedure to substitute the individual national systems. Rather, it is a body of procedural protections applied in the measure strictly necessary for the protection of the free movement of Community enterprises and citizens.

Fonderico then analyses a second series of cases, in which the national proceedings for the regulation of services do conform to Community norms. These are cases in which the Community law is more penetrating because it addresses the national rules that “can create undesirable effects upon the markets of other Community Member States”; the Community law targets highly integrated sectors (like communications, energy or technical rules), and its application is entrusted to common systems of sectoral administration. In these areas, Community law contributes an increased protection of the participatory rights of citizens and enterprises, as well as organisational and procedural circuits between national administrations and the Commission, and between the national administrations themselves. The regulation of national proceedings thus serves not only to protect the access of individual enterprises or individual Community citizens to the markets of other member States, but also to balance the different national interests, with each other and with the interests of the Community. And the procedural openings thus achieved “provide a space for sharing knowledge, preventing and addressing controversies in the exercise of national powers, and for the direct involvement of interested private actors.”

3. Supranational substantive limitations: necessity, reasonableness and proportionality

Other kinds of constraints upon States’ right to regulate have a substantive rather than procedural nature. These include the review of the correspondence of the national rules with the public end they ostensibly pursue, and which ought to justify any limitations upon operators’ freedom to provide services.

In the WTO system, this review takes the form of the “necessity test”: a national measure having a trade-restrictive effect is permitted only insofar as it is *necessary* to realise a legitimate objective. The GATS agreement, as illuminated by Mariangela Benedetti and Sabrina Quintili, provides for a two-part necessity test. First, there is a “more aggressive” necessity test, which addresses national measures that are discriminatory. Discriminatory measures are presumptively illegitimate, but this presumption may be overcome where the State can demonstrate that they are indispensable to realising a narrow array of public purposes specifically indicated in the agreement, such as public morals, public order, the protection of public health and the environment and privacy (Art. XIV, General Exceptions). There is also a second, more deferential test, which applies to measures that are not discriminatory, but still hinder or limit the free provision of services. These measures are presumptively legitimate, but other member States may challenge them for not being necessary to pursue a legitimate objective. Examples of such objectives can be seen in the non-exhaustive list

contained in the disciplines adopted by the *Working party on domestic regulation* in implementation of GATS Article VI.

Benedetti and Quintili examine these two versions of the necessity test, highlighting their structural differences through an analysis of their application by the WTO Dispute Settlement Bodies. The authors also highlight some features that are common to both necessity tests: not only do they both derive from a common origin, but their interaction also creates a tendency towards convergence.

It is from this perspective that Benedetti and Quintili consider the following, very interesting possibility. The subject-matter of WTO judicial review is progressively expanding to include even non-discriminatory national measures. Inevitably, it has become more deferential and respectful of national authorities' regulatory discretion. But this more deferential review is also being applied to discriminatory measures, which were previously subjected to a stricter scrutiny. The overall consequence is that national measures are now subject to a more uniform and more complex necessity test, independently of their discriminatory character. To evaluate the legitimacy of the measure, the judicial body is not limited to considering whether it is absolutely indispensable for the achievement of the public goal, but weighs and balances a broader range of factors: how important is the public interest to be pursued by the contested measure? How does the measure contribute to the realisation of the public goal? To what extent is the interest in the free provision of services compromised? Is there a reasonably available alternative measure capable of realising the same public goal in the same way? As we can see, the evolution of the WTO necessity test seems to signal a progressive approach towards the principle of proportionality, which is applied in Community law, thus supporting the argument that a common administrative law of economic integration is being formed.

Mariangela Benedetti and Sabrina Quintili's contribution gives us another interesting starting point for further reflection. The WTO judicial body assesses the importance of the public end pursued by the national regulator. It thus evaluates not only the congruence of the measure with respect to the purpose, but also the "worthiness" of the purpose itself. From this perspective, judicial review risks becoming more invasive, rather than more deferential, specifically with regard to non-discriminatory measures. If it is true that such measures can be justified by the pursuit of a legitimate objective (the list set forth in implementing the agreement is just illustrative), it is also true that the judicial body could develop a review of the legitimacy of the objectives themselves. On this point, however, we will have to await further jurisprudential developments.

The European law governing services also limits the discretion of national public authorities. The limitations regard both the administrative law and the administrative function of the member States; their sources are the jurisprudence and legislation (primary and secondary) of the European Union; they consist of general precepts whose application is subject to both the specification of *ex ante* standards and the *ex post* review of the action of public authorities and a case-by-case judgement on the worthiness (from the

Community perspective) of the balance between the various interests affected by the individual measure.

There are many ways in which the different components of this system hold together in a consistent way.

First of all, as Simona Morettini points out, since the 1990's, "in many sectors, directives have given normative form to principles articulated by the Court of Justice in relation to non-harmonised services".

Second and most importantly (because regarding both laws and the administrative power), the European law on the discretion of national public administrations presents some common characteristics: it targets national measures restricting the free circulation of services; national measures may derogate from European norms only if they respond to imperative needs of a general interest (specified in part by the Treaty, in part by the European courts) and respect the principle of proportionality; it is the courts' responsibility to check the observance of these conditions.

Thirdly, the European rules are addressed not only to member States' regulatory and administrative authorities, but also to their national courts. This is especially true when the exercise of an administrative power is under scrutiny. In accordance with the rules on preliminary reference, the Court of Justice tells national courts which principles to apply in resolving the cases before it and the criteria to follow in determining the proportionality of a legally-contested administrative measure.

Finally, Morettini analyses the interesting example of the Court of Justice's review of national authorisation regimes to illustrate its impact on the extension of national administrative discretion. In some cases, the Court sets forth the interests that, from the Community point of view, may legitimise a preventive authorisation regime. In these cases, the administration must give a primary importance to these interests in applying the legislation. In other cases, the Court provides an interpretation of the requirements to which authorisation is subject; to the explicit end of preventing the arbitrary exercise of administrative powers, the Court establishes the duty to set forth criteria which are objective, non-discriminatory, known in advance and the duty to conclude the proceeding within a reasonable time-limit; it requires the non-discriminatory application of the norms.

4. The transfer of the right to regulate: equivalence and harmonisation.

A third line of inquiry focuses on a different kind of limit, though it constrains domestic regulation for the same reasons as the others. It emerges out of cases in which national authorities are required to cede their right to regulate, letting in substantive rules created from the outside. This cessation may take place in a horizontal sense, in favour of other States, or in a vertical sense, in favour of supranational public powers.

The principle of harmonisation has a vertical character, in so far as it requires domestic regulation to converge towards the common standards set forth by international or supranational organisations. In the global arena, the WTO does not have regulatory powers. Thus it does not produce standards

directly. However, harmonisation is achieved through the technique of borrowing regimes: WTO rules refer to the standards set forth by other global standards setters and require the member States to respect them. But which global bodies may be subject to such reference? And what techniques does the WTO use to encourage States to comply with these global standards? These central questions in the area of harmonisation are the focus of the careful analysis of Maurizia De Bellis and Elisabetta Morlino, who examine not only the GATS discipline in force, but also the state of current negotiations. The authors shed special light on how member States tend to protect their right to regulate much more jealously in the service sector than in the goods sector. The principle of harmonisation thus appears to be weak in the services sector. In particular, while domestic measures consistent with international standards are presumptively legitimate for products (see the TBT and SPS agreements), the WTO does not accord the same presumption in the area of services. Here the discipline currently in force just says that the correspondence of national measures with international standards ought to be taken into account when applying the necessity test. De Bellis and Morlino explain the reasons behind this increased caution. In the services sector, global standards setters are numerous and diverse. They often have a limited membership, like the Basel Committee. They often do not provide for the effective participation of all the WTO members, especially the developing countries. This produces a resistance on the part of many States, which seem to be little inclined to shed their right to regulate and entrust it to bodies whose decision-making process they can barely affect. This also influences the content of some of the current proposals, which seem to associate more inclusive global standards setters (only those which formally and substantively guarantee an effective participation of all the members of the WTO) with more efficient harmonisation mechanisms (the presumption of the legitimacy of measures conforming to the standards).

The principle of equivalence, by contrast, functions in a horizontal direction, in requiring member States to transfer their right to regulate to other States, recognising that their rules are different from, but equivalent to, their own. Here too, De Bellis and Morlino's analysis reveals that the member States, while accepting WTO judicial review of the exercise of their right to regulate, are much less disposed to give up this right to foreign regulators. The weakness of the WTO equivalency principle is clear in comparison with the European one. There are three reasons for this. First, the recognition of foreign rules is optional, and States may basically take it or leave it. The States have in fact exercised this option with moderation, as illustrated by the authors' data on the mutual recognition agreements notified to the WTO. Secondly, recognition functions most of the time on a bilateral basis, rather than a multilateral one, even in departure from the most favored nation principle. Finally, most agreements do not provide for automatic and comprehensive recognition, but rather a blander kind of equivalence, which grants a "right to scrutinise" to the State called upon to introduce foreign rules into its own system.

The authors observe, however, the emergence of a new generation of mutual recognition agreements, which do reinforce the principle of

equivalence. These agreements introduce forms of automatic recognition, which exclude the States' right to scrutinise (thus reducing the administrative costs of this scrutiny): The authors argue that the presumption of non-conformity is no longer "implied by equivalence checks, but rather a presumption of equivalence with a possible check of non-conformity, which can be invoked only on the basis of evidence of substantial differences". These new kinds of mutual recognition agreements signal two further innovative tendencies. First, there is the tendency towards the privatisation of equivalence: States are increasingly entering into agreements with foreign professional organisations, recognising the validity of their norms. Second, there is a more cautious tendency towards the connection of harmonisation and equivalence: the presence of common standards becomes the premise and the basis for the mutual recognition of the norms that conform to them.

Something similar can also be seen in the European system. But here the conformation of the two principles of harmonisation and equivalence has different characteristics from those observed in the WTO.

Alessandro Tonetti examines two important and recent directives in the area of services, n. 2005/36 in the area of professional services and n. 2006/123 on services in the internal market.

The picture that emerges is the following. The harmonisation of the substantive disciplines covers a very limited area: only ten of the nearly eight hundred professions governed by the member States are subjected to this type of harmonisation norm, but even here the European law leaves significant margins of discretion to the States. Even less extensive is the area of substantive harmonisation in the rules governing services, being essentially limited to a series of consumer protection measures.

Instead, we see a peculiar relationship between harmonisation and equivalence. Tonetti's essay clearly illustrates the three constitutive elements. First of all, the harmonisation norms function as an accessory to the equivalence norms, to guarantee their correct operation.

Equivalence norms, in turn, essentially regulate the relationships between national administrations and the citizens (or enterprises) of other member States operating in their jurisdiction. In both of the directives taken into consideration, the administration, in the course of a special proceeding, must certify the equivalence between the norms of the origin and the host States and, in case of substantive discrepancies, can adopt compensatory measures, in respect of the principle of proportionality.

It is this specific characteristic of the principle of equivalence, finally, that explains the main characteristic of the harmonisation measures: they target national administrative proceedings and organisations. The procedural measures require States to introduce protections for the benefit of the interested party and to simplify administrative proceedings; the organisational measures require the States to identify the competent authorities and to institute contact points to provide information to interested actors; they also establish the forms of cooperation between the administrations of the different member States.

This has varied consequences, some common to those observed in the WTO discipline, others peculiar to European law. Above all, both the European and WTO systems manifest a limitation of States' right to regulate, effected by the "vertical" (in the case of equivalence) or the "horizontal" (in the case of harmonisation) substitution of national rules.

Secondly, the limitations upon the national discretion regard not only legislation, but also administration, as demonstrated by the prohibition upon national administrations in the host State from imposing the same administrative burdens already required by the origin State.

Finally, limitations on member States' right to regulate, which follow from both harmonisation and equivalence measures, make use of typically administrative law techniques and procedures: for example, they require the law-makers and administrators of member States to give reasons for their actions and to subject their decisions to the judgement of a foreign body, the Commission.

REASONABLENESS, IMPARTIALITY, OBJECTIVENESS AND PARTICIPATION: THE GATS STANDARDS

BENEDETTO CIMINO

SUMMARY: 1. Introduction - 2. Substantive and procedural protections- 2.1. Reasonableness - 2.2. Objectivity - 2.3. Impartiality - 3. Procedural protections: participation - 3.1. Participation in individual proceedings - 3.2. Participation in rule-making proceedings - 3.3. Reasons for the current lack of global norms for rule-making proceedings - 4. Conclusion

1. *Introduction*

Until the 1970's, the main barriers to global trade were national protective measures, such as tariffs, import quotas, export subsidies and State enterprises with a monopoly on transboundary trade. To overcome these restrictions, international trade law employed the classical tools of market liberalisation: the abolition of tariffs and other entry barriers (cross-border measures). The effectiveness of these tools can be measured quantitatively, on the basis of the tariff levels reached or the amount of quotas on importation reduced or eliminated: the Kennedy Round signals the apex of this approach, while also revealing its limits. New barriers are emerging. They consist of measures that are formally non-discriminatory and generally applicable to national and foreign products alike. They are barriers that function "geographically" within States and not at their borders, but are equally able to create trade distortions¹.

These measures do not have protectionist ends. On the contrary, they pursue objectives considered legitimate by supranational law itself. However, the exercise of the domestic regulatory power can be directed to illicit ends, giving rise to measures that are discriminatory in fact. Moreover, some internal measures can be objectively unnecessary, inadequate or disproportionate.

It is therefore necessary to perform a complex balancing of contrasting interests. On the one hand, there is market liberalisation: this interest is institutionally protected by supranational law, for the benefit of exporters and the national consumers that can enjoy greater competition (and thus lower prices, greater selection, etc.). Market liberalisation is realised mainly through a limitation of national governments' power and the recognition of greater private autonomy. On the other hand, there are all the non-economic interests that can be wrongly harmed by market liberalisation and deregulation (workers' rights, the struggle against fraud; health protection; prevention of unfair competition, etc.): global law recognises individual

¹ There are measures relating to the characteristics and qualities that a good or a service must have in order to be legally introduced into trade, such as the titles, requirements and education that service providers must have; these are measures of domestic regulation (so-called "behind-the-border or internal measures").

Member States' right to protect these interests, mainly for the benefit of their own citizens. They do this mainly through government regulation and oversight.

At the normative level, supranational law defines the goals of liberalisation, determines the policies that States can properly pursue and imposes external limits on the exercise of the national regulatory power. Within these limits, States get to establish the level of protection of their citizens' non-economic interests.² All administrative functions are exercised at the domestic level, on the model of indirect implementation.

National public powers thus become a part of the global regulatory system. This creates structural tensions. National powers are responsive to domestic constituencies, but they are required to pursue supranational or foreign interests as well. The extra-territorial efficacy of national decisions and the power to regulate foreign subjects raises new problems of legitimation³.

To confront this tension, supranational law looks to national administrative law⁴. It is not difficult to understand why.

² For a more searching analysis of the WTO rules on domestic regulation, see, *ex plurimis*: G. MORCEAU and J. TRACHTMAN, *TBT, SPS, and GATS: A Map of the WTO Law of Domestic Regulation*, in *Journal of World Trade*, 2001, p. 811 et seq.; P. SAUVÉ and A. MATTOO, *Domestic regulation and the GATS: untangling the issues*, in P. SAUVÉ (ed.), *Trade rules behind borders: essays on services, investment and the new trade agenda*, London, Cameron May, 2003, p. 113 et. Seq.; A. MATTOO and P. SAUVÉ (ed.), *Domestic Regulation and Service Trade Liberalization*, Washington, 2003; M. KRAJWESKI, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, The Hague, 2003; J.P. TRACHTMAN, *Negotiations on domestic regulation and trade in services (GATS Article VI): a legal analysis of selected current issues*, in E.-U. PETERSMANN (ed.), *Reforming the world trading system: legitimacy, efficiency and democratic governance*, Oxford, 2005, p. 205 et. seq.

³ See B. KINGSBURY, R.B. STEWART and N. KRISCH, *The Emergence of Global Administrative Law*, in 68 *Law and Contemporary Problems* 36 (2005): "the emerging global administrative law establishes checks for coordinated domestic administration, or, in the terminology introduced here, for the distributed element in global administration. In order to ensure that domestic regulators act as participants in the global regime rather than merely as national actors, intergovernmental agencies have promoted global norms to govern not only the substance of domestic regulation, but also the decisional procedures followed by domestic regulatory agencies when applying a global norm or when subject to its strictures. In effect, these procedural requirements place domestic regulatory bodies and officials in an additional role as agents of the relevant global regime and seek to make them in some way responsible for compliance with it. These requirements are designed to protect the interests of other states, individuals, and firms subject to regulation, as well as broader social and economic interests affected by the regime by providing them with procedural means to ensure the fidelity of domestic regulators to global administrative norms designed to protect their rights or concerns".

⁴ This analytical framework is developed in studies on global administrative law. In general, see B. KINGSBURY, R.B. STEWART and N. KRISCH, *The Emergence of Global Administrative Law*, cit.; S. CASSESE, *Il diritto amministrativo globale: una introduzione*, in *Riv. trim. dir. pubbl.*, 2005, p. 331 et. seq.; Id., *Global Standards for National Administrative Procedure*, in 68 *Law and Contemporary Problems* 109 (2005); L. CASINI, *Diritto amministrativo globale*, in *Dizionario di diritto pubblico*, Milano, 2006, *ad vocem*; J.-B. AUBY, *La globalisation, le droit, l'Etat*, Paris, 2003; S. BATTINI, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, 2003; ID., *L'impatto*

Administrative law exists to check an essentially non-representative power and to bind it to the pursuit of specific ends. It thus requires public authorities to give reasons for their decisions, it subjects their decisions to judicial review and grants participatory rights to private actors.

International trade law, having parallel purposes, makes use of similar legal tools. But the transplantation of national norms and principles to the supranational sphere is not completely linear. The global adoption of traditionally national legal tools implies their partial metamorphosis, for at least five different reasons.

First of all, national and international law seek to protect different interests. National administrative law procedures aim to defend individuals – whatever their interest, as long as it is legitimate – in their relations with the government. International trade law uses the same tools to defend a more specific category of private interests and actors: foreign importers of goods and services.

Second, different institutions come into play in the national and international contexts. In a purely national setting, individuals have two tools for checking government power, one direct and procedural, the other indirect and political, operating through parliamentary representation and democracy. In the global setting, individuals have only the procedural tool at their disposal.

Third, the structure of regulation is different at the national and supranational levels. Supranational law does not aim to create a general procedural model to replace corresponding national models, but rather just a body of protections that can be applied as necessary to economic integration.

Fourth, the relationships are more complicated at the international level. National administrative laws do of course deal with complex multi-polar relationships that go beyond the simple bilateral contraposition between the government and private actors. But this complexity multiplies in the global context.

Finally, the transplantation of national administrative law does not take place in a homogenous way. It is more rooted in some sectors than in others. Particular tools and institutions are preferred over others.

A useful area in which to analyse this perspective is the multilateral regime for the liberalisation of trade in services. As the European Commission recently stressed: “Services are much more prone to Internal Market barriers than goods and are harder hit. Because of the complex and intangible nature of services and the importance of the know-how and the qualifications of the service provider, the provision of services is often subject to much more complex rules covering the entire service activity than

della globalizzazione sulla pubblica amministrazione e sul diritto amministrativo: quattro percorsi, in *Giorn. dir. amm.*, 2006, p. 339; see also “*The Emergence of Global Administrative Law*”, 68 *Law and Contemporary Problems* (2005); the *European Journal of International Law*, 2006, vol. 16, n. 1; and 37 *New York University Journal of International Law and Politics* 4 (2005); finally, see the papers published by the Institute for International Law and Justice, New York University, at www.iilj.org.

is the case for goods”.⁵ This regulation affects not only a commercial good as such, but also a whole process for the provision of a service, the different ways in which it can be marketed and the service provider’s characteristics. As a result, the global rules in this area are particularly penetrating and affect many aspects of national regulation.

This study will examine the rules applicable to administrative procedure, rather than the substantive content of national regulatory measures. I will thus focus on the supranational requirements regarding the phases that precede the adoption of a measure of general application (the rule-making process); and the requirements affecting the application of national measures (duties to provide reasons for decisions and to guarantee participation in adjudication proceedings).

The focus of this analysis will be the domestic regulation norms expressly set forth in Article VI of the General Agreement on Trade in Services; the secondary norms contained in the Disciplines on Domestic Regulation in Accountancy Sector⁶ and in the Reference Paper on Telecommunications⁷; the proposals for new disciplines introduced before the Working Party on Domestic Regulation, a subsidiary body of the WTO established by the Council for Trade in Services in order to negotiate new obligations to be submitted to the approval of the Member States⁸. I will make particular reference to the Consolidated Working Paper, issued in

⁵ European Commission, *The State of the Internal Market for Services*, Report to the Council and the European Parliament, COM(2002) 441 def., Brussels, 30 July 2002, 6 ff.

⁶ See WTO, WPPS, *Report to the council for trade in services on the development of disciplines on domestic regulation in the Accountancy sector*, S/WPPS/4, 10 December 1998, and WTO, CTS, *Decision on Disciplines Relating to the Accountancy Sector*, S/L/63, 15 December 1998.

⁷ The Reference Paper was drafted by the Negotiating Group on Basic Telecommunication, a body established by the Decision on Basic Telecommunications to promote the liberalisation of the telecommunications sector, given the weakness of disciplines provided by the GATS. The document does not have autonomously binding effects, but the States may include it in their own additional commitments, i.e. commitments that the Members, based on Art. XVIII of the GATS, may take on to promote the liberalisation of their markets. The Reference Paper has been adopted by more than 60 member States so far.

⁸ Article VI:4 of the GATS mandates the Council for Trade in Services to enact the disciplines “with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services”. To this end, in 1995, the CTS established a Working Party on Professional Services, “to examine and report, with recommendations, on the disciplines necessary to ensure that measures ... in the field of professional services do not constitute unnecessary barriers to trade” (WTO, CTS, *Decision on Professional Services*, Adopted by the Council for Trade in Services on 1 March 1995, S/L/3, 4 April 1995). In 1998, CTS gave binding force to the Disciplines on Domestic regulation in Accountancy sector, which had been drafted by the Working Party. The WPPS was replaced by the new Working Party on Domestic Regulation, and given the task of developing all the relevant disciplines *ex art.* VI:4 GATS (WTO, CTS, *Decision on Domestic Regulation*, S/L/70, 2 April 1999). For a thorough analysis of these issues, see L.S. TERRY, *GATS Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, *Vanderbilt Journal of Transnational Law*, 2001, 989.

2006 by the WPDR Chairman, which brings together the various proposals put forward by the national delegations⁹.

The normative material will be examined in light of the following principles: reasonableness, objectivity, impartiality and participation in adjudication and rule making procedures; for each principle, I will demonstrate how the global transplantation of national rules has affected their scope and purpose.

2. Substantive and procedural protections

2.1. Reasonableness

The principle of reasonableness, in both common law and in *droit administratif* legal systems, emerges as an instrument for checking the discretionary power of administrative authorities.¹⁰ It is meant, above all, as a prohibition upon arbitrary, irrational or patently unfair decisions, “so absurd that no sensible person could ever dream that it lay within the powers of the authority”,¹¹ as in the so-called “Wednesbury unreasonableness”¹² of British law, or the French doctrine of *erreur manifeste d’appréciation*¹³.

The principle of reasonableness also comprehends the various forms of the illegitimacy of an act of state due to the abuse of power. From this standpoint, it becomes the *summa* of the “categories of reasonableness” under English law, or of the “excess of power” under Italian law¹⁴.

Reasonableness, finally, has the more specific meaning of the determination of discretion in its *proprium*, as a balancing of conflicting interests. The principle of reasonableness thus opens the courthouse doors to the review of administrative action as an activity functionally directed towards the pursuit of the primary public interest through the least possible sacrifice of the relevant secondary interests. The German experience, which has inspired the jurisprudence of the European Union and its Member States¹⁵, translates this approach as *Verhältnismäßigkeitsprinzip*, the duty to

⁹ WTO, WORKING PARTY ON DOMESTIC REGULATION, *Disciplines on Domestic Regulation pursuant to GATS Article VI:4. Consolidated Working Paper*, Note by the Chairman, JOB(06)/225, July 2006.

¹⁰ A. SANDULLI, *Il procedimento*, in S. Cassese (ed.) *Trattato di diritto amministrativo*, Milano, 2003, p. 1064 et. seq.

¹¹ LORD GREEN MG, in the *Tameside Case* [1977] AC at 1026.

¹² See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at 229.

¹³ *Conseil d’État*, 15 février 1961, *Arrêt Lagrange*.

¹⁴ G. PERICU, *Attività amministrativa*, in L. MAZZAROLLI et. al. (ed.), *Diritto amministrativo*, III ed., Bologna, 2001, p. 1251; H.W.R. WADE and C.F. FORSYTH, *Administrative Law*, VIII ed., 2000, Oxford, at p. 385 et. seq.

¹⁵ On the proportionality principle in European jurisprudence, see Judgment of the European Court of Justice, 29 November 1956, in Case 8/55, *Fédération charbonnière de Belgique*; 14 December 1962, joined cases 5-11, 13-15/62, *Società acciaierie San Michele*; on this topic, see also E. ELLIS (ed), *The Principle of Proportionality in the Laws of Europe*, Oxford, 1999, p. 66; F. ORTINO, *Basic Legal Instruments for the Liberalisation of Trade*, cit., p. 402 ff.; G. BEMANN, *Proportionality and Subsidiarity*, in C. BARNARD and J. SCOTT (ed.), *The Law of the Single Market: Unpacking the Premises*, Oxford, 2002, p. 75 et. seq. On the proportionality principle in European countries, see, in particular, the “bilan

adopt measures which are proportionate, to be evaluated by means of a two-fold analysis of the measure's suitability in pursuing the predetermined objective and the lack of less harmful alternatives (necessity).

In the GATS context, the principle of reasonableness is formally embodied in Article VI:1 (each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable ... manner) and is widely invoked by the jurisprudence and implemented in secondary norms. First of all, reasonableness has directly implied a procedural protection, consisting in the duty to give reasons. This approach can be seen in certain provisions of the Accountancy Disciplines¹⁶ and in the Reference Paper on Telecommunications¹⁷. Secondly, it is understood as the duty of thoroughness in processing the application, particularly in reference to the full understanding of the relevant facts. Moreover, reasonableness is invoked to require the government to provide a case-by-case analysis, explicating the decision's coherence with the facts established by the investigation as well as to allow a margin of flexibility in evaluating the most opportune solution in light of the concrete circumstances¹⁸.

At first glance, the transplantation of reasonableness to the global level seems to proceed in a linear way. Looking more closely, however, this linear picture dissolves. The GATS review of reasonableness addresses

coût-avantage" in French jurisprudence, starting with the decision of the *Conseil d'État*, 28 mai 1971, *Arrêt Ville Nouvelle Est*.

¹⁶ See art. IX:4, Disciplines on domestic regulation in the accountancy sector: "On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application".

¹⁷ See *Reference paper on Telecommunications*, art. 4, paragraph 2: "[t]he reasons for the denial of a licence will be made known to the applicant upon request".

¹⁸ WTO, PANEL REPORT, *Mexico – Measures Affecting Telecommunications Services (Mexico – Telecommunications)*, WT/DS204/R, 2 April 2004, paragraph 7.328: "The dictionary meaning of the word 'reasonable' means 'being in accordance with reason', 'not extreme or excessive'. The word 'reasonable' implies a degree of flexibility that involves consideration of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. The elements of 'balance' and 'flexibility', as well as the need for a 'case-by-case analysis', are inherent in the notion of reasonable". In this case, the panel applies the jurisprudence of APPELLATE BODY REPORT, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (hereafter *US – Hot-Rolled Steel*), WT/DS184/AB/R 24 July 2001, paragraph 84-85, "in sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case". Although the Appellate Body was interpreting a "reasonable" period of time in the context of a different WTO Agreement, we consider that the same basic elements of the word "reasonable" also apply in the present context. Our interpretation of these provisions raises a further interpretive question, namely the meaning of a "reasonable period" under Article 6.8 of the Anti-Dumping Agreement and a "reasonable time" under paragraph 1 of Annex II. The word "reasonable" implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is "reasonable" in one set of circumstances may prove to be less than "reasonable" in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the Anti-Dumping Agreement, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation".

national experiences only in their *modus operandi*, their technique for balancing the interests. But more importantly, it changes the hierarchy of relevant interests. To comprehend the real content of the principle of reasonableness in the global context we can take three examples.

Article XVI prohibits “planning licensing.” In contrast to authorisation requirements for the purposes of oversight¹⁹, which provide for a qualitative examination of the service provider’s abilities, planning licensing subjects the provision of a given service to quantitative limits and constitutes a *de facto* numerical limitation. Market access is thus subjected to an evaluation of the congruity of the supply of a service existing at a particular moment and the demand for it.

In WTO terminology, this has to do with an economic needs test (ENT), “measures based on criteria the fulfillment of which is beyond the control of the affected service supplier”²⁰. The GATS regards ENTs as “market access restrictions”, which are illicit as such in all of the sectors for which the States have undertaken market-access commitments without opposing *ad hoc* reservations²¹.

This qualification radically affects national administrations’ discretion. In balancing the interests involved in an authorisation procedure, they cannot completely sacrifice the interest of the professionally or commercially capable service supplier. The service provider may be subjected to stringent evaluations of competence, ethics, financial stability, etc., but cannot be subjected to a comparative evaluation against other aspirants. The outcome of the reasonableness evaluation is in part predetermined by the

¹⁹ For this distinction, see M.S. GIANNINI, *Diritto amministrativo*, Milano, 1993, II, p. 615, and A. SANDULLI, *Il procedimento*, cit., p. 1273.

²⁰ WTO, CTS, *Economic Needs Tests*. Note by the Secretariat, S/CSS/W/118, 30 novembre 2001. See also the definition provided by the Oecd: “an ENT can generally be characterized as a provision in national regulations, legislation or administrative guidelines imposing a test which has the effect of restricting the entry of service suppliers, based on an assessment of “needs” in the domestic market. Such measures may operate to restrict access for both foreign and domestic suppliers to a market” (OECD, WORKING PARTY ON TRADE COMMITTEE, *Assessing Barriers to Trade in Service. The Scheduling of Economic Needs Test in the Gats: an Overview*, TD/TCWP(2000)11/F); and by WTO, CTS, *Economic Needs Test. Communication from Mercosur*, S/CSS/W/139, 20 marzo 2002: “ENTs in the GATS: these measures can generally be considered as a quantitative restriction to foreign services and services suppliers on the basis of the extent of existing local suppliers in the domestic market”.

²¹ Based on art. XIX et. seq. of the GATS, Member States should define, through negotiations, their intended commitments to the progressive removal of market access restrictions (*ex art. XVI*) and they must grant foreign services and service suppliers a treatment no less favourable than that accorded to their own like services and service suppliers (*ex art. XVII*). This regulatory flexibility is further increased by the possibility of including some limitations to the commitments undertaken by means of an *ad hoc* procedure: the States may include the restrictive measures that they reserve the right to apply in their Schedules of Specific Commitments. For a full understanding of this mechanism see, in particular, WTO, GROUP OF NEGOTIATIONS ON SERVICES, *Scheduling of initial commitments in Trade in Services*. Explanatory note, MTN.GNS/W/164, 3 September 1993; ID., *Scheduling of initial commitments in Trade in Services*, Explanatory Note, *Addendum*, MTN.GNS/W/164/Add.1, 30 November 1993. See also, M. KRAJESKI, *National Regulation and Trade Liberalization*, cit., at 75 et. seq., and L. ALTINGER and A. ENDERS, *The Scope and Depth of GATS Commitments*, 19 *World Economy* 312 (1996).

supranational law, which defines the admissible level of the compression of the private interest beyond that provided by national laws.

A second example can be drawn from the extension of the duty to give reasons, meant as a procedural rule requiring that the reasons underlying a decision be made explicit. The duty to give reasons is familiar in both national and global procedural law, but the scope of its application and its purposes differ significantly from one context to the other.

In adjudication proceedings, national laws (with important differences between one legal system and another) impose relatively broad duties to give reasons. In Italy, this affects every individual proceeding, including agencies' non-discretionary decisions. In Spain, this duty is triggered by negative decisions, decisions which depart from precedent or from the opinions set forth in the course of the procedure and acts implying a wide discretion. In Germany, even favourable decisions need to be motivated, when they adversely affect the rights of third parties, but non-discretionary decisions do not. The principle thus aims to protect the interests of both the individuals directly addressed by the provision and third parties, especially in the face of widely discretionary choices. Moreover, it enables the decentralised review of the legitimacy of administrative action. In rule-making proceedings, by contrast, at least in civil law systems, the opposing principle holds: there is no duty to give reasons, unless individual laws provide otherwise²².

In the global context, the duty to give reason is, in a sense, more limited. In individual proceedings, it applies only to negative decisions. Moreover, only the applicant has the right to ask for the reasons for which his application has been rejected (art. VI:3 GATS); at the same time, this duty is more extensive in rule-making administrative proceedings whose outcomes may have restrictive effects upon trade: "Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures ... in relation to legitimate objectives" (Accountancy disciplines, III:5).

There is a reason for the different approach. The WTO duty to give reasons aims solely at the protection of the Member States and foreign service providers. As a result, other interested parties (national competitors, citizens, etc.) are not considered to be directly relevant and their protection is left to the States. Moreover, States cannot avoid this obligation by opting for rule-making procedures.

A third example comes from the use of the term reason and its variants in the secondary law. It is used eight times in the Accountancy disciplines, and twenty times in the Consolidated Working Paper.

In more than half the cases, it refers to the procedural duties falling upon the applicant or to the time limits of the procedure and thus becomes a tool in the review of long, complicated and burdensome procedures.

²² For the Spanish law, see Ley 30/1992, de 26 de noviembre de *Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, art. 54; for the Italian law, see l. 7 August 1990, n. 241, art. 3; in Germany, *Verwaltungsverfahrensgesetz*, § 39. For a comparative analysis, see, in particular, S. BATTINI, *L'obbligo di motivazione*, in G. NAPOLITANO (ed.), *Diritto amministrativo comparato*, Milano, 2007.

The test of reasonableness (or proportionality) is used as a simplification technique²³. Substantively, this implies a further prioritisation of the relevant interests in national proceedings. The interest in a swift conclusion to the authorisation procedure is given priority over the adequate representation of third-party interests.

2.2. Objectivity

The WTO principle of objectivity has two meanings. The first and more general one implies the duty to evaluate on the basis of criteria that are concrete, non-subjective and open to unanimous agreement²⁴.

The second and more narrow meaning of objectivity is the requirement that decisions be based upon predetermined criteria, thus rendering government action more predictable. A clear link between objectivity, predetermination and transparency can be seen in the Accountancy Disciplines: “[l]icensing procedures (...) shall be pre-established, publicly available and objective”²⁵. The norms are fully adjudicable. There are precedents in the WTO jurisprudence of the censure of overly “casual” national procedures for their unpredictable outcomes²⁶.

The problem of limiting administrative discretion is addressed by many national laws,²⁷ but rarely assumes such a central importance.²⁸ English law

²³ This approach emerges in some decisions of the European Court of Justice. The Court of Justice, indeed, applies the proportionality principle to administrative burdens and procedures as well as to substantive barriers to free circulation. Consequently, the Court examines whether administrative burdens and procedures are structured so as to minimise their trade restrictiveness and are not more burdensome than necessary to pursue imperative goals. In particular, the Court has affirmed that the proportionality principle requires that economic operators should be able to obtain the permits required by domestic law, “under a procedure easily accessible” and within a reasonable time.

²⁴ Objectiveness is used as tool to guide the rule of reason test: art. VI:4 GATS, in particular, clarifies that the *requirements* provided by domestic regulation must be “based on objective ...criteria, such as competence and the ability to supply the service”. Other WTO agreements go further: in the SPS, the objectiveness principle requires domestic agencies to respect the scientific evidence (see, SPS agreement, art. 5, Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection).

²⁵ This duty has a horizontal dimension in the *Consolidated Working Paper*, § G.1.

²⁶ WTO, APPELLATE BODY REPORT, *United States – Import of certain Shrimp and Shrimp Product*, WT/DS58/AB/R, 12 October 1998, paragraph 180.

²⁷ In Italian law, see A. POLICE, *La predeterminazione delle decisioni amministrative. Gradualità e trasparenza nell’esercizio del potere discrezionale*, Napoli, 1997; P. VIRGA, *Eccesso di potere per mancata prefissione dei parametri di riferimento*, in *Scritti in onore di Massimo Severo Giannini*, I, Milano, 1988, p. 587 et. seq.

²⁸ An exception is US law. In this context, the issue is strictly tied to the constitutional principle of the separation of powers, according to the non-delegation doctrine. Initially conceived as formal prohibition upon the Congress from delegating a wide discretion to administrative agencies, the doctrine has been subsequently reinterpreted as a substantial safeguard “to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power” (K. DAVIS, *Administrative Law Treatise*, II ed, 1978, 208 et. seq.). The courts have begun to impose a prior limitation upon administrative agencies of their own discretionary powers, by way of an adequate *rule making* procedure, to reduce the risk of partiality and arbitrariness in adjudication procedures: see the two fundamental decisions, 326 F.2d 605 (5th Cir. 1964), *Hornsby v. Allen*, e 398 F.2d 262 (2d Cir. 1968), and *Holmes v. New York City Housing Authority*. On this issue, see also

denies that a wide discretionary power is *per se* incompatible with the rule of law, as long as it is not unfettered discretion²⁹. This approach is paralleled in Continental legal systems as well. In Italy, for example, the duty to predetermine the criteria for administrative decisions emerges only in the 1990's, and is limited to particular areas of administrative activity, like giving economic advantages (contributions, subsidies, financial aids) or awarding public contracts or, in general, in cases of comparative evaluation³⁰.

From the national perspective, the exercise of a wide discretionary power, being subject to ministerial directive and parliamentary oversight, can be legitimised by the proper functioning of the so-called democratic circuit. Only where the need of impartiality is great, because scarce resources must be allocated between multiple applicants, are predetermined internal limitations required.

The transnational perspective, however, stands the national one on its head. While the procedural control upon administrative action is accompanied and reinforced by democratic controls for citizens, it stands alone in protecting foreign economic operators. In other words, the extra-territorial effect of national administrative decisions regarding actors who do not make up a constituency in national representative bodies creates an intense need (unknown in national constitutional and administrative law) for their external legitimation.

Secondly, foreign firms are vulnerable to unfavourable treatment by national authorities, sensitive to the protectionist pressures from national groups. This increases the risk that decisions affecting foreign firms will not be totally impartial. This risk extends to every sector and area of administrative activity.

Owing to these two factors, the supranational law is particularly suspicious of administrative discretion and thus seeks techniques for reviewing and monitoring its exercise. It is no coincidence that the predictability of administrative action is a very important issue in European law, which links it back to the principles of proportionality and equality. See, in particular, the recent Directive on services, art. 10 (Conditions for the granting of authorisation): "Authorisation schemes shall be based on

SHAPIRO, *The choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 *Harv. Law Rev.* 921 (1965) and R. B. STEWART, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667 (1974-5).

²⁹ In the past, some scholars contested the legitimacy of wide discretionary powers (e.g., see A.V. DICEY, *Law and constitution*, 1885, IX ed. London, 1950, 202). Modern scholars, however, uphold a different point of view (H.W.R. WADE and C.F. FORSYTH, *Administrative Law*, cit., 345 et. seq.).

³⁰ See, in particular, art. 12, l. n. 241/1990. Some scholars maintain that in presence of "a disproportionate relationship between available means and objectives and when it is impossible to satisfy the requests of all applicants ... the predetermination of criteria is mandatory, on pain of the illegitimacy of the decision because of an excess of power" (P. VIRGA, *Eccesso di potere per mancata prefissione dei parametri di riferimento*, in *Scritti in onore di Massimo Severo Giannini*, I, Milano, 1988, p. 587 et. seq.). However, realistically, this duty is not a general principle, but is enforceable only when provided by law (A. Sandulli, *Il procedimento*, cit., p. 970 et. seq.). For a list of relevant norms, A. POLICE, *La predeterminazione*, cit., p. 173 et. seq.).

criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner”³¹.

All of the WTO agreements demonstrate a clear preference for binding or semi-binding adjudication procedures. This topic assumes great importance in those areas in which public authorities (for objective or for policy reasons) were granted wide margins of appreciation³².

Given the wide discretion in the national authorisation of specific commercial activities, the development of the new disciplines in the services sector, which would guarantee objectivity and predetermined licensing criteria, is a central mandate of the Council for Trade in Services. The Consolidated Working Paper, in particular, sets forth detailed rules for the various procedures, linking them to duties of prior publication³³.

This issue could assume its greatest importance in the face of competitive licensing procedures, as in the allocation of scarce resources or when States reserve the right to limit the provision of a service for general interest purposes, as in the presence of an Economic Needs Test.

³¹ Directive 2006/123/CE of the European Parliament and the Council, on Services in the Internal Market, 12 December 2006.

³² WTO, WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY, *The Fundamental WTO Principles of National Treatment, Most-Favoured Nation and Transparency*, Background Note by the Secretariat WT/WGTCP/W/114, 14 April 1999: “[w]hile, as stated above, publication and administration provisions serve to foster a rules-based approach to trade policy, the function of transparency obligations is perhaps relatively most important in areas where the role of WTO rules of general application is limited. One such case concerns areas where the scope for discretionary government measures is large, either because of their actual or potential direct control over specific economic transactions affecting trade, such as in the areas of government procurement and state trading, or because national laws of general application allow for considerable executive discretion in establishing trade measures. An example of this is the area of import licensing, in particular that of a discretionary nature, which is the focus of the WTO Agreement on Importing Licensing Procedures. This has, as one of its principal aims, to ensure that import licensing, particularly non-automatic import licensing, is implemented in a transparent and predictable manner”.

³³ Consolidated Working paper, E.3; see also *Reference Paper on Telecommunication*, art. 6, Allocation and use of scarce resources: “Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner”; Accountancy Disciplines, art. III, Licensing Requirement: “Licensing requirements shall be pre-established, publicly available and objective” (and identically, art. IV Licensing procedures); EU - Disciplines on Licensing Procedures, art. 1 .1. and 1.2. Proposals and guidelines to favor the compliance with this provision are developed in the documents of other international organizations: see OECD, *Trade Facilitation Principles in GATT Article V, VIII and X: Reflections on Implementation Approach*, TD/TC/WP(2003)12/FINAL, 2 June 2003, *passim*, and notably, § B, Predictability mechanisms; likewise, some scholars have tried to define in depth the substantive content of the duties assumed by the Member States: see ALLEN, ROBERT STUMBERG, *Memorandum for the Intergovernmental Policy Advisory Committee - Harrison Institute for Public Law, Georgetown University Law Centre, GATS proposal that domestic regulations must be “objective”*, 1 March 2007 – Draft “6” for circulation, who suggest five likely meanings of the term “objective (a) not arbitrary; b) not biased; c) relevant to the ability to perform or supply the service; d) not subjective; e) the least-trade-restrictive alternative”) and analyze their impact on the Member States’ right to regulate.

2.3. Impartiality

Intuitively, the impartiality of administrative action assumes a particular importance in the global context. The invocation of this principle, in GATS art. VI:1, signals a leap with respect to the classical legal categories of international trade law; these classical categories are rooted in the more general prohibition of discrimination, based on the two traditional formulas of “most favoured nation treatment”³⁴ and “national treatment”³⁵.

Impartiality is a *quid pluris*, focused on the treatment given by the authorities to individuals as such³⁶, and evoking the consolidated national doctrines prohibiting *favores* and *odia* as well as the principle *nemo iudex in*

³⁴ This principle is formulated in GATS article II, which obliges Member States unconditionally to: accord to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country; eliminate all discrimination between foreign services; and to extend to all the most favorable discipline. On the prohibition of “external” discrimination, see, *ex plurimis*, L. ALTINGER and A. ENDERS, *The Scope and Depth*, cit., 308 et. seq.; R.B. SELF, *General Agreement on Trade in Services*, in TERENCE P.S. (ed.), *The World Trade Organization, the Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, Washington, 1996, 527 et. seq.; C.G. RASCAZZO, *La Comunità europea e l'accordo generale sugli scambi di servizi: affinità e differenze di metodi e di obiettivi*, in G. SACERDOTI and G. VENTURINI, *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia*, Milano, 1997, p. 188 et. seq.; G. VENTURINI, *Recenti sviluppi in tema di liberalizzazione degli scambi di servizi*, in SIDI, *Diritto e organizzazione mondiale del commercio internazionale dopo la creazione della Organizzazione mondiale del commercio*, Napoli, 1997, p. 137 et. seq.; C. ARUP, *The New World Trade Organization Agreements. Globalizing Law through Services and Intellectual Property*, Cambridge, 2000, 113 et. seq.; S. CHARNOVITZ, *Triangulating the World Trade Organization*, in 96 *American Journal of International Law* 28 (2002).

³⁵ This principle is formulated in GATS article II, which requires Member States to accord to services and service suppliers of any other Member treatment no less favorable than that which they accord to their own like services and service suppliers (but only in sectors covered by specific commitments). It prohibits not only all measures that prescribe a formally discriminatory treatment (*de jure* discrimination) based on nationality, but also those not safeguarding the “equivalence of competitive opportunities” to national and foreign operators (*de facto* discrimination). On this issue, see note 34 as well as the European Commission, *GATS: General Agreement on Trade in Services. Guide to the undertakings*, Brussels, 1995, 31: “[f]ormally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member”.

³⁶ The WTO jurisprudence leaves no doubts. See these findings, concerning the homologous provisions of GATT article X: WTO, PANEL REPORT, *Argentina - Bovine Hides*, WT/DS155/R, paragraph 11.76 (the principle of impartiality “generally will not be whether there has been discriminatory treatment in favor of exports to one Member relative to another. Indeed, the focus is on the treatment accorded by government authorities to the traders in question”); WTO, *Panel Report, EC – Bananas*, paragraph 32; see also WTO, COUNCIL FOR TRADE IN GOODS, *Article X of the GATT 1994 – Scope and Application*, Note by the Secretariat, G/C/W/374, 14 May 2002: “Referring paragraphs 1 and 3 (b) of the same Article, and highlighting their focus on private traders as main beneficiaries of the obligations established in those provisions, the panel found that Article X could not be reduced to apply only to incidents of discrimination between Members”.

re sua. Formally, it translates into the duty of the equal treatment of service suppliers “under like circumstances,” in order to preserve competition³⁷.

An examination of just the national legal categories is not however sufficient to understand the actual and potential scope of the impartiality principle in the global context.

National solutions, both organisational (tenure, the merit system, division of competences between political and administrative bodies), and functional (the duty to fairly weigh all the relevant private interests), are not always adequate to global problems.

The above-mentioned conflict, between the structural location (national) and the (partly) global functions that administrations must fulfil can be clearly seen here.

Global law thus seeks out alternative solutions. The tendency is away from impartial administration and towards independent and neutral administration. Organisationally, this model is characterised by the attribution of regulatory competences to authorities which are separate from the regulated class and free from their influence. Functionally, it is characterised by the prohibition upon public powers from pursuing policies beyond the proper competitive structure of the market³⁸.

So far, this model has only been imposed in the telecommunications sector, but there are proposals for extending it to other public services, like the postal service³⁹. Article 5 of the Reference Paper requires the establishment of independent regulatory authorities which are “not accountable” to the executive⁴⁰. Article 3, relating to the burdens upon

³⁷ WTO, PANEL REPORT, *Mexico – Telecommunication*, paragraphs 7.329-30: “This footnote [footnote 2 of the Annex on Telecommunication] clarifies that no discrimination is permitted with respect to other foreign suppliers, to domestic suppliers, or to other users of like public telecommunications transport networks and services under like circumstances. The word “non-discriminatory” therefore addresses the conditions of competition of service suppliers in relation to other suppliers who are users of public telecommunications transport networks and services”.

³⁸ See *Annex on Telecommunication*, art. 5; Reference Paper on Telecommunication, art. 6, Allocation and use of scarce resources, art. 3, Universal service and, notably, art. 5, Independent regulators: “The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants”. See also P. COWEY, M.M. KLIMENKO, *The WTO Agreement and Telecommunication Policy Reform*, Policy Research Working Paper, in www.worldbank.org.

³⁹ WTO, CTS, *Postal/Courier: Proposal for a Reference Paper*, Communication from the European Communities and their Member States, paras II:3, Individual license and II:4, Independence of the regulatory body.

⁴⁰ On the WTO debates on regulatory independence, see WTO, COUNCIL FOR TRADE IN SERVICES, *Principles of Competitive Entry: Independent Telecommunications Regulation and Interconnection Principles*. Communication from the United States, S/C/W/110/Add.1, 15 June 1999, in particular I.A: “a truly effective regulator also must be protected from direct political influence from industry or other government entities”. See also, OECD, WORKING PARTY ON TELECOMMUNICATION AND INFORMATION SERVICES POLICIES, *Telecommunications Regulations: Institutional Structures and Responsibilities*, DSTI/ICCP/TISP(99)15/FINAL, 26 May 2000; P. COWEY, M.M. KLIMENKO, *The WTO Agreement and Telecommunication*, cit., 12; WTO, CTS, *General Trends in Telecommunication Reform*. Communication from the ITU, S/C/W/110/Add.4, 17 June 1999; ITU, TELECOMMUNICATION DEVELOPMENT BUREAU, *Telecommunication policies and*

universal services, imposes obligations of transparency, non-discrimination and “competitive neutrality”⁴¹. The procedures for allocating scarce resources are animated by a particular attention to the neutrality of public action through the elimination of pre-established positions of privilege and the requirement of non-discrimination in public concessions procedures⁴².

The Reference Paper is an example of the universal application of principles and models familiar to some national experiences. But global law presents truly original features, in its aim of extending the principle of separation between regulators and the regulated beyond the context of national public services, to make it a general requirement throughout the administrative system. See the clear formulation contained in the Consolidated Draft Text, G2: “The decision of and the procedures used by the competent authority preparing, adopting or applying licensing procedures shall be impartial with respect to all market participants. In particular, it shall be separate from any supplier of services for which a licence is required”.

This proposal, if made binding, would strongly impact national regulation, in two sectors in particular. The first is in the area of local public services, in which local administrations are often in charge of the companies providing transportation, water supply, electricity and the like. The second is in the area of professional services, where the norm is not easy to reconcile with the regulatory and decision-making powers exercised by professional associations. This latter issue clearly emerged during the XXIII meeting of the WPDR, in the debate following the European Union’s proposal for regulating licensing procedures. Many delegations raised objections. The duty of separation however did make it intact into the Chairman’s consolidated version⁴³.

their repercussions at the level of institutional, regulatory and operational aspects of services, Document 1/193(Rev.1)-E, 23 September 1997, annex 3, *Guidelines on the regulatory body*.

⁴¹ According to the *International Telecommunication Union*, the principle of transparency concerns either the public availability of all applicable national norms and information relating to all relevant facts. Notably, the States shall make available all information about subsidies granted to and the burdens effectively borne by the incumbent operator, preferably by means of separate accounts for different parts of its operations. The principle of non-discrimination entails the duty to accord an equal treatment to all operators, nationals and foreign. Notably, the burdens of universal service, when not charged to taxpayers, shall be allocated in a fair manner between service suppliers. Finally, according to the principle of competitive neutrality, no potential operator shall be prevented from accessing the market and no service suppliers shall enjoy an unfair benefit, under pretext of pursuing social goals relating to the institution of the universal service (ITU, *Methodological Note on Universal Service Obligations*, Note by the Secretariat, 9 October 1998, 5, in www.itu.org).

⁴² See art. 6, Allocation and use of scarce resources: “Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner”.

⁴³ In connection to the doubts expressed by the delegation of New Zealand, the Swiss delegate joined the debate: “[o]n sub-paragraph 3, she asked if professional bodies, acting impartially with respect to licensing procedures, could fulfil the requirement” (WTO, WPDR, *Report on the meeting held on 30 September 2003*, Note by the Secretariat, S/WPDR/M/23, 27 November 2003, 16); subsequently “[t]he representative of Canada, in

3. Procedural protections: participation

3.1. Participation in individual proceedings

The participation of private actors in administrative proceedings has an important place in the national administrative procedure laws. In adjudication proceedings in particular, the right to be heard or, at least, the right to present written arguments and observations is often granted by general provisions.

GATS law, by contrast, does not contain any provision directly addressed to participation in individual proceedings. There are two immediate explanations for this.

The first and more simple one attributes this lacuna to global bodies' deference to the Member States' right to regulate, in the name of the principle of national procedural autonomy, according to an approach often defended in the European Community context as well. But this is only a part of the truth. It is sufficient to note how, in other contexts, WTO norms do set forth individual procedural obligations in great detail⁴⁴.

The second explanation regards the types of national proceedings regulated by the Agreement. While the general principles of reasonableness, impartiality and objectivity can be applied to administrative activity as a whole, the norms that regulate individual procedures are not contained in the GATS text, but rather in the secondary norms issued by the Council for Trade in Services, a body whose mandate is limited to approving the rules governing authorisation and certification procedures⁴⁵. These procedures,

giving preliminary comments, associated himself with Switzerland's and New Zealand's comments on sub-paragraph 3 regarding the separation of service suppliers and the competent authority, and the challenge it posed to self-regulating professional bodies. He welcomed further discussion on the idea of neutrality as contained in sub-paragraphs 2 and 3" (ibid, § 19). This is the reply of EU delegation: "[o]n sub-paragraph 3, the formulation was intended to address different services sectors, recognizing that some authorities might not be independent of the market operators. Decision-making as a regulator should be separated from commercial interests, and she welcomed suggestions for alternative formulations" (ibid, 25).

⁴⁴ See, for example, art. 5 of the Antidumping agreement, or art. 3, Investigation of the Agreement on safeguards: "[a] Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".

⁴⁵ Indeed, GATS article V:4 delegates to the Council the power to enact disciplines only "with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services ...". For a useful distinction between these procedures, see, first of all, WTO, WPPS, *The Relevance of the Disciplines of the Agreements on Technical*

aimed at widening the legal rights of private actors, do not trigger the same needs for protection that disciplinary proceedings, for example, would.

This is the more convincing interpretation, but it raises further questions. As is clear, the widening effect only regards the immediate and direct subject of the proceeding, and not possible third parties with contrasting interests, like competitors or citizens in general who may be harmed by the granting of a license. Intuitively, from the standpoint of the global regulator, the target of the provision is the foreign service supplier, while those with contrasting interests are other national operators or the citizens of the host country. The decision to not regulate participation thus presupposes a specific value judgment.

This interpretation is supported by further considerations, provided by the jurisprudence and other normative measures, that can influence, however indirectly, the exercise of the right of participation. Based on the perspective of this analysis, it is necessary to distinguish between the position of the applicant and that of third parties.

Section E.3 (Transparency) of the Consolidated Draft Text addresses national participatory right: “[e]ach Member shall ensure that the following information are made publicly available: ...(j) where there is public involvement in the licensing process, information on how that involvement is provided for”.

The purpose of this rule is to enable economic operators to be informed of the procedural steps that can negatively influence or delay the granting of a license, The norm protects just the interests of the applicants and does not create the right for a third party to participate in the procedure. Still, where the applicant has not been adequately informed of the public involvement in his proceeding, he can raise a procedural irregularity. In general, administrations cannot hear parties representing contrasting interests without having previously made public the procedures that will be followed and bearing the risk of being contested before global dispute resolution bodies.

Norms prescribing the reasonable duration and maximum simplicity of the procedure affect even more strongly the national power to grant participatory rights to parties other than the applicant (GATS, art. VI:3; Accountancy disciplines, V.16; Consolidated working paper, §§ G.4 and G.10). States, on the basis of these rules, cannot recognise an absolute right to intervene in the relevant proceedings. Rather, the legitimacy and scope of such rights are made subject to a reasonableness review, according to a balancing test that gives greater weight to the service supplier’s interest in the most timely conclusion of the procedure.

Barriers to Trade and on Licensing Procedures to Article VI:4 of the General Agreement on Trade in Services. Note by the Secretariat, S/WPPS/W/9, 11 September 1996; for the recent negotiations, see also the *Consolidated Working Paper*, § D, *Definitions*; and WTO, WPDR, *Definitions of Qualification Requirements, Qualification Procedures, Licensing Requirements, Licensing Procedures and Technical Standards*. Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu S/WPDR/W/37, 6 October 2005.

These substantive and procedural limits do not of course refer to the applicant's right to participate in a defensive role. This right is in fact fully guaranteed.

An applicant for authorisation can make use of the rights accorded by GATS art. VI:3 GATS: to have information concerning the status of the application, to correct any errors in the application, to be advised by the administration on the administrative burdens to be borne. These are technically simplification and loyal cooperation requirements, but they do offer procedural opportunities for establishing a dialogue with the administration, however much from a defensive position. And this is without neglecting the right to a review of adverse decisions, which GATS expressly grants only to the applicant (art. VI:2).

The full right to be heard pending an adverse decision can be deduced from an interpretation of the general principles. The jurisprudence has effectively followed this path in the area of import licenses for goods and there is no reason to preclude its application to the domestic regulation of services as well. This jurisprudence applies the principles of reasonableness and impartiality not only to the final decision, but also to the administrative proceeding in its entirety, thus defining minimum standards of due process binding upon national authorities⁴⁶.

The Appellate Body overruled a national proceeding in which "there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made". The judgment, moreover, held decisions adopted through an "informal", "casual" or "not transparent" procedure to be illegal. It thus clearly recognised the affected parties' right to be heard, the agencies' duty of individual notification of adopted measures, and a prohibition of fact-finding based only on an "ex parte enquiry"⁴⁷.

Though the service supplier's right to defence is affirmed in principle, it is much more difficult to evaluate which instrumental rights, and how many

⁴⁶ In an important recent finding, the Panel, discussing the notion of "administration of a measure," noted: "Does the term 'administer' relate to the application of laws, regulations, decisions and rulings in particular cases? If so, does it concern the manner in which administrative processes are conducted? ... In the Panel's view, the application of a law in a particular case encompasses the administrative process entailed in that application, because the administrative process represents the series of steps, actions or events that are taken or occur in pursuance of what is required by the law in question. In addition, we consider that the application of a law in a particular case encompasses the results of administrative processes. We hold this view because the results of administrative processes are the final manifestation of the application of a law in a particular case. Furthermore, the results of administrative processes are, by definition, the product of administrative processes which, as we have already said, would seem to fall within the scope of the ordinary meaning of the term « administer »" (WTO, APPELLATE BODY REPORT, *European communities – Selected Customs Matters*, WT/DS315/AB/R, 13 November 2006, § 7.103 e § 7.105).

⁴⁷ WTO, APPELLATE BODY REPORT, *US – Shrimp*, cit., para 180 e ss.; on this decision, see S. CASSESE, *Global standards for national administrative procedures*, 68 *Law & Contemp. Probs.* 109 (2005), and G. DELLA CANANEA, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 *European Public Law*, 574 (2003).

of them, ought to be recognised. The analogy with other WTO agreements does not lead very far, because the relative discipline involves measures that are applicable trans-nationally, directly affecting the relationships between States, not relations between States and the private actors that come into contact with them.

Invocations of due process and procedural fairness⁴⁸, however, seem to legitimate the reference to the principles common to national legal systems⁴⁹.

Notwithstanding the different models and great asymmetries in their respective procedural standards, procedural protections increase in relation to the threat to the rights of private parties⁵⁰. In the area under examination here, therefore, the duties of due process ought to assume a greater importance in disciplinary proceedings, or in proceedings for revoking or not renewing a license. This interpretation can be linked, however indirectly, to § E.3(h) of the Consolidated Draft Text. This norm imposes the prompt publication of “any monitoring, compliance or enforcement procedures including notification procedures for non-compliance”. Formally it is a duty to publish something, but, substantially, entails a minimum standard of fairness, at least in sanctioning procedures.

3.2. *Participation in rule-making proceedings*

⁴⁸ For the principle of natural justice in common law, see H.H. MARSHALL, *Natural Justice*, London 1959; P. JACKSON, *Natural Justice*, London, 1979; FLICK, *Natural Justice: principles and practical applications*, Sidney, 1979; H.W.R. WADE and C.F. FORSYTH, *Administrative Law*, cit., 435; on determining what process is due in several contexts under US law, see FRIENDLY, *Some Kind of Hearing*, 123 in *U.P.A. L. Rev.* 1267 (1975); see also BREYER, STEWART, SUNSTEN, SPITZER, *Administrative Law and Regulatory Policy, Problems, Text and Cases*, IV ed., New York, 1999, 691 et. seq.

⁴⁹ See A. SANDULLI, *Il procedimento*, cit., 1064; G. PERICU, *Attività amministrativa*, cit., 1313. On German law, see, *ex plurimis*, EHLERS, *Anhorung im Verwaltungsverfahren*, in *JURA*, 1996, 617 et. seq.; in the United States, the courts have displayed a special solicitude in extending procedural safeguards to protect licensed professionals. As early as 1873, the Supreme Court held that a lawyer might not be disbarred without notice and opportunity for hearing [*ex parte Robinson*, 86 U.S. 505 (1873)]; hearings have also been required in initial licensing [*Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963)].

⁵⁰ In Germany, *VwVfg*, § 28, holds that only the individuals affected by a decision that transforms their “*status quo*” into a “*status quo minus*” have the right to be heard (STELKENS, BONK, SACHS, *Verwaltungsverfahrensgesetz – Kommentar*, § 28, c.p.v. 26). In Italy, the so-called “*giusto procedimento*” (which differs from ordinary participation rights having a democratic or collaborative functions, because its aims to afford an individual the opportunity of defence) concerns decisions, such as expropriations or sanctions, that affect pre-existing rights or legitimate interests. On this point, see the decision of the Italian Constitutional Court, 20 March 1978, n. 23, and 25 October 1985, n. 234; see also, G. SCIULLO, *Il principio del giusto procedimento tra giustizia costituzionale e amministrativa*, in *Jus*, 1980, p. 291 et. seq.; in United States, for the application of APA to licensing procedures, see C.R. HOWART, *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?*, 37 *Admin. L. Rev.* 317 (1985); HETHERINGTON, *State Economic Regulation and Substantive Due Process of Law*, 53, *Law & Contemp. Probs.* 267 (1970) and NOTE, *Due Process Limitations on Occupational Licensing*, 59 *Va. L. Rev.* 1097 (1973).

Rights to participate in regulatory proceedings, of various intensity and scope, are provided in many national legal systems, but they are only recognised generally in Anglo-American law. The development of these rights coincides with the expansion of delegating legislation and with the decline of the myth of administration as a mere transmission belt for parliamentary choices.

In the early 20th century, in England, statutory inquiries replaced Parliamentary Private Bills, which had been used until then in expropriation proceedings. Following this, such inquiries were extended to the whole administrative system for the regulation and planning of private activities.⁵¹ In the United States, notice and comment and formal rule making procedures⁵² were tied to the increased government regulation and administrative discretion in implementing the public policies of the New Deal.⁵³

The participation of private actors functions as a surrogate to the political process in ensuring the full representation of the interests affected by the administrative choices. Procedural intervention replaces democratic representation as a technique for legitimising and controlling the discretionary choices of unelected public authorities.

The function of participatory rights in the rule-making phase, and the causes leading to their creation, go far to explain the attention given to them by global law. But in this context, the topic assumes a greater, though somewhat different importance.

Participatory rights assume a greater importance in global law, because every act adopted by a public authority (whether elected or not) in a foreign

⁵¹ On participatory rights in the United Kingdom, see J. F. GARNER, *Consultation in Subordinate Legislation*, in *Public Law*, 1964, p. 105 et. seq.; A. D. JERGESEN, *The Legal Requirements of Consultation*, in *Public Law*, 1978, p. 290 et. seq.; T. PROSSER, *Democratisation, Accountability and Institutional Design: Reflections on public Law*, in P. MCAUSLAN – J. F. MCELDOWNEY (eds.), *Law, Legitimacy and the Constitution*, London, 1985, p. 170 et. seq.; A. POLICE, *La tutela del privato nel diritto urbanistico inglese: le garanzie del procedimento*, in *Rivista giuridica di urbanistica*, 1991, n. 4, III, p. 661 et. seq.; G. RICHARDSON, *The Legal Regulation of Process*, in G. RICHARDSON – H. GENN, *Administrative Law and Government Action*, Oxford, 1994, 105; F. FRACCHIA, *Analisi comparata della partecipazione procedimentale nell'ordinamento inglese ed in quello italiano*, in *Diritto e società*, 1997, n. 2, p. 189; G. HART, *The Value of the Inquiries System*, in *Journal of Planning & Environment Law*, 1997, p. 8 et. seq.; in the case law, see *R. v. Liverpool Corporation*, 14 Feb. 1972, [1972]2 QB 299; *Bushell and another v. Secretary of State for the Environment*, 4 Feb. 1980, [1981] AC 75; *R v. Birmingham City Council*, 22 Jan. 1993, 91 LGR 532.

⁵² See U.S. Code, Title 5, Part 1, Chapter 5, 553, *Rule making*: “General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include: 1) a statement of the time, place, and nature of public rule making proceedings; 2) reference to the legal authority under which the rule is proposed; and 3) either the terms or substance of the proposed rule or a description of the subjects and issues involved ... After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose”.

⁵³ For participation rights in the United States, see *infra*, 3.3.

legal system has a subjectively “administrative” nature for the citizens of other States. It does not matter to a foreign firm whether a rule has been enacted by a parliament or an executive agency; the problems of accountability are the same⁵⁴.

Participatory rights have a somewhat different importance at the global level, because their purpose here is not to recreate the representation of the opposing interests embodied in a national collectivity at the administrative level, but more specifically to open the door to some specific external interests, which would otherwise be neglected.

In the WTO context, the TBT and SPS agreements contain the most detailed provisions for participation in rule-making proceedings. They adopt the American model of notice and comment. The rules provide for a duty of publication and notification to the WTO Secretariat of every relevant new law, standard and regulation, including an indication of the objective pursued and its underlying rationale. This notification must be given within a useful time (at an appropriately early stage, when amendments can still be introduced and comments taken into account). States must give the other Member States a reasonable time in which to present and discuss their observations, and they are obliged to take these observations and discussions into consideration when making their decision⁵⁵. Annex 3 of the TBT, the Code of Good Practice, provides furthermore that a parallel procedure be opened to “interested parties” (the standardisation authorities) of the other Member States⁵⁶.

This procedure, however, has its limits. It takes place entirely at the inter-State level (or, in any case, between public authorities). Governments intervene to represent the interest of their own economic operators, according to a model of diplomatic protection. The participation of domestic interest groups is left to the will of the individual States that intend to adopt the new measure.

In the services sector, the rules governing participation in rule-making proceedings have even less bite. The primary law contained in the GATS

⁵⁴ For this aspect, see S. BATTINI, *La globalizzazione del diritto pubblico*, in *Riv. trim. dir. pub.*, 2006, p. 336.

⁵⁵ See, TBT Agreement, art. 2, *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*, paragraph 9 et. seq., and (the almost identical) SPS Measures Agreement, Annex B, *Transparency of Sanitary and Phytosanitary Regulations, Notification Procedures*, art. 5.

⁵⁶ TBT Agreement, Annex 3, *Code of Good Practice for the Preparation, Adoption and Application of Standards*, paras. L – N: “Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO ... Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments ... The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary”.

does not address regulatory procedures at all, concentrating instead on the substantive conformity of national measures with treaty obligations, through the so-called necessity test.

The only existing law in this area is contained in the Accountancy Disciplines: “When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption”. And it is lacking from many point of view. First of all, it does not clarify the scope of the recognised rights to intervene; apparently, participation seems open to private actors as well, though the context of the provision would seem to preclude this⁵⁷. Secondly, at the procedural level, the provisions are vague, the procedural requirements are set forth only in a very general way and the interested administration’s duties to give reasons are not clarified. But most serious is the lack of a “mandatory provision.” The phrase “shall endeavour to” is in fact used in the practice of treaty drafting to refer to a non-binding undertaking.

This problem is in fact one of the most important ones emerging from the Working Party debates, as well as from the position papers of various international organisations. Participants in the debates argued both in favour of the introduction of a binding horizontal duty of prior notification⁵⁸, and against such a general duty, for its violation of States’ right to regulate⁵⁹.

⁵⁷ The same article, indeed, imposes the duty to give reasons for measures adopted, but only upon the request of another member State. Consequently, if only the States have the right to know the rationale behind a norm, *a fortiori*, is difficult to extend the right to participate in the rule making procedures to private individuals and to give consideration to their comments.

⁵⁸ WTO, WPDR, *Transparency in Domestic Regulation*. Communication from the United States, S/CSS/W/102, 13 July 2001, paragraph 5: “Meaningful notice and comment periods provide a reasonable assurance that interested parties will see the notice and have adequate time to respond. The ability of individuals and firms to comment on regulatory measures before implementation offers a number of benefits, including increased efficiency and credibility of the proposed measure. Prior comment also reduces uncertainty and discriminatory treatment in a given market as all parties are better informed through the ability to participate in the development of regulations. Prior comment allows the opportunity to solicit views on proposed new or amended regulations from all interested parties, including domestic and foreign service suppliers operating or seeking to operate in the national market as well as the general public so that the provision is developed under an informed debate. Established mechanisms to solicit and respond to public inquiries and comments help make the process easier to administer. Dismissing the need to consider and respond to comments on the proposed measures on the grounds of burdensome costs can deprive countries of the benefits such procedures provide. Beyond the initial start-up costs, maintenance costs for such a system can be low. As previously mentioned, new technologies such as the Internet have further reduced the financial burden associated with a prior consultation system. In order to complement the prior comment mechanism, pending regulations, comments received by the regulators, and responses to the comments all should be made available to the public”.

⁵⁹ WTO, WPDR, *Domestic Regulation: Necessity and Transparency*. Communication from the European Communities and their Member States, S/WPDR/W/14, 1 May 2001, paragraph 28: “The European Communities and their Member States recognise that prior consultations on the introduction of regulatory measures can prove useful. However, we are of the opinion that the different regulatory and legislative systems of Members need to be respected, and we therefore do not see any scope for introducing obligations for establishing prior consultation mechanisms as a result of disciplines under Article VI:4.

The text under discussion, proposed by the United States and incorporated into the Consolidated Working Paper (the outcome of three, progressively less stringent draft proposals) is based on § 553 of the U.S. Code, and is very detailed. In particular, rule-making bodies are required to provide States and private actors with an opportunity to comment and “[to] address in writing substantive issues raised in comments received”⁶⁰.

In more recent informal documents however, the most important features of the American proposal seem to have been abandoned in favour of the minimalist approach of the Accountancy Disciplines⁶¹.

3.3. *Segue: reasons for the current lack of global norms for rule-making proceedings*

There are three main reasons for the situation described above.

The first reason is technical, and does not depend on the supranational context and the character of the ends at stake. Many countries, especially in the Third World, have highlighted inability of their bureaucracies to run participatory proceedings. Such proceedings do have disadvantages: increased delay arriving at a decision, thus compromising an administration’s ability to respond quickly to changing needs; increased costs of running the proceedings and conducting the necessary studies to analyse or refute the parties’ arguments; increased contentiousness and a more searching and intensive judicial review, leading to further delays⁶².

The provisions of the accountancy disciplines, which recognize this difficulty, and call upon Members to endeavour to provide opportunity for comment when introducing new measures, could provide valuable guidance for the current work on regulatory disciplines”.

⁶⁰ See the *Consolidated Working Paper*, E:4: “[Proposal i] Each Member shall endeavour to: a) publish in advance any measures of the type referred to in paragraph E.1 that it proposes to adopt; and b) provide interested persons and other Members a reasonable opportunity to comment on such proposed measures. Each Member shall endeavour to: c) at the time it adopts such final measures, address in writing substantive issues raised in comments received from interested persons with respect to the proposed measures; and d) allow a reasonable period of time between publication of such final measures and their effective date. [Proposal ii] Each Member shall endeavour to ensure that any measures of general application it proposes to adopt in relation to matters subject to these disciplines are published in advance, and a reasonable opportunity is available for interested persons, including those of other Members, to comment on such proposed measures”.

⁶¹ The United States, which always argues for strengthening procedural transparency, has also had to accept this solution. See WTO, WPDR, *Outline of US Position on draft Consolidated text in the WPDR*. Communication from the United States, 11 July 2006, JOB(06)/223: “We are looking for disciplines that adopt realistic and flexible standards of compliance, covering ... provision, on a best endeavour basis, for prior publication of new regulations and reasonable opportunity for interested persons to comment, as well as the expectation that substantive comments received will be taken into consideration by the regulator”.

⁶²The national experiences clarify these problems. In the United States, compliance with the APA procedural safeguards has created an average length of many years for each proceeding (relating to this problem, some scholars speak about “rule-making ossification”); moreover, this fact has compelled the agencies to seek alternative solutions to avoid procedural bottleneck, such as case-by-case decisions, negotiated rule making, broad interpretation of cases dispensing with the prior notification rule. For general remarks, see BREYER, STEWART, SUNSTEN, SPITZER, *Administrative Law and Regulatory*

These arguments, however, are not fully persuasive. The issues raised could in fact be resolved by means of various expedients: *ad hoc* derogations; transitory periods; application of notice and comment only in the most sensitive sectors (such as telecommunications); limiting intervention to the individual States, at least at the initial phase, to reduce the documentary burden. In fact, such difficulties have not undermined prior notification procedures in the sectors covered by the TBT and SPS Agreements.

The second and third reasons are tied to the transplantation of this particular procedure from the national to the supranational context, and to the functional mutation that follows from this: as discussed in the previous section, participatory rights have a greater though different significance at the supranational level.

First of all, to limit the GATS notice and comment rules to just administrative proceedings would be an incongruous choice. In the national context, this could be justified by the different assumptions of legitimacy of the legislative and executive powers. But at the global level, this distinction carries less weight. Moreover, accepting this approach offers the Member States a comfortable *escamotage* for avoiding the obligations, by simply shifting the *sedes decidendi*.

Still, extending participatory rights to rule-making procedures as well would require some Member States to significantly change their legislative systems. Though some countries already have generalised notice and comment procedures for secondary legislation, almost no one does for primary legislation. At most, there might be a practice of holding parliamentary hearings with private parties, but this has no binding effect on the decisions to be adopted.

This consideration is even more important in the GATS context than in the context of the TBT or SPS, which regulate through technical norms or standards and therefore, because of the constitutional traditions of the Member States, only rarely require legislative acts having the form of law.

Policy, cit., 633 et. seq.; MCGARITY, *Some Thoughts on "Deossifying" the Rule Making Process*, 1992, *Duke Law Journal*, 1385; PIERCE, *Seven Ways to Deossify Agency Rule Making*, 47 *Administrative Law Review*, 59 (1995). Yet again, in the WPDR debates, these difficulties have been pointed out and many countries have urged giving broad flexibility to notice and comment provisions; after all, even the OECD has acknowledged that, for many developing countries, it is only realistic to introduce transparency in rule making in specific sectors. See WTO, WPDR, *Report on the meeting held on 7 and 18 February 2005*, cit., § 140: "[t]he delegation of India, regarding such aspects of the paper as interested persons, publishing in advance, and responses in writing, while recognizing that some flexibility had been provided, raised the issue of the capacity of developing countries. They agreed with Mexico that it was not necessary to address comments in writing"; § 141: "[t]he delegation of Chile ... also raised other issues such as the costs implied by the proposal, capacity needs, and the relationship with other proposals"; § 151: "[t]he delegation of South Africa ... noted that references to "reasonable" and "to the extent practicable" would offer a certain flexibility, but asked what aspects of the document would refer directly to the abilities of LDCs and developing countries in general to adopt the disciplines".

In the area of services, the situation is quite delicate. Just consider the regulation of professional services, an area which bears strong political implications, and has long been at the centre of parliamentary debates⁶³.

The American proposal for transparency in rule-making proceedings was hotly debated before the WPDR⁶⁴. In the face of the objections put forward by many countries⁶⁵, the American proponents had to concede the limits of rule-making procedures.

The third factor hindering the development of global norms for rule-making proceedings is connected to the different balance between national and foreign interests that they would create.

The intervention of private parties would not be neutral with respect to the substantive content of the rules adopted, and it can affect the exercise of discretion. The authorities, in making final decisions, shall also take into consideration the arguments raised in the rule-making debates. Likewise, the quality of the reasons given, and their coherence in responding to the regulatory alternatives presented at the rule-making phase, would naturally become fertile ground for global judicial review. This would alter the current mechanisms for reviewing the Member States' right to regulate, until now based exclusively on the necessity test. The current "static" determination of the regulation's output would be supplemented by a "dynamic" review of the entire decision-making process, along the false line of the "hard look doctrine".

To better understand how this could affect the hierarchy and mutual relevance of the interests involved in a particular regulatory regime, it is useful to examine the American experience.

⁶³ Prior notification, however, can be anticipated during the administrative procedures required to introduce an Executive's proposed law. In particular, notice and comment should be required pending regulatory impact analysis (RIA), a procedure widely known in many OECD countries (there was such a proposal: WTO, WPDR, *Regulatory Impact Analysis in Australia*, S/WPDR/W/15. Communication from Australia, 3 May 2001, paragraph 8). This does not however solve the problem: comments, indeed, are not directed to the authority which adopts the final decision; and the result of participation cannot bind national parliaments.

⁶⁴ WTO, WPDR, *Horizontal Transparency Disciplines in Domestic Regulation. Proposal by the United States*, cited by the WTO, WPDR, *Report on the meeting held on 7 and 18 February 2005*. Note by the Secretariat, S/WPDR/M/29, 11 July 2005, § 130 et. seq. "Another very important discipline it presented was the requirement for advance notice and comment. That was a mandatory requirement, designed to apply to specific commitments, but the delegation recognized there might be differences in how countries wished to implement the requirement, and therefore proposed the standard of to the extent practicable".

⁶⁵ WTO, WPDR, *Report on the meeting held on 7 and 18 February 2005*, cit., § 144: "[o]n paragraphs B.2 and B.3 [about notice and comment], the delegation [of European Community] asked whether they would also apply to parliamentary bodies"; § 154: "the delegation of Malaysia, on paragraph B.2(b), said there could be a problem with Malaysia's domestic legislative procedures. Like other delegations, they also had concerns on paragraph B.3, and sought further explanation". Such difficulties were also underscored by the Mexican delegation. The WPDR Secretariat noted that: "[r]egarding prior notice and comment, the delegation said it clearly concerned regulations of general application, and did not deal with legislation or laws, which would present a problem in many countries" (WTO, WPDR, *Report on the meeting held on 7 and 18 February 2005*, cit, 57).

After WWII, American law saw a progressive delegitimation of the system of agencies granted wide discretionary powers by Congress. The economic analysis of law progressively highlighted the relationship between regulators and the regulated, characterising it as a form of corruption or, in more refined terms, as an imbalance in representation produced by regulatory capture.⁶⁶ Undeniably, from the global perspective, this framework is well-adapted to the relationships between national regulatory authorities, and national and foreign firms, given States' natural tendency to favour domestic pressure groups.

American courts developed two methods for dealing with this legitimacy crisis. First, they extended the right to participation in rule-making procedures and standing to parties not directly and individually affected by the regulation (bodies representing diffused interests, collectivities, non-governmental organisations, etc.). Second, they heightened their level of scrutiny, giving a hard look at the different parties' arguments and regulatory alternatives, which created a heavy burden of motivation and procedural thoroughness. The problem of regulatory capture has thus been addressed through the granting of rights of information, participation and legal recourse to one or more non-governmental organizations – economic analysis speaks of republican tripartism⁶⁷ - to balance the regulated firm's influence and break the bipolar relationship between the regulatory authority and the regulatory target.

Transplanted to the global level, this technique would break the link between national regulators and national firms by granting foreign firms and other Member States the right to intervene as third parties in administrative proceedings.

In truth, the American proposal accords participation rights to national actors as well, thus implying an even wider procedural legitimation than that provided by the TBT and SPS agreements. Its goal, however, is not so much to give voice to domestic firms as to bring out the possible differences between domestic groups. There is a basic awareness that national firms, which usually have protectionist interests, are in any case able to lobby the administrative authorities, especially in the face of opaque procedures. A greater transparency allows the adequate representation of other interests, like those of consumer organisations and national communities interested in

⁶⁶ For a useful analysis of this issue, see R. B. STEWART, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.*, 1667 (1974-5), and ID., *Administrative Law in Twenty-first Century*, in 78 *N.Y.U. L. Rev.* 437 (2003); G. SHUBERT, *The public interest*, 119 (1960); STIGLER, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971); A. KAHN, *The Economics of Regulation*, 11-14 (1971); J. Landis, *Report on Regulatory Agencies to the President-Elect*, 71 (1960); J.J. LAFFONT AND J. TIROLE, *The politics of government decision making. A theory of regulatory capture*, in *Quarterly Journal of Economics*, 1089 (1991); M.E. LEVINE and J.L. FORRENCE, *Regulatory capture, public interest, and the public agenda. Toward a synthesis*, in 6 *Journal of Law Economics & Organization*, 167 (1990).

⁶⁷ I. AYRES, J. BRAITHWAITE, *Tripartism: Regulatory Capture and Empowerment*, 16 *Law & Soc. Inquiry*, 435 (1991).

increasing market competition, and whose participation could benefit the global interest in open markets⁶⁸.

Global law aims to utilise instruments conceived by administrative law to guarantee the balance between domestic groups, thus overcoming the particular “imbalance in representation” characterising the relationships between national authorities and foreign firms.

This re-balancing does however lead to a new imbalance, on many different fronts.

First of all, the problem of an imbalance in representation can re-emerge in the relationships between foreign firms and participating Member States, becoming a question of external discrimination. Not all foreign firms have the same resources for asserting their position. The disparity already existing between the different actors in the global area could thus be further accentuated by global rules on participating in rule-making procedures. Some Member States have expressly highlighted this concern⁶⁹.

The biggest risk of all is a possible over-representation of the interests of foreign firms, to the disadvantage of national firms and other groups, producing a kind of domestic reverse discrimination. Foreign firms could wield greater economic resources than national ones, which could be a decisive advantage in decisions requiring complicated procedures, accurate scientific studies and costly market analysis. But above all, foreign firms enjoy the significant coercive power provided by the threat of legal action before a WTO dispute resolution panel, brought by their Member State. This is a threat which national firms cannot make in the current WTO dispute resolution system. This possibility displaces the traditional analyses based on purely national models, introducing a unique element in the purely global dimension.

⁶⁸ Using the public choice theory framework yet again, the negotiation of free trade treaties is tied to contrasts in domestic decision-making, more than to mediation between the distinct national interests of participating States (see P. MOSER, *The Political Economy of the GATT*, Grusch, Switzerland, 1990: “The main purpose of international trade negotiations is not to trade off divergent interests between countries, but to modify the rules of interactions in the domestic political process”). The costs of protectionism are spread among communities of consumers, whereas well-organized groups of producers enjoy the advantages: consequently, producers’ interests are over-represented compared to consumers’ interests before national decision makers. But, whenever decisions are made through bargaining with other commercial partners, new groups, interested in accessing the markets, counterbalance the protectionist efforts (see J. M. FINGER, *The GATT as international discipline over trade restrictions: a public choice approach*, World Bank Working Paper, March 1990; H. HAUSSER, *Domestic Policy Foundation and Domestic Policy Function of International Trade Rules*, in 41 *Aussenwirtschaft*, (1986), no. 2/3, at 171-184). This analysis is related to traditional barriers to trade and to classical diplomatic boards where such decisions are made. However, where barriers are not protectionist, but regulatory, the *locus decidendi* change and it comes back to the national level: to ensure the correct functioning of countervailing mechanisms, indeed, a new *forum* emerges, where various interests can be represented. One can locate this forum in participation procedures.

⁶⁹See, for example, WPDR, *Report on the meeting held on 7 and 18 February 2005*, cit, § 135, that summarizes the position of Korean delegation: “the implementation of prior comment ... might therefore involve an imbalance of opportunity depending on each Member’s capacity or resources”.

Much depends, naturally, on the type of review to be performed by the Panel and the Appellate Body. The Accountancy Disciplines, using the same formula of the American Federal Administrative Procedure Act, provide for a “duty to give consideration” to the comments presented. On the basis of this formula, American courts have been able to impose very strict controls on national administrative authorities. From the technical standpoint, this is a procedural control. Consequently, its penetration depends, in large measure, on the level of formalisation attained in the process and on the confrontation between the authorities that are parties to the proceeding. It is no coincidence that many States have expressly requested that the required replies to the comments presented not be formal writings, but communicated in an informal way, thus breaking the functional link between the decision and the results of a participatory process, and shifting the burden of due consideration from the legal plane to the diplomatic one⁷⁰.

4. Conclusion

In the introduction, I set forth five factors that influence the global transplantation of principles of national administrative law, thus affecting the function and structure of regulation. In light of this analysis, it is now possible to examine the precise implications of each of these factors.

a) The beneficiaries of the protections change. Global administrative law seeks to legitimise and control the public powers employed in the regulation of transnational relationships and phenomena. As many studies have shown, global governance is only rarely marred by an absolute lack of accountability. More often, its faults lie in the incorrect selection of the constituencies to whom global authorities must respond⁷¹.

The free trade agreements proceed from the classical approach to the problem of international legality. The implementation of these agreements follows two entirely domestic routes: national parliaments and administrations maintain control of their decisions, notwithstanding their extra-territorial efficacy⁷². This framework has the defect of selective accountability in relations with foreign firms and individuals. To protect them, global law employs the national administrative law techniques for

⁷⁰ See WTO, WPDR, *Report on the meeting held on 7 and 18 February 2005*, § 138. As a consequence of these pressures, the United States blunted the duties of due consideration provided in its proposal, see WTO, WPDR, *Report on the meeting held on 22 June 2005*. Note by the Secretariat, S/WPDR/M/30, 6 September 2005, 42: “[c]hanges were made to B(3)(c) which dealt with responding in writing to comments on proposed regulations by changing the language so as to clarify that this provision required a summarized written response to substantive comments and not specific individual responses to all comments”.

⁷¹ See R.W. GRANT, R. O. KEOHANE, *Accountability and Abuses of Power in World Politics*, in 99 *American Political Science Review*, No. 1, 26 et. seq. (2005); R. O. KEOHANE, *Global Governance and Democratic Accountability*, in D. HELD M. KOENIG-ARCHIBUGI (eds.), *Taming Globalization: Frontiers of Governance*, 2003, 130 et. seq.

⁷² See B. KINGSBURY, *Sovereignty and Inequality*, in 9 *European Journal of International Law*, 623-5 (1998); N. KRISH, *The Pluralism of Global Administrative Law*, *ibid.*, vol. 17, 253 (2006).

protecting private autonomy and freedoms, while changing a key element, the beneficiaries of these protections.

A clear distinction can be made between the roles and competences of the WTO and the States in the law of administrative procedure. The GATS grants some instrumental rights to foreign service suppliers: to participate in the proceeding, to obtain a decision within a reasonable time, to be given reasons for a refusal, to appeal to an outside tribunal. It also imposes external limits upon the discretion of national administrations, thus influencing the balancing of the relevant interests in adjudication proceedings: it recalibrates the level of the acceptable sacrifice of the interest of foreign operators in their favour.

Within these limits, it is the States function to grant participatory rights to their own citizens and national economic operators, as well as to take account of their interests in making decisions. National administrative provisions are, however, subject to a test of their procedural congruity and reasonableness. Specifically, the protections granted to domestic actors cannot unreasonably prejudice the speed of the decision; they cannot shift the axis of discretionary judgements, which must rotate around the interest of free competition.

This analysis enables us to better appreciate the implications of the global regulation of domestic regulation. It does not imply the mere extension of the protections already offered by national legal systems but rather, in changing the beneficiaries of these protections, it also changes the regulation's very purpose. This new situation is not neutral with respect to the pre-existing hierarchy of relevant public and private interests. It creates a new balance both in the relationships between private interests, as well as in the relationship between the private interest of the applicant and the public interest pursued by the regulatory authority.

b) The institutional framework changes. From the national perspective, the democratic investiture of governing authorities and bureaucratic selection mechanisms is the proper institutional context for legitimising discretionary power and ensuring an impartial implementation of national policies. But looking at this same institutional context from the supranational perspective, one suspects an intrinsic national prejudice in relation to foreign economic operators, compromising national administrations' ability to pursue global ends.

Global law thus influences both of these sources of bias, first by "quantitatively" limiting the scope of discretionary power, through the duty to employ predefined and transparent selection criteria. Moreover, by introducing further organizational safeguards, it also breaks the link and the possible collusion between national regulators and the national targets of their rules.

c) The structure of the regulation changes. International free trade organisations pursue specific rather than general objectives. This not only affects their function, but also the model of regulation that they employ.

The global law governing domestic regulation cannot be understood as a global version of the American APA or the German VwVfg, each of which make up a complete and self-sufficient *corpus* of norms. Global regulation, by contrast, is more spotty and, for many of the issues central to national administrative law, it is subtle, mere principle or altogether absent.

The negotiators' approach is extremely pragmatic. The texts of the Accountancy Disciplines and the Consolidated Working Paper are full of detailed provisions in relation to specific procedural steps and administrative practices that can significantly impact commercial operators. Setting forth the basic protections of due process, procedural fairness and reasonableness, the disciplines are almost entirely focused on simplifying bureaucratic formalities, facilitating the public administration's relationships with its "users", prohibiting excessive formalities and imposing a cooperative logic, in order to decrease the length and cost of administrative proceedings.

In other words, the disciplines are not a "codification"; they are not a law "of" procedure, but a law "on" procedure. This approach is undoubtedly influenced by technical difficulties (States' resistance to giving up regulatory power, different legal traditions which hinder harmonisation), but is mainly justified by the ultimate goals of the law, which is the creation of a regulatory environment supportive of the transboundary provision of services.

d) It makes relationships more complex. The levels of government and interest groups multiply: at the global level we have national and global authorities, national firms and foreign competitors, domestic associations and international non-governmental organisations. Furthermore, the same actors may perform different roles: in rule-making, in particular, the States can function both as authorities obliged to guarantee participatory rights to third parties, and also as third parties with their own right to intervene in other Member States' regulatory proceedings. However, the relationship between the different actors is unstable: national citizens can support the interest in free competition, alongside the foreign firms or they may play a protectionist role. The heightened complexity is thus not a purely quantitative fact, but also a relational one, generating unexpected conflicts that can be exploited by global law.

Some principles are particularly affected by this: the participation of citizens, if guaranteed directly by international commercial law, loses its function of protecting individuals and gets exploited to bring out conflictual interests at the national level. This becomes instrumental to the pursuit of external interests.

This heightened complexity, and the risk of cross-purposes can however cause strong internal resistances and counter-pressures, which make it more difficult to impose functioning national mechanisms at the global level.

e) The transplantation does not happen in a homogeneous way. The heterogeneity emerges on many fronts. First of all, some areas and relationships are more regulated than others: sometimes it is a negotiated

choice, tied to the economic priorities of the moment (for example, the decision to regulate accountancy and telecommunications services comes from the strong internationalisation of the businesses operating in these two sectors); sometimes it has structural causes, like the influence on States' right to regulate (regulating public services implies not only limiting the police power, to preserve competition, but also affirmative actions to enable the creation of a competitive environment).

Secondly, some procedural protections are preferred over others. In general, substantive mechanisms are preferred over participatory ones. The traditional "continental" approach of reviewing the reasons given seems to prevail over the "Anglo-American" approach of procedural review. At first glance, reviewing the debates between the United States and the European Union in the WPDR, this could be tied to the cultural influence exercised by the two models. On greater reflection however, an explanation must take account of the specific dynamics of the global context, in which this ideological conflict vanishes. The problem of the different costs of the procedural protections arises, which assumes a particular importance if correlated to States' reluctance to bear the specific costs of the interests of foreign economic operators as opposed to their own citizens. Finally, as I have tried to demonstrate, it is clear that participatory guarantees have different implications in the global sphere than they do in the national context.

COMMUNITY STANDARDS OF “GOOD ADMINISTRATION” IN THE NATIONAL REGULATION OF SERVICES

GIULIANO FONDERICO

SUMMARY: 1. Introduction — 2. The conformation of administrative procedures affecting the market in services with Treaty — 2.1. The prohibition of discrimination on the basis of nationality and the principle of transparency: implications for the access to markets — 2.2. The prohibition of discrimination and the regulator’s independence — 2.3. The freedom to provide services, the right of establishment and the principle of proportionality — 2.4. The prohibition of state aids, proportionality and the principle of transparency in the financial relations between States and enterprises — 3. Procedural doctrines of good administration in the secondary legislation — 3.1. The right of defence against unfavourable decisions — 3.2. Participation in regulatory proceedings for the provision of services — 3.3. The duty to state reasons — 3.4. The duration of the proceeding — 4. Institutional organisation and the administrative proceeding: transparency and the simplification of competences — 5. The conformation of national administrative proceedings — 5.1. Common features — 5.2. The minimum standard of “good administration” in national administrative proceedings — 5.3. Sectoral requirements in the national regulation of services — 6. The interaction of Community principles with the national regulation of services — 7. The beneficiaries of Community standards: the transboundary application of procedural protections and the balancing of interests — 8. The domestic application of Community procedural standards — 9. Conclusion

1. Introduction

Of the numerous changes that Community law demands of national laws, this paper shall examine three specific areas. This study seeks primarily to analyse the standards for transparency, participation and the rule of law that Community law imposes upon national administrative procedures for the regulation of services. This body of rules will also be referred to as the rules of “good administration,” even though we will see (*infra*, section 5.1) that this expression, for our purposes, has a stricter connotation than what is generally attributed to it. Following upon this analysis, I will test whether these rules (and their underlying principles) give rise to a general model for the limitation and integration of national laws affecting the single market. Finally, I will examine how Community principles of good administration interact with domestic law in national administrative procedures and how they influence the protection of the parties affected by regulation.

This paper does not address the more general theme of the “Europeanization” of national law, nor the question of which law – Community or national – should enjoy “procedural primacy.” The more circumscribed scope of this examination focuses on the relationship between the substantive rights and duties envisaged by the Treaty, on the one hand, and national administrative procedures for the regulation of the market in services,¹ on the other. We will see how the European Court of Justice has derived from this relationship a set of limitations upon national procedures, mainly in the service of greater transparency, greater participation, and the rule of law.

¹ This is examined in J.S. DELICOSTOPOULOS, *Towards European procedural primacy in national legal systems*, in *European Law Journal*, 2003, pp. 609-610.

The conformation of national procedures to Community rules takes place through the direct effect of Treaty principles, as well as through policies developed by Community institutions on the basis of the Treaty. We will see that in both of these cases this conformation occurs in the negative sense as well, where Community law does not dictate specific rules for administrative procedures as such, but instead addresses conflicts and gaps between the national administrative procedural rules and one or more substantive Treaty norms.

2. *The conformation of administrative procedures affecting the market in services with Treaty principles*

2.1. *The prohibition of discrimination on the basis of nationality and the principle of transparency: implications for the access to markets*

According to the Court's ruling precedent, "the general principle of equality, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of community law."² The Court has drawn a number of dynamic conclusions from this principle as to the different phases of administrative proceedings, and the relationship between parties in them.

Addressing the particular issue of procurement contracts, the Court linked the equal treatment of tenderers with the duty of transparency imposed by the directives in identifying the economically most advantageous offer: the award criteria must be known to all tenderers before the preparation of their tender.³ The Court's underlying reasoning was not unlike that of Italian judicial decisions in the area of *par condicio* in public competitions.⁴ The award criteria must be defined in advance and remain stable in the course of the competition, in order not to prejudice some candidates' chance of being selected.

The Court thus interpreted the specific legal duties so as to link the principle of non-discrimination with the principle of transparency. There are two types of relationship between these principles: first, transparency furthers equal treatment – in the above-mentioned sense of access to reliable award criteria; second, it enables the oversight of institutions' concrete *respect* for equal treatment.⁵ In other words, not only must concrete

² ECJ, 8 October 1980, *Überschär*, Case C-810/79. A penetrating examination of the principle of equality is that of G. DAVIES, *Nationality discrimination in the European internal market*, The Hague, 2003. Even cases of commercial restrictions, decided by the ECJ on the basis of other principles, are analyzed in light of non-discrimination.

³ ECJ, 25 April 1996, *Commission v. Belgium*, Case C-87/94, paragraph 88 and the following, relying on Council Directive 90/531.

⁴ See, *ex multis*, the decision of the Italian Council of State (Supreme Administrative Court), section V, 6 October 1999, n. 1331, in *Cons. Stato*, 1999, I, 1599; *Cons. Stato*, sez. IV, 10 luglio 1999, n. 1212, in *Appalti urbanistica edilizia*, 2000, 203, with commentary by LUDRIANO.

⁵ In general terms, following a liberal reading of the principle of non-discrimination, ECJ, 18 November 1999, *Unitron Scandinavia A/S*, in Case C-275/98, paragraph 31.

discrimination be avoided, but even the mere appearance of it must be avoided as well.

The principle of equality (and its implications for the rules of “good administration”) was initially addressed only to the area of government contracts. However, the Court’s insistence on the relationship between its specific decisions and the basic principles of the Treaty paved the way for a broader application. In addition to government contracts – to which the criteria of equal treatment apply by virtue of secondary Community law⁶ — the Commission has considered the application of the principles of equality and transparency to other areas, such as the provision of services, not specifically covered by the directives on government contracts. This refers to the procedures by which public institutions select a particular enterprise to provide a service – as in the case of government contracts – but with the particular feature that “the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.”⁷ Through the concession, national authorities regulate enterprises’ access to particular markets, created by the authorities themselves, by means of a fixed legal regime and possibly the grant of public contributions.

In its communication in this area,⁸ the Commission held that, notwithstanding a lack of specific precedents, the awarding of service concessions must respect the minimum criteria of non-discrimination and transparency, and thus that the criteria governing tender competitions must be known to all potential concessionaires in advance and apply to everybody in the same way. The Commission reached this conclusion in the specific area of concessions, but with the premise that the same principles would be applicable to “any act of State laying down the terms governing economic activities.”⁹

The Court too has repeatedly expressed a similar disposition. Already in the *Telaustria* decision,¹⁰ which followed closely upon the Commission communication, the Court held the principle of transparency to apply to service concessions, thus requiring that there be a degree of advertising “sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.”¹¹ In the later

⁶ Directives 92/50/EEC and 93/38/EEC, now replaced by Directives 2004/18/EC and 2004/17/EC, respectively.

⁷ Directive 2004/18/EC, Article 1, paragraph 4. Along the same lines, the Commission, in its *Interpretative Communication on Concessions under Community Law*, 2000/C 121/02, paragraph 2.2. On the concession of services in Community law, see B. MAMELI, *Concessioni e pubblici servizi*, in *Riv. it. dir. pubbl. comunitario*, 2001, p. 63.

⁸ Commission, *Interpretative Communication on Concessions under Community Law*, op. cit..

⁹ Commission, *Interpretative Communication on Concessions under Community Law*, id., paragraph 3.

¹⁰ ECJ, 7 December 2000, *Telaustria Verlags GmbH*, Case C-324/98.

¹¹ See paragraphs 61-62. Though this statement was an *obiter dictum* (as the main question before the Court was the application of Directive 93/38/EEC), the Court put it forward nonetheless with the intent of “helping” the national court in deciding the questions posed by the preliminary ruling (paragraph 59).

Consorzio Aziende Metano decision,¹² the Court (here directly vested with the question of transparency) reaffirmed that the lack of transparency in the awarding of a concession disadvantages foreign undertakings in expressing their interest in obtaining that concession, and thus constitutes an indirect discrimination on the basis of nationality.¹³ It is not that this discrimination favours national undertakings as such, but rather the individual undertaking that gets the concession award, which need not be a national one. Still, the Court's reasoning implied that domestic undertakings are more likely to be aware of the intentions of their own national administrations and, in principle, more likely to benefit from such opaque procedures.

Community secondary legislation has also developed analogous solutions to parallel issues arising in the area of public service concessions. In the air travel sector, for example, the grant of an operating license to an individual undertaking must be made on the basis of a public procedure, with a notice specifying the contents and conditions of the service and the guarantee of minimum time limits for tendering offers.¹⁴ More recently, specific duties of transparency in public service concessions and in the provision of general services can be found in the rules governing electronic communications, electrical energy and gas.¹⁵

Applications of the principle of transparency in the secondary legislation go beyond the area of concessions to include every act of national governments conditioning the provision of services. The practical criteria are similar to those set forth in the area of public contracts, though they tend to be more general and less formalistic.

First of all, there are cases in which Community law, faced with the need to fix a quota in granting of certain rights, has required the adoption of publicity procedures. This approach was anticipated by some sectoral directives in the grant of rights of use for radio frequencies¹⁶ and in the selection of airport groundhandling service providers¹⁷, and later generalized by the "Services" Directive¹⁸. Moreover, the sectoral directives view the duties of transparency and the prior determination of the criteria to arise from the administration's decision to fix a quantitative limit upon the rights to be granted. In the law governing radio frequencies, such

¹² ECJ, 21 July 2005, *Consorzio Aziende Metano v. Comune di Cingia de' Botti*, Case C-231/03.

¹³ Paragraphs 17-18. The Court found direct concessions to be admissible only under special circumstances, such as there being a very modest economic interest at stake, such that "the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect" to be appreciated (paragraphs 19-20).

¹⁴ See Regulation 2407/92/EEC, Article 4. The secondary legislation in the area of maritime transport is less detailed, limiting itself to asserting the principle of non-discrimination: Regulation 3577/92/EEC, Article 4.

¹⁵ See Directives 2002/22/EC, Article 8, and 2003/54/EC, Article 3, paragraphs 2 and 4, and 2003/55/EC, Article 3, paragraph 2, respectively.

¹⁶ Directive 2002/20/EC, Article 7.

¹⁷ Directive 96/67/EC, Article 11, paragraph 1, letter b).

¹⁸ See Directive 2006/123/EC, Article 12, about the rule's drafting stages and upon the reasons which have restricted its original aims; see, within the research which the present paper is part of, A. TONETTI, *Harmonisation and equivalence in the european services regulation*, paragraph 3.

obligations contribute to the procedure for the re-examination of the limitation, to be carried out periodically, and eventually initiated by the interested parties themselves. Once the quantitative limitation has been determined, the duty of transparency shifts to the phase in which the rights are granted. The law governing airport groundhandling services is less analytic than the law governing radio frequencies, and seems to assume the long-term rigidity of certain airport infrastructures, which would impede the exercise of such rights by an indeterminate number of operators. For this reason, the directives prefer to address administrators' choices at the level of substantive discretion rather than that of procedure.

The criteria for authorisation and enabling decisions, such as concessions of rights to use public goods, are, by contrast, strictly defined by Community norms¹⁹ though, in some cases, they may be left up to national authorities, in whole or in part. In such cases, the approximation measures will require, among other things, that the criteria be "objective and "transparent,"²⁰ a formula suggesting not only the substantive requirement that decision-makers exercise their discretion within reason, but also the procedural requirement that the criteria be knowable ahead of time to the interested undertakings.²¹ In certain sectors, like energy and gas, it is expressly required "that the authorisation procedures and criteria shall be made public"²²; such requirement has been embodied also by the 2006 "Services" Directive²³

This approach can be seen even more explicitly in looking at the community rules on the administrative proceeding as a whole (and thus at every aspect of the rules governing it). The "Services" Directive contains, at such regard²⁴, a principled affirmation which adopts a solution already provided by the sectoral legislation. For example, in the licensing of railway undertakings, "[t]he procedures for the granting of licences shall be made public by the Member State concerned, which shall inform the Commission thereof."²⁵ In the field of electronic communications and networks, Member States must publish any decision to limit the granting of rights of use in

¹⁹ See Directive 2002/20/EC, Article 6 and annex.; Directive 2003/54/EC, Article 6.

²⁰ See Directives 97/67/EC, Article 9, paragraph 3, on postal services licenses; 2002/20/EC, Article 6, paragraph 1, on the authorisation of electronic communications networks and services; 2003/54/EC, Article 6, paragraph 1, on the construction of new electricity generating plants. One markedly more detailed scheme for authorisations and licensing, even in the part dealing with the definition and advance publicity of the criteria, can be seen in Directive 1997/13/EC, subsequently repealed by Directive 2002/20/EC, governing general authorisations and individual licenses in the field of telecommunications services. We can see that the greater stringency of Community law was balanced by a wider discretion in making some of the basic choices that the first generation of telecommunications directives left up to the Member States.

²¹ On the use of the word "transparency" in Community law, see B. VESTERDORD, *Transparency – Not Just a Vogue Word*, in *Fordham Int'l L.J.*, 1998-1999, vol. 22, p. 902, which attributes the following content to it in the area of adjudication procedures: the duty to give reasons, the right to be heard and the right of access to one's files.

²² Directive 2003/54/EC, Article 6, paragraph 4; Directive 2003/55/EC, Article 4, paragraph 2.

²³ See Directive 2006/123/EC, Article 10, paragraph 1, letter f)

²⁴ See Article 13, paragraph 1.

²⁵ See Directive 95/18/EC, Article 15, paragraph 1.

general, as well as individual decisions affirmatively granting them.²⁶ In the more visible area of airport services, “These criteria shall be made public and the supplier of groundhandling services or self-handling airport user shall be informed in advance of the procedure for obtaining approval.”²⁷

2.2. *The prohibition of discrimination and the regulator’s independence*

A further implication of the principle of equality, relevant to this study, is of an organizational nature and has to do with the distinction between the regulatory agency, on the one hand, and the regulated bodies, on the other. Though this problem was initially raised with specific respect to the circulation of goods, its solution has since found a wider application, extending to services as well (and to any other economic activity subject to government regulation).

The original case arose out of the privatisation of telecommunications terminal equipment, in which various Member States delegated technical regulatory responsibilities to the very actors involved in the production and sale of such terminal equipment.²⁸ The Court was asked to evaluate the relevant Commission directive and held that granting regulatory functions to an undertaking, itself in competition with other regulated parties, violates the principle of equal treatment and gives the regulating undertaking an undue competitive advantage. The Court did not need to establish the concrete existence of discriminatory behaviour, finding the skewing of “equal opportunity” to suffice.²⁹

This principle was reaffirmed in later decisions³⁰ regarding service activities, and has had numerous applications in the secondary legislation.³¹

²⁶ Directive 2002/20/EC, Articles 5, paragraph 2, and 7, paragraph 3. In the previous regulatory framework, Directive 94/46/EC, in order to justify the process of liberalisation, stated that “any special right which directly or indirectly - for example by not providing for an open and non-discriminatory authorisation procedure - limits the number of the undertakings authorized to import, market, connect, bring into service and maintain such equipment, is liable to have the same kind of effect as the grant of exclusive rights.” On this basis, the currently valid directive in this area, 2002/77/EC, Article 1, prohibits Member States from granting special rights without respecting objective, proportionate and non-discriminatory criteria.

²⁷ Directive 96/67/EC, Article 14, paragraph 1. Similarly, see also Regulation 2407/92/EEC, Article 13, in the area of air transport, as well as Directive 2003/55/EC, Article 4, paragraph 2 on the market in gas.

²⁸ ECJ, 19 March 1991, *France v. Commission (telecommunications terminals equipment)*, Case C-202/88. The case arose out of Directive 88/301/EEC, which the Commission had adopted on the basis of Article 86 (*ex* Article 90) of the Treaty.

²⁹ It must be said that whenever the enterprise which is simultaneously regulating and regulated enjoys a dominant market position, the national norms permitting this may constitute a violation of Article 82 EC, since this may be an abuse of dominant position thus creating a “conflict of interest,” which is simply a particular way of looking at the violation of the principle of equality. See ECJ., 13 December 1991, *GB-INNO BM*, in Case C-18/88.

³⁰ ECJ 17 November 1992, *Telecommunications Services*, Joined Cases C-271, 281 and 289/90; 9 November 1995, *Tranchant*, Case C-91/94.

Still, its initial formulation contained the seeds of its further development, linked to a substantive interpretation of the separation between the regulator and the regulated. Moving beyond formal but ultimately subjective distinctions in order to consider conflicts of interests, the Commission held that when the Member States themselves own businesses active in the provision of the regulated services, there has to be an effective structural separation between regulatory functions and ownership and management.

The Commission made this specification – also reaffirmed in various sectoral directives³² — in a decision regarding the postal sector,³³ where it held the attribution of ownership and management functions to distinct offices within the same ministry to be a conflict of interest and a violation of equal treatment. The Commission went further, also holding that the assignment of regulatory functions to a body only technically distinct from the regulated parties, when there are no other safeguards to ensure impartial judgment (for example, a restriction on regulatory employees going to work for the dominant operator in the regulated sector at the conclusion of their public employment), was insufficient to guarantee the requisite independence.³⁴

The directives sometimes call for a “functional” independence, meaning that the regulatory body, in order to carry out its task, has to be not only legally distinct, but also to have its own resources *vis a vis* the regulated one.³⁵ A sharp application of this point can be seen in the law governing telecommunications terminal equipment (though this is addressed to goods rather than to services), which specifies that, in the body charged with verifying technical conformity, “its director and the staff responsible for carrying out the tasks for which the notified body has been designated must not be a designer, manufacturer, supplier or installer of radio equipment or telecommunications terminal equipment, or a network operator or a service provider, nor the authorised representative of any of such parties. They must be independent and not become directly involved in the design, construction, marketing or maintenance of radio equipment or telecommunications terminal equipment, nor represent the parties engaged in these activities.”³⁶

2.3. The freedom to provide services, the right of establishment and the principle of proportionality

³¹ See Directives 90/388/EEC, in the field of telecommunications services; 2003/54/EC, Article 23, for energy; 2003/55/EC, Article 25, for gas; 96/67/EC, Article 14, paragraph 1, for airport groundhandling services; 95/18/EC, Article 3, as amended by Directive 2001/13/EC, for railway services.

³² *Id.*

³³ Commission Decision of 23 October 2001, *La Poste*, 2002/344/EC, paragraph 77 and the following section.

³⁴ This was *obiter dictum*, addressed to the specific issue raised by the interested Member State.

³⁵ Directive 97/67/EC, Article 22, paragraph 1. On this, see also *infra*, section 5.3.

³⁶ Directive 1999/5/EC, Annex VI.

The core of the freedom to provide services and the right of establishment lies in the prohibition of discrimination on the basis of nationality. This prohibition influences both national procedural and national substantive law. National procedural rules must not discriminate on the basis of nationality, for example by providing for disadvantageous procedural time limits, less participatory protections or narrower rights of judicial review for the non-national party. Apart from this however, Community law does not import specific sets of duties for the protection of fundamental rights into national law.

The Court has long been developing a further test to measure respect for the freedom of circulation: the “obstacle to market access” test, which applies in cases where there is no formal or substantive discrimination on the basis of nationality.³⁷

From this perspective, any administrative measure regulating an activity – for example, an authorisations scheme, contribution requirements, etc. – can in principle constitute a restriction on the transboundary provision of services or the right of establishment. The Court however did not regard such measures as necessarily incompatible with the Treaty, insofar as it recognized that they might also pursue public interests worthy of protection. It admitted the possibility of an exception for such “mandatory requirements” as effective financial supervision, the protection of public health, the fairness of commercial transactions and consumer protection.³⁸

This list is not exhaustive, and the Court also granted the Member States some leeway in defining their own interests, as long as they are not manifestly arbitrary and there is not a clear contradiction between the stated “mandatory requirement” and the State’s concrete behaviour.³⁹ The Court tends to analyse the proportionality between the mandatory requirement and the state-imposed restriction.⁴⁰ It is important to focus on those areas in which the Court analyses whether there are less restrictive measures capable of attaining the same goals, or whether the measure is excessively

³⁷ Though this is a common formula in Community judicial decisions, some commentators regard it as essentially an expression of judicial rhetoric. See in particular, G. DAVIES, *Nationality discrimination in the European internal market*, op. cit., according to which the Court always really decides on the basis of effective or potential discrimination, even when it claims to be doing the opposite. On the different interpretations of the Court’s decisions, see E. SPAVENTA, *From Gebhard to Carpenter: towards a (non-)economic European constitution*, in *CML Rev.*, 2004, 743.

³⁸ ECJ, 20 February 1979, *Cassis de Dijon*, Case C-120/78, on the circulation of goods, but also as an expression of a more general principle. With regard to services in particular, see ECJ, 12 July 2001, *Smits y Peerbooms*, Case C-157/99. Directive 2006/123/EC, Article 4, nr. 8 recognises the reasons which, in ECJ case-law, can justify limitations on the circulation of services.

³⁹ See ECJ, 6 November 2003, *Gambelli*, Case C-243/01, in the area of gambling, where the Court held out the contradiction between a protection scheme aimed at limiting the spread of a service, on the one hand, and the State’s intensive advertising of that activity, on the other.

⁴⁰ See, among the most recent decisions, ECJ, 6 March 2007, *Placanica et.al.*, Joined Cases C-338/04, C-359/04 and C- 360/04.

extensive.⁴¹ In such analysis, the Court may give weight to the national norms governing regulatory proceedings in the area of services.

The Court has repeatedly analysed whether the proceeding for the application of national measures – for example, the proceeding for granting authorization for the provision of a particular service – was structured in such a way as to minimize the restrictions on free circulation and the right to establishment. The Court’s reasoning in these cases likens the procedural burden to the obstacle to market access attributable to the substantive limits that the national law may put in the way⁴². Procedural burdens, like substantive ones, may not exceed what is necessary to protect “mandatory requirements.”

This test was initially limited to a few specific areas, like the length of the proceeding or the access to a judicial remedy. In the *Mueller* case, regarding the circulation of goods, the Court affirmed that the principle of proportionality requires that authorisations be obtainable “under a procedure easily accessible to manufacturers and traders.”⁴³ In the later decision, *Commission v. Germany (purity requirement for beer)*, the Court added that national administrations have a duty to state the reasons for refusing authorisation, and that parties must be able to “challenge before the courts an unjustified failure to grant authorisation.”⁴⁴

The procedural implications of the principle of proportionality have been the focus of increasingly sophisticated analysis.⁴⁵ Evaluating a Spanish authorisation scheme for maritime cabotage transport, the Court in the *Analir* decision specified that the fundamental freedoms guaranteed by the Treaty cannot be subjected to the unlimited discretion of national administrations. The authorisation scheme must therefore be grounded in objective and non-discriminatory criteria that are known in advance to the undertakings concerned. The Court reaffirmed that those who are affected negatively by a decision ought to have the option of a judicial remedy.⁴⁶

In the *Smits y Peerbooms* case, the Court added that “[s]uch a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of

⁴¹ These are two different formulas, though the Court does not always distinguish them carefully. The latter may be seen as comprehending the former.

⁴² On this, see also “Services” Directive 2006/123/EC, at whereas (43).

⁴³ ECJ, 6 May 1986, *Mueller*, Case C-304/84.

⁴⁴ ECJ, 12 March 1987, *Commission v. Germany (purity requirement for beer)*, Case C-178/84, paragraphs 45-46. On the Court’s proportionality analysis see, within the research which the present paper is part of, S. MORETTINI, *Community principles affecting the exercise of discretionary power by national authorities in the service sector*, in particular section 3.1.

⁴⁵ The Court, even when reviewing the decisions of Community institutions, demonstrates a growing sensitivity to the individual rights that can be inferred from formal procedural protections. On this see L. AZOULAY, *The Court of justice and the administrative governance*, in *European law journal*, 2001, pp. 429-430.

⁴⁶ ECJ, 20 February 2001, *Analir*, Case C-205/99, paragraphs 38-39.

being challenged in judicial or quasi-judicial proceedings.”⁴⁷ Then, the principle of simplification of procedures has been implemented by Directive 2006/123/EC, which has drawn a number of conclusions regarding the simplification of documentation and the development of administration by electronic means⁴⁸.

2.4. The prohibition of state aids, proportionality and the principle of transparency in the financial relations between States and enterprises

National government regulation of services is also limited by the prohibition of state aids, set forth in Articles 87 and 88 of the Treaty. This limitation extends to any form of aid that States or other government agencies may give to businesses. The States have traditionally used such aids to influence industrial policy and economic planning, through such tools as incentives and tariffs.

Limits on state aids does not by definition affect the law governing national proceedings, at least not directly, because it merely sets forth the forms of state aids that are admissible. In particular circumstances, however, the prohibition of state aids can imply certain procedural adaptations, aimed at increasing the transparency of the financial relationships between States and both public and private enterprises.⁴⁹ This is the case in granting either public or private corporations the right to exercise a service of general economic interest,⁵⁰ a status which can imply the rights to both exploit different kinds of public goods and to claim monetary compensation for the provision of services.

Member States have the discretion to define the missions of services of a general economic interest, just like they have the discretion to define the “mandatory needs” which justify limitations on the freedom to provide services. This discretion is subject to review only in the case of manifest error.⁵¹ At the same time, procedures for granting services concessions are subject to the principles of non-discrimination and proportionality, which

⁴⁷ ECJ, *Smits y Peerbooms*, op. cit., paragraph 90. Likewise, see also the conclusions of the Advocate General Colomer, 16 May 2006, *Placanica*, Joined Cases C-338/04, C-359/04 and C-360/04, paragraphs 121-122. The judicial review requirement, read together with the burden of proof requirement, set forth in the above-mentioned *Commission v. Germany* case, underscores the fact that a decision to refuse has to be motivated as to enable the party to challenge its reasoning before a Court.

⁴⁸ See Directive 2006/123/EC Article 5, paragraph 3 and Article 8, respectively.

⁴⁹ The issue is thus even broader than the transparency of financial relations between States and public enterprises or holders of special and exclusive rights, which is governed by specific instruments of secondary legislation (see Directive 723/1980/EEC) which contains essentially accountancy requirements.

⁵⁰ On the definition of services of a general economic interest, see Communication from the Commission, *Services of general interest in Europe*, OJ 01, C 17. In the jurisprudence, see ECJ, 19 December 1991, *Merci convenzionali*, in Case C-179/90).

⁵¹ Communication from the Commission, *Services of general interest in Europe*, op. cit., paragraph 14.

means that they must not cause unnecessary distortions in order to pursue the mission of general economic interest.⁵²

This approach has given rise to the problem of defining the relationship between the benefits that an operator pursuing a mission of general economic interest receives from the State (or from other governmental agencies), any fees that the operator must pay and collect, and the compensation derived from the fulfilment of the mission. In one kind of imbalance among these factors, the state-provided benefits, added to the compensation for the performance of the service, exceed the total fees owed by the operator; this form of overcompensation could be seen as a state aid, and as such, be prohibited by *ex-Article 87* of the Treaty. Community jurisprudence has approached this problem in various ways⁵³ and has only recently attained coherence in the *Altmark* decision. Here, the Court set forth a four-part test for the determination of overcompensation, according to which: a) there must be an entrustment of a public service task, with clearly defined obligations; b) the parameters for calculating the compensation must be established in advance in an objective and transparent manner; c) the compensation cannot exceed what is necessary to cover all or part of the costs, taking into account a reasonable profit on the investment; d) when the undertaking charged with fulfilling public service obligations is not selected pursuant to a public procurement procedure, the level of compensation must be determined with reference to a typical undertaking.⁵⁴

The Commission also maintains that there is a decreased risk of overcompensation, at least in principle, when the price is based on an “open and competitive” tender for the selection of the provider of a service of general economic interest.⁵⁵ Should this not be the case, the providers’ internal accounts must be based on the consistent application of objectively justifiable cost accounting principles, to reveal the costs borne in relation to the amount of compensation.⁵⁶ Following the *Altmark* decision, the Commission formalized this test in the “Community framework for State

⁵² Commission, *Interpretative communication on concessions under Community law*, 2000/C 121/02, paragraph 3.1.

⁵³ V. C. BOVIS, *Developing public procurement regulation: jurisprudence and its influence on law making*, in *CML Rev.*, 2006, pp. 461 and 481 and following sections.

⁵⁴ ECJ, 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, in Case C-280/00. These criteria were reiterated by the ECJ, 30 March 2006, *Servizi ausiliari dottori commercialisti*, in Case C-451/03, at paragraphs 62 and the following section. E. GROMNICKA, *Services of General Economic Interest in the State Aids Regime: Proceduralisation of Political Choices?*, in *European public law*, 2005, p. 429 and the following section, sets forth the Member States’ views on the Court’s procedural criteria.

⁵⁵ The Commission had developed this principle with respect to privatization measures, in which the compatibility of the sales price of public enterprises could be disputed. See Commission, *Annual Report on Competition Policy*, 1993, paragraphs 402-403. This principle is now applied to public financial investments, on which see *Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises*, 19 July 2006, paragraph 5.2.4., where calls for tender are seen as a mechanism for guaranteeing the proportionality of state aids.

⁵⁶ See the discussion paper, *Services of general economic interest and state aid*, 12 November 2002; for an application of these principles to the particular case of airport and airline services see Commission, *Community guidelines on financing of airports and start-up aid to airlines departing from regional airports*, 6 September 2005 (forthcoming).

aid in the form of public service compensation”, 2005/C 297/04, and in Decision 2005/842/EC taken *ex* Article 86, paragraph 2, of the EC Treaty, underscoring the difference between illegitimate state aids and legitimate public compensation, in which the service of general economic interest is assigned pursuant to a public procurement procedure.⁵⁷

Member States must thus set forth the concrete features of the service of general economic interest and the criteria for calculating compensation in advance, to ensure the transparency of the service provision and the verification of its compatibility. A public procurement procedure, with objective, transparent, predetermined selection criteria, continues to be framed as a burden, enabling interested Member States to request some relief from the verification procedure, in light of Article 88 of the Treaty.

The assignment of services of a general economic interest must also respect the principles derived from the fundamental freedoms of the Treaty, in particular, the freedom of movement of services and the right of establishment. As we have seen,⁵⁸ these principles already require administrative bodies to assign contracts and public service concessions through competitive procedures. The Article 87-derived obligation to hold public procurement procedures ought therefore to be seen as closing the gap in the cases where a similar obligation cannot be derived from other sources.⁵⁹ It ought to address, in particular, the entrustment of services whose costs are not totally paid by a public authority (and which are therefore not governed by public works contracts) and which do not imply special and exclusive rights.⁶⁰

3. Procedural doctrines of good administration in the secondary legislation

Procedural doctrines of good administration are provided by a number of secondary, sectoral and horizontal, legislation, which has been partly mentioned.

The sectoral provisions mainly govern public (or used to be public) services as communications, energy, postal, airport services and banking and finance regulated services. The horizontal legislation sets forth the elaboration of technical rules, the mutual recognition of professional

⁵⁷ See Decision 2005/842/EC, whereas (4). For a detailed application of the *Altmark* test, see Decision 2005/217/EC, *TV2/Danmark*. Prior to the Court’s decision, the Commission had carried out a analogous examination in Decision 2002/782/EC, *Aiuti a Poste italiane S.p.A.*

⁵⁸ Paragraph 2.1.

⁵⁹ See Commission, *Community guidelines on financing of airports and start-up aid to airlines departing from regional airports*, *op. cit.*, paragraph 58, which specifies that this reasoning holds “[w]ithout prejudice to the obligations deriving from the rules and principles applicable to public procurement and concessions.”

⁶⁰ This feature, at least in the Commission’s approach, is typical of service concessions, assuming that they regard activities that are normally the responsibility of the States, but whose operation is transferred to third parties. See, Commission, *Interpretative communication on concession*, *op. cit.*, paragraph 2.2.

qualifications and, more recently, the services themselves, as in the cited Directive 2006/123/EC.

The Services Directive provides exceptions for its scope (article 2) and recedes with respect to sectoral legislation (article 3); thus, the Services Directive is not a general provision nor strictly a gap closing provision. It governs a number of services resulting from those excluded from its scope and those disciplined by sectoral legislation.

As to procedures, the Services Directive consolidates the Community case-law trends or resumes the solutions already formulated by sectoral legislation. Under this point of view, the exclusions from the scope could cause the (wrong) assumption that the excluded services are not subject to the principles established by the Court, according to the Treaty. Actually, the exclusions and derogations laid down by the Directive partially depend on the difference between legal systems for the concerned services, as they depend, more often, on balancing solutions reached in the stages of the drafting of the Directive.

3.1. *The right of defence against unfavourable decisions*

When a national measure might have detrimental consequences for its target, the secondary law imposes a number of minimal procedural protections, foremost of which is the effective recognition of the right of defence. This right is a synthesis of a number of more specific doctrines, like the right to be notified of contestations, the right to be heard, the right to access one's files and the right to use the relevant means of evidence.⁶¹ Generally speaking, even the right of defence can be related back to Treaty principles: not only to the principle of proportionality applied to the freedom of circulation,⁶² but also the protection of fundamental rights and the principle of good Community administration.⁶³ It thus applies to proceedings before national administrations, insofar as they governed by Community law, as well as to proceedings carried out by Community bodies directly.

In the secondary norms on services, one finds various applications of the right of defence, according to the type of proceeding and the interested sector. With regard to proceedings for granting authorisation, for example, a

⁶¹ See the Opinion of Advocate General Ruiz-Jarabo, 11 February 2003, *Aalborg Portland v. Commissione*, in Case C-204/00, paragraph 28.

⁶² See *supra*, section 2.3.

⁶³ The right of defense is also included in the Charter of Fundamental Rights of the European Union, specifically as a manifestation of the right to good administration (Article 41, which specifies the right to be heard, to access one's file and the obligation of the administration to give reasons for its decisions). For an examination of this right and its place in the European constitutional project, see D.U. GALETTA, *Il diritto ad una buona amministrazione europea come fonte di essenziali garanzie procedurali nei confronti della pubblica amministrazione*, in *Riv. it dir. pubbl. comunitario*, 2005, pp. 819 and 829 and following sections. On the co-existence of both an essentialist element – the protection of a fundamental right – and a functionalist one – good administration, in the European right of defense jurisprudence, see E. BARBIER DE LA SERRE, *Procedural justice in the European Community case-law concerning the rights of the defence: essentialist and instrumental trends*, in *European public law*, 2006, p. 225 and following section.

right of defence against possible adverse decisions in the proceeding itself is generally replaced by a right of appeal from an administrative decision, in function of which the obligation to give reasons for final decisions is provided. This solution⁶⁴ can be seen in the concrete areas of banking,⁶⁵ investment services,⁶⁶ postal services,⁶⁷ the recognition of professional qualifications,⁶⁸ airport groundhandling services,⁶⁹ railway services⁷⁰ and electronic communications networks⁷¹ and also in the “Services” Directive⁷², which provides a minimum right of defence in the procedure, requiring the administration to inform the applicant about any incomplete documentation⁷³

Looking at proceedings appealing decisions in the granting of rights of use, the situation changes somewhat. The decision to revoke rights of use must be supported by reasons, and can be subjected to judicial review in the banking, investment⁷⁴ and airport services sectors,⁷⁵ while in the electronic communications sector, an undertaking has the opportunity to present its views.⁷⁶ This sector, moreover, admits a particular form of defence into the proceeding, which consists in the spontaneous remedy of the breach by the interested undertaking. No such possibility is provided in other areas, such as railway transportation⁷⁷ and air transportation.⁷⁸

The degree of protection is not meaningfully increased in genuinely disciplinary proceedings (in proceedings for the revocation of rights of use, discussed above, there can be a disciplinary element, but this is always linked to the protection of the interests animating the authorisation regime in the first place), which themselves differ from sector to sector. The right of defence in this kind of proceeding, for example, is apparently neglected in

⁶⁴ Which today seems rather backwards compared to solutions at the national level, given that recent amendments to Italian Law n. 241/1990 have introduced the communication of the reasons for rejection, which the interested party may challenge (Article 10-*bis*).

⁶⁵ Directive 2002/12/EC, Articles 10 and 33

⁶⁶ Directive 93/22/EEC, Article 3, paragraph 4.

⁶⁷ Directive 97/67/EC, Article 9, paragraph 3.

⁶⁸ Directive 2005/36/EC, Article 51, paragraph 2.

⁶⁹ Directive 96/67/EC, Article 14, paragraph 1.

⁷⁰ Directive 95/18/EC, Article 15.

⁷¹ In virtue of a general appeals procedure, set forth in Article 4, Directive 2002/21/EC.

⁷² Directive 2006/123/EC, Article 10, paragraph 6.

⁷³ See Article 13, paragraph 6. The right of defence is less expanded than what is provided by Italian law. The information about the reasons for refusal- as provided by the recently amended Law nr. 241/1990 (article 10-*bis*)- allows the applicant to file comments, further than in the case of incomplete documentation.

⁷⁴ Article 14, Directive 2002/12/EC, and Article 3, Directive 1993/22/EEC, respectively.

⁷⁵ Directive 96/67/EC, Article 14, paragraph 2.

⁷⁶ Directive 2002/20/EC, Article 10, paragraph 2. Previously, Directive 97/13/EC, Article 9, paragraph 4. It must be specified that in this particular case, the revocation of rights of use is considered an extreme measure, to be adopted when remedial provisions are insufficient to bring the activity back within the scope of the authorisation.

⁷⁷ Directive 95/18/EC, Article 11.

⁷⁸ Regulation 2407/92/EEC, Article 13.

the area of banking and financial services and, in electronic communications networks, is treated just as it is for revocation of rights of use.⁷⁹

The variety of approaches manifested in the secondary law can be interpreted in many different ways. At least in part, it can be explained as an expression of a Community confidence in a minimum level of protection that national systems always guarantee in making disciplinary decisions. Should such minimum level not be concretely respected, parties can pursue a legal remedy on the basis of general principles of European law. Another interpretative key might be the temporal character of the rules governing different areas, suggesting progressively greater protection as the secondary legislation has become more refined. This explanation, however, would not hold for the positive law, which includes both older norms giving greater scope to the right of defence and more recent norms neglecting it (for example, in the area of banking law).

But there is also a third possible interpretation. In the Court's jurisprudence, as has been argued,⁸⁰ an essentialist interpretation of the right of defence exists alongside a functionalist one: according to the essentialist interpretation, the right of defence ought to be guaranteed insofar as it is a personal right, independently of any concrete utility it may or may not bring to the proceeding and independently of the interests concerned; according to the functionalist interpretation, by contrast, the right of defence ought instead to serve "good administration" and ought to be increasingly protected the more that it serves this objective.⁸¹ The secondary legislation regulating services seems to privilege the functionalist approach, giving particular weight to balancing the interest of defence with the interest in adopting the provision.

In authorisation procedures, in which Community law limits the discretion of national administrative authorities, the secondary legislation assumes that the undertaking's contribution cannot be significantly increased after the presentation of the request. In appeals and disciplinary proceedings, the scope of defence increases, but it still runs into limits where important public interests are involved which could be easily and permanently harmed. This can explain the lack of specific protections in the rail and air transportation sectors, where passenger safety is at stake, and in the banking and finance sectors, believed to be vulnerable to quick-spreading, systemic crises.

The secondary law however provides an additional guarantee, as would be implied by the reasoning of the Court of Justice. This law frequently provides that negative decisions trigger special duties of publicity and information on behalf of the Commission or national authorities. This can be seen in the case of the refusal to authorize the construction and operation

⁷⁹ Directive 2002/12/EC, Article 10.

⁸⁰ *Supra*, note 92.

⁸¹ V. E. BARBIER DE LA SERRE, *Procedural justice in the European Community case-law concerning the rights of the defence: essentialist and instrumental trends*, op. cit., *passim*. On the problems of defining the content of the right of defence, see also H.P. NEHL, *Principles of administrative procedure in EC law*, Oxford, 1999, p. 98.

of natural gas facilities⁸² or the withdrawal of banking authorisations.⁸³ Especially when they involve the Commission, these duties aim at supporting the exercise of the specific oversight powers, provided by Treaty Articles 226 and 86. But they also produce a specific effect in terms of the greater transparency of the state decisions that can affect the transboundary provision of services. Even before triggering Commission review, perhaps this transparency might also discourage at least the most manifestly arbitrary behaviours.⁸⁴

3.2. *Participation in regulatory proceedings for the provision of services*

In addition to the right of defence from unfavourable decisions, the Community law applicable to services also makes various appeals to the principles of participation and transparency in regulatory proceedings, which generally conclude with enforcement measures or measures having general effects (like tariff provisions, rules governing access to infrastructure or the allocation of scarce resources). This is an area where the positive norms go ahead the case law of the European Court of Justice, which does not recognise the right of participation in general and law-making proceedings of the European institutions unless provided by the Treaty or by secondary legislation.⁸⁵

Still, such generalisations do not necessarily hold true in the practice of specific sectors.

One example can be seen in the rules governing electronic communications, which expressly provide for a consultation of parties interested in regulatory projects having a “significant impact on the relevant

⁸² See, for example, Article 4, paragraph 3, of Directive 2003/55/EC, on the denial of authorisation.

⁸³ Directive 2002/12/EC, Article 14.

⁸⁴ But see Directive 2003/54/EC on the electricity market, whereas (30), according to which “the requirement to notify the Commission of any refusal to grant authorisation to construct new generation capacity has proven to be an unnecessary administrative burden.” Still, the same burden has been required in the nearly overlapping Directive 2003/55/EC, on the market in gas.

⁸⁵ The leading case in this subject is ECJ 14 October 1999, *Atlanta AG v. Commission*, case C-104/97. See. P. CRAIG, *EU Administrative Law*, Oxford, 2006, pp. 316-318, also for further references. A decision of the Court of First Instance, 17 June 1998, *UEAPME v. Commission*, in Case T-135/96, recognised, with respect to substantially normative acts, a relationship between the lack of democratic representation and the need that such deficit be remedied by the consultation of social actors. Community case law, however, does not further develop this principle. We are beginning to see such affirmations in national jurisprudence. Cf. the decision of the Italian Council of State, section VI, 11 April 2006, n. 2007, according to which “the exercise of regulatory powers by authorities not captured by the traditional tripartite division of powers and the circuit of responsibility set forth by Article 95 of the Constitution is nevertheless justified on the basis of the existence of a participatory proceeding, which reproduces the deliberation characteristic of representative bodies.” For commentary in this area, see M. CLARICH, *I procedimenti e le garanzie del contraddittorio*, in *Autorità indipendenti. Bilancio e prospettive di un modello*, Bologna, 2005, pp. 154-155.

market,”⁸⁶ whether or not such measures take the form of an individual decision or a normative act,⁸⁷ or in the procedures for limiting the number of rights of use to be granted for radio frequencies, which administrations can only adopt after giving “all interested parties, including users and consumers, the opportunity to express their views.”⁸⁸ It is a different case for technical regulations, for which the Member States are obliged to ensure that their standardisation bodies “publish the draft standards in such a way that comments may also be obtained from parties established in other Member States,”⁸⁹ as well as for airport services regulation, where consultation is not open to the public, but is instead limited to a committee of airport users.⁹⁰ Generally speaking, the Commission has invited the Member States to consult widely with interested parties when defining public service obligations.⁹¹

The model set forth by Community law, at least in its most recent formulations, is similar to the American-derived “notice and comment” requirement, which provides for the publication of draft rules and then the opportunity for interested parties to express their views in the context of formal hearings.⁹² An original feature of the participation provided by Community norms – which traces back to the particular nature of the Union – is the expressly trans-national scope that this can have (for example, in the case of technical regulations). The publication of national measures is in fact aimed at soliciting comments from parties established in other Member States, on the assumption that such parties are potentially interested in the regulatory measure — as actual or aspiring service providers in that Member State — or that they can be indirectly affected by it.⁹³

Another ground of distinction is the opening of national procedures, again in the service of greater transparency, to the Commission and the administrations of other Member States, which ought to be informed of regulatory measures that may affect intra-Community trade. Such notice must generally be given preventatively, so as to enable them to express their

⁸⁶ On the fact that participation takes place in discussing the draft measures, see F. MERUSI, *Il diritto amministrativo comune nelle comunicazioni elettroniche*, in *Riv. it. dir. pubbl. comunitario*, 2004, pp. 1269 and 1271 and following sections, according to which the directives introduce an innovative form of “debate to contest.”

⁸⁷ Directive 2002/21/EC, Article 6.

⁸⁸ Directive 2002/20/EC, Article 7, comma 1, letter b).

⁸⁹ Directive 98/34/EC, Article 4, paragraph 1.

⁹⁰ Directive 96/67/EC, Article 13.

⁹¹ See the above-cited decision, 2005/842/EC, at whereas (10).

⁹² See the Federal Administrative Procedure Act, § 503 and following sections. On the “notice and comment” model, and its possible use in Community law, see G.J. EDLES, *Developing a European administrative law tradition: the model of the US administrative procedure act*, in *European Public Law*, 2000, pp. 543 and 556 and following sections. In the American legal commentary, see E. GELLHORN, *Public Participation in Administrative Proceedings*, in *Yale L.J.*, 1972, vol. 81, p. 359; R.B. STEWART, *The Reformation of American Administrative Law*, in *Harvard Law Review*, 1975, vol. 88, p. 1969, and *Administrative Law in the Twenty-first Century*, in *N.Y.U. Law Review*, 2003, vol. 78, p. 437.

⁹³ Transnational participation is widespread in environmental law, on which see R. MACRORY, S. TURNER, *Participatory rights, transboundary environmental governance and EC law*, in *CML Rev.*, 2002, p. 489.

observations and thus influence the formation of the final decision or, in the case of information given after the decision's adoption, to influence its reform or rejection.⁹⁴ Such an approach can be seen, yet again, in the regulation of electronic communications,⁹⁵ but there are also examples in the areas of recognition of professional qualifications,⁹⁶ technical standards and regulations⁹⁷ and land and air transportation.⁹⁸

The various forms of participation envisaged by the secondary legislation can perform different functions, which is also true for participatory institutions as such.⁹⁹ Participation in general proceedings, for example, enables private parties to collaborate and allows public institutions to prepare more accurate preliminary reports. One seemingly common goal among the Community provisions – which might also characterize them with respect to analogous national provisions – is the multiplication of bodies able to review the national application of Community law.

Participatory institutions do not only serve the interest of the private parties that make use of them and the administrations that run the proceedings. They also promote the Community's interest in the formation of a single market, with respect to which they guarantee a far-reaching oversight that Community institutions by themselves would not be able to offer. This view of participation is consistent with Community law's traditional support for other forms for the decentralised review of the behaviour of Member States, such as litigation.¹⁰⁰

3.3. *The duty to state reasons*

The duty to give reasons for decisions that can affect the Community freedoms of providing services and establishment is, as we have seen, a

⁹⁴ Cf. M. CLARICH, *Garanzia del contraddittorio nel procedimento*, in *Dir. amm.*, 2004, pp. 59 and 84-86, which speaks of “horizontal deliberation between regulators.” The Services Directive provides – in general, but with a “balance-like” approach – a “mutual evaluation” of the existing authorisation schemes concerning the Member States and the Commission, which is addressed to the promotion of bills at the Community level. See Article 39 Directive 2006/123/EC.

⁹⁵ Directive 2002/21/EC, Article 7. On procedures arising from the application of this norm, see L. SALTARI, *I procedimenti comunitari composti: il caso delle telecomunicazioni*, in *Riv. trim. dir. pubblico*, 2005, pp. 389 and 419, and following sections.

⁹⁶ See, for example, Articles 14 and 15 of Directive 2005/36/EC.

⁹⁷ Directive 98/34/EC, Article 2.

⁹⁸ See Regulation 1191/69/EEC, Article 8, and Regulation 2408/92/EEC, Article 9, respectively.

⁹⁹ One important reference is S. CASSESE, *Il privato e il procedimento amministrativo. Un'analisi della legislazione e della giurisprudenza*, in *Riv. it. sc. giur.*, 1971, p. 25 and the following section., which distinguishes between the functions of participation, collaboration and defence.

¹⁰⁰ In fact, the desire to promote private lawsuits can be counted as one of the basic goals of the Community legal system, as seen by the Court of Justice. Cf. Commission, *Fifteenth annual report on monitoring the application of Community law*, COM(98) 317 final; *Sixteenth annual report on monitoring the application of Community law*, COM(99) 301 final.

principle affirmed in the Community case law.¹⁰¹ The secondary law does not depart from this orientation, but rather reinforces it in countless decisions, mentioned in part above.¹⁰² There are essentially three categories of decisions which must be motivated: (1) authorisations and related, second-degree decisions (revocations, suspensions, etc.); (2) decisions to derogate from limits set by Community norms; (3) sanctions.¹⁰³

With regard to authorisations for service activities, the secondary legislation generally requires motivation only for decisions refusing such authorisation, and combines this with the right to judicial appeal. This approach can be seen, other than in the “Services” Directive¹⁰⁴, in the regulation of such areas as electrical energy, gas, airport services, banking, rail and air transportation services.¹⁰⁵ In some of these cases, the Community norms include detailed requirements for the contents of such motivations. In the energy and gas sectors, for example, the Directives specify that the reasons for a refusal “shall be made public...The reasons must be objective, non discriminatory, well founded and duly substantiated. Appeal procedures shall be made available to the applicant.”¹⁰⁶

By placing this limitation merely on refusal decisions, the legislation ties the duty to give reasons to the regulated party’s right to defend itself against the decision. The motivation required here is thus more restricted than that provided by the Treaty, in general terms, for the decisions of Community institutions (Article 253). Here, the content of the decision is irrelevant, and the motivation is required not only in function of the right of defence, but also in service of the principle of transparency.¹⁰⁷

In fact, looking at the national regulation of services, the duty to give reasons furthers a more limited and, as it were, more negative, objective: to more easily reveal discriminatory actions and national market closures possibly detrimental to Community undertakings. The assumption is that national regulation which limits access to service markets aims in fact to benefit domestic interests and, with respect strictly to the Treaty, is an obstacle to the freedom of circulation, and is permissible only insofar as it is proportional in its form and substance.¹⁰⁸ From this standpoint, Community law has the sole interest of removing such unjustifiable obstacles, and leaves

¹⁰¹ ECJ, 12 March 1987, *Commission v. Germany (purity requirement for beer)*, cit.. More generally, see *supra*, section 2.3.

¹⁰² *Supra*, section 3.1.

¹⁰³ The duty to give reasons could then also be derived from the norms enabling the participation of interested parties in the proceeding. I will return to this subject *infra*, in section 5.3.

¹⁰⁴ Directive 2006/123/EC, Article 10, paragraph 6, where statement of reasons is required in any situation different from the grant of authorization (apart from rejections), which could delay the access of the provider to the market such as the extension of the procedure expiration date (see Article 13, paragraph 3).

¹⁰⁵ See Directives 2003/54/EC, Article 6, paragraph 4; 2003/55/EC, Article 4, paragraph 3; 96/67/EC, Article 14, paragraph 2; 2002/12/EC, Articles 10 and 33; 95/18, Article 15, paragraph 2; as well as Regulation EC 2407/92, Article 13, paragraph 2.

¹⁰⁶ See Article 6, paragraph 4, of Directive 2003/54/EC and Article 4, paragraph 3, Directive 2003/55/EC, respectively.

¹⁰⁷ Cf. B. VESTERDORD, *Transparency – Not just a vogue word*, op. cit., pp. 903-906.

¹⁰⁸ See *supra*, section 2.3.

it to Member States to protect the national interests potentially harmed by improperly granted authorisations.

These objectives lose some of their force when the national proceeding arises out of a national implementing norm pursuing Community policies beyond the mere removal of trade barriers between the Member States. This can be seen in norms regulating the recognition of professional qualifications, where the Community acts affirmatively in establishing minimum standards for the exercise of specific activities.¹⁰⁹ In such cases, the duty to give reasons can have a wider scope – covering any decision regarding recognition, including positive decisions to grant it. The same can be said for the right to appeal.¹¹⁰

In the case of derogation decisions, the duty to give reasons seems motivated by the concern for making decisions which potentially hinder Community trade subject to review. Such decisions emerge when the secondary legislation, after having fixed rules for the conduct of Member States and their administrations, permits these governments to derogate from such rules or to suspend their application in specific and exceptional circumstances. Such a regime is in place for the emergency enactment of technical rules for the protection of public health and safety,¹¹¹ quotas for the authorisation for the provision of airport services,¹¹² and emergency measures adopted by national authorities in the area of electronic communications.¹¹³

In these areas, the duty to state reasons serves precisely to make explicit the reasons for the exemption and – this being always accompanied by the duty to notify the Commission and the authorities of other Member States – can make a difference in possible judicial or quasi-judicial appeals, as well as in monitoring and oversight measures by Community bodies. This function is evident, for example, in the rules governing airport groundhandling services, which provide for limitations on the number of authorisations. The communication of the exemption by the national government triggers a procedure before the Commission which, via publication of the national decision in the Official Journal of the European Communities and consultation of interested parties, can lead to a decision to approve or to oppose it.¹¹⁴ A similar regime is in place in the area of air travel services for decisions limiting and refusing the exercise of traffic rights.¹¹⁵

¹⁰⁹ See the case of the medical profession, addressed by Article 21, paragraph 6, Directive 2005/36/EC.

¹¹⁰ See Article 51, paragraphs 2 and 3, Directive 2005/36/EC. On the content of the motivation, see *Code of conduct approved by the Group of Coordinators for the general system of recognition of Diplomas*, which includes as a best practice the right to appeal and specifies the procedure to follow (see paragraph 12). Obviously, in this as in other cases, Community law does not preclude the Member States from adopting higher standards of transparency, as for example, a generalised duty to give reasons.

¹¹¹ Directive 98/34/EC, Article 9, paragraph 7.

¹¹² Directive 96/67/EC, Article 9.

¹¹³ Directive 2002/21/EC, Article 7, paragraph 6.

¹¹⁴ See Directive 96/67/EC, Article 9, paragraphs 3-6.

¹¹⁵ See Regulation 2408/92/EEC, Article 9.

In the motivation of disciplinary decisions, the affected party's right of defence takes on a particular importance. We see this in the provisions of implementing regulations, basically in the areas of banking and finance. In both of these cases, government powers to discipline are accompanied by duties to give reasons and to provide for the judicial review of administrative decisions.¹¹⁶

3.4. *The duration of the proceeding*

The secondary legislation also addresses the duration of national proceedings, in light of the general principle established by the Court that national restrictions on the exercise of Community rights must be based on a procedural system which resolves disputes arising out of such restrictions in a "reasonable time."¹¹⁷

The different regimes embodied in the norms have the following general characteristics.

First, the temporal factor is relevant mainly in the procedures that lead to the lifting of a limitation on the activity of an interested party. This can be seen in the case of authorisations for the exercise of regulated professions, banking and finance, and currently in the "Services" Directive.¹¹⁸ There are also examples arising from negative authorisation mechanisms – roughly similar to Italian "declarations of the commencement of activity" – where the competent authority's failure to meet certain time limits precludes it from blocking the provision of a regulated service.¹¹⁹

We do not encounter norms regulating the time limits in second-degree procedures for determining the exercise of rights, nor in penalty or otherwise disciplinary proceedings.¹²⁰ We can conclude from this that, at least in the secondary legislation, the main goal is the swift access to markets, rather than fulfilment of a more general principle of determinate time limits for administrative decisions.

While the secondary legislation can set forth determinate time limits – usually specifying a few months,¹²¹ or even less¹²² — it does not always make use of this solution (and, in many cases, does not consider the

¹¹⁶ Directive 2002/12/EC, Article 22, paragraph 6; Directive 93/22/EC, Article 19, paragraph 7.

¹¹⁷ ECJ, *Smits y Peerbooms*, op. cit, paragraph 90. See *supra*, paragraph 2.3.

¹¹⁸ See Directives 2005/36/EC, Article 51, paragraph 2, 2002/12/EC, Article 10 and 93/22/EC, Article 3, paragraph 5, respectively and Directive 2006/123/EC, Article 13, paragraph 3.

¹¹⁹ See the regime embodied in Article 7 of Directive 2005/36/EC, on the procedures for a professional service provider who moves from one Member State to another.

¹²⁰ See Article 10 of Directive 2002/20/EC, on the authorization of electronic communications, which also contains numerous provisions on the duration of the proceeding.

¹²¹ See the norms cited *supra*, at note 110, as well as Article 15, paragraph 2, of Directive 95/18/EC, on licensing rail carriers, and Article 13 of Regulation 2407/92/EC, on licensing air carriers.

¹²² See Article 5, paragraph 3, Directive 2002/20/EC, on users' rights relating to electronic communications networks and services.

temporal dimension at all).¹²³ In the absence of specific time limits, it is necessary only that the length of the proceeding be “reasonable,” and that any eventually dilatory activities by the State can be concretely verified.

Community law governing procedural duration ultimately sets forth rules for the suspension or the deferral of proceedings in relation to specific procedural needs.¹²⁴

4. *Institutional organisation and the administrative proceeding: transparency and the simplification of competences*

In principle, the Treaty and secondary Community law respect the organisational autonomy of the Member States.¹²⁵ The structure of national administrative institutions, nonetheless, may be more or less coherent with the substantive and procedural rules required by the Treaty. We have seen that the Court has derived from the general principles a basic rule requiring the independence of the regulator from the regulated.¹²⁶ The secondary law includes additional requirements for national organisations, to further the transparency of proceedings in the area of the regulation of services.

An initial example is provided by the rules governing electronic communications, which require Member States – in assigning regulatory functions to national authorities – to formally publicise the authorities charged with exercising these functions.¹²⁷ This communication may take the form of publication in an easily accessible form or notification of both the interested undertakings and the Commission.¹²⁸

Member States may allocate regulatory functions among multiple authorities. This can be derived precisely from the provisions of the secondary legislation which mention national regulatory authorities, always defined as one or more “bodies,”¹²⁹ as well as from some provisions setting forth duties of “internal” cooperation between national authorities and transparency in the division of competences. These provisions make sense only if we allow that the Member States may assign regulatory functions to multiple authorities.¹³⁰

¹²³ See Directives 2003/54/EC and 2003/55/EC, on electrical energy and gas, respectively, which do not address time limits for authorisation procedures.

¹²⁴ See Article 10 of the banking directive 2002/12/EC and Article 7, paragraph 4, of Directive 2002/22/EC. This is recognised in the “Services” Directive, which establishes the terms and conditions for the extension of the procedure set time period (Article 13, paragraph 3, Directive 2006/123/EC).

¹²⁵ S. CASSESE, *L'influenza del diritto amministrativo comunitario sui diritti amministrativi nazionali*, in *Riv. ital. dir. pubbl. comunitario*, 1993, 329-330. In the case law, see ECJ, 14 January 1988, *Commission v. Belgium*, in Joined cases C-227/85-230/85, at paragraph 9.

¹²⁶ *Supra*, section 2.2.

¹²⁷ See, for example, Directive 2002/21/EC, Article 3.

¹²⁸ *Id.*

¹²⁹ Article 2, paragraph 1, letter g).

¹³⁰ Article 3, paragraph 4. See *infra*. This is recognised in the decision 2002/627/EC establishing the European Regulators Group, which affirms in the third whereas that “Detailed responsibilities and tasks of the national regulatory authorities differ among the

Whenever a Member State opts for this path, it assumes the burden of transparency in its relations with both the Community and the targets of the regulation. The Commission must be punctually notified of who is assigned to do what, so that it may oversee the functioning of both the whole and its individual parts.¹³¹ The targets of the regulation must also be enabled to fully know their rights as well as the *fora* in which they might exercise them. Without this, interested parties might be dissuaded from undertaking transboundary service activities, which the Community is instead supposed to encourage. From the perspective of economic analysis, it can also be said that the goal is to remove or limit as much as possible the hidden burden of “administrative complication” present in the cost structure of Community undertakings¹³².

This logic is reflected in other norms which do not establish rules for the transparency of competences, but do provide for bureaucratic simplification through the centralisation of relationships with Community service providers. The most important cases at such regard are the “contact points” in the recognition of professional qualifications and the “points of single contact” established for the performance of bureaucratic formalities in services. The first ones have to provide information and assistance to citizens and the contact points in other Member States.¹³³ The collection of the information upon which the activity of the contact points is based is assigned to another organisational figure, the “coordinator for the activities of the authorities.”¹³⁴ The points of single contact are, instead, the offices that Member States have to establish as to centralize, in the relationships with providers of services, the procedures and the formalities needed for access to the market¹³⁵. The points of single contact have also functions of information and assistance similar to those of the points of contact¹³⁶.

5. *The conformation of national administrative proceedings*

5.1. *Common features*

The principles emerging from both the Court’s jurisprudence and the secondary legislation addressing national proceedings would appear similar to the principles applied by the Court for Community proceedings (for example, the duty to state reasons, reasonable time limit, right to defence).

various Member States, but all of them have at least one national regulatory authority who is charged with application of the rules once they have been transposed into national law”.

¹³¹ This explains the provision for the separation of competences, which must not only be published, but must also be communicated to the Commission: Article 3, comma 6, of Directive 2002/21/EC.

¹³² This *ratio* is made explicit in Directive 2006/123/EC, at whereas (43).

¹³³ Directive 2005/36/EC, Article. 57.

¹³⁴ *Id.*, Article 56, paragraph 4.

¹³⁵ Directive 2006/123/EC, Article 6. The establishment of points of single contact does not affect the allocation of functions and powers among the authorities within the national systems (see paragraph 2 of the mentioned Article 6).

¹³⁶ See Article 7, Directive 2006/123/EC. On this, see also A. TONETTI, *Harmonisation and equivalence in the european services regulation*, cit., paragraph 3.

Some of these principles, in turn, are the legacy of at least some of the Member States,¹³⁷ even though it is difficult to trace them back to a single origin. Principles such as “good administration” have distant roots in natural law,¹³⁸ while others have been transplanted from different areas of national law.¹³⁹

Whatever the origin of these principles, their similarities suggest the existence of a certain degree of osmosis between the different systems, in many respects inevitable considering that the Court can and does interpret the Treaty in light of the general principles of national legal systems.¹⁴⁰ The Court exercises a certain freedom in performing this analysis. Sometimes it elevates principles which are affirmed in only some Member States (or, in extreme cases, in just one) to the status of common principles.¹⁴¹ Here the Court comparatively analyses different national systems, determines the solutions which seem to be the best and requires the rest of the system to adapt to them.¹⁴² Other times the Court takes a greater distance from national traditions and, working essentially with the Community law of the Treaty, puts forward combinations which gain autonomy from national legal systems.¹⁴³

The outcome of this interpretation informs the action of both Community institutions and the Member States. But the way that Community principles are reflected in national procedures varies according to whether the national regulatory function is embedded in Community systems of common administration. In one case, the regulatory functions are harmonised only for the purpose of avoiding discrimination against Community undertakings or barriers to national markets. Here, the case law and secondary legislation make a selective application of doctrines of transparency, participation and the guarantee of the rule of law. For example, there is a duty to state reasons

¹³⁷ On the similarities and differences between Community and national principles of administrative procedure, see C. FRANCHINI, *I principi applicabili ai procedimenti amministrativi europei*, in *Il procedimento amministrativo nel diritto europeo*, S. CASSESE, F. BIGNAMI (eds.), Milano, 2004, pp. 281, 293-297.

¹³⁸ Cf. B. SCHWARTZ, *Administrative procedure and natural law*, in *Notre Dame L. Rev.*, 1952-1953, vol. 28, pp. 169, 177. Along these lines, cf. M. D'ALBERTI, *La visione e la voce: le garanzie di partecipazione ai procedimenti amministrativi*, in *Riv. trim. dir. pubblico*, 2000, pp. 5-6. On the relationship between certain Community principles and the rule of law, see M. HERDEGEN, *The origins and development of the general principles of Community law*, in U. BERNITZ, J. NERGELIUS (eds), *General principles of European Community law*, The Hague, 2000, pp. 3-23.

¹³⁹ In virtue of these and other criteria of distinction, academic commentary has proposed various classifications of the general principles of Community law. Cf., H.G. SCHERMERS, D. WAELBROECK, *Judicial Protection in the European Union*, The Hague, 2001, pp. 28-30; B.J. BOULOIS, *Droit institutionnel des Communautés Européennes*, Paris, 1993, p. 208 and the following section.

¹⁴⁰ Cf. T. TRIDIMAS, *The General Principles of EU Law*, Oxford, 2006, p. 4.

¹⁴¹ See, for example, the case of the principle of proportionality, described in J. SCHWARZE, *I principi dello Stato di diritto per l'azione amministrativa nella «vecchia» e nella «nuova» Unione europea*, in *Riv. it. dir. pubbl. comunitario*, 2004, pp. 1283-1284.

¹⁴² This is a customary approach to legal unification, on which see K.D. KERAMEUS, *Procedural Harmonization in Europe*, in *Am. J. Comp. L.*, 1995, vol. 43, 401-402. See also J. SCHWARZE, *id.*, p. 1282, who writes of “evaluative comparison.”

¹⁴³ A typical example of this is the precautionary principle.

only for national decisions that hinder the undertaking from accessing the market of a Member State, while this is required for all Community decisions. Similarly, procedural time limits are regulated to prevent administrative inertia from delaying an enterprise's market access, not to guarantee determinate time limits for every kind of administrative activity.

In another case – which is not however a specific object of this study – the application of Community principles to national proceedings is an expression of Community policies to involve national administrations in the various forms of indirect or joint implementation common in the Community legal system. In this case, Community procedural principles can be imposed as such upon national proceedings or upon the national phases of composite proceedings.¹⁴⁴ The rule is that the different jurisdictional locations of the proceeding ought not to influence the procedural protection accorded to the parties.

In both of these cases, the duties of transparency imposed by Community law upon national regulation create a certain degree of uniformity in national procedures. In the first case described above, however, such uniformity could essentially be defined as “derivative”: it is pursued only if and to the extent that there is a need to guarantee the homogeneity of substantive standards.¹⁴⁵ This harmonisation is hardly ever justified by the mere need for identical or at least similar procedures in the different Member States, a need that does in fact arise when the national administrations are involved in the exercise of Community functions¹⁴⁶.

This suggests that the Community law for national regulatory proceedings does not as a rule constitute an autonomous system, but rather a set of standards and doctrines for the integration of national administrative laws.¹⁴⁷ Beyond the general principles established by the Court, integration varies in intensity from sector to sector, so that it usually leaves sufficiently wide space to national rules.¹⁴⁸

A second common feature has to do with the nature of the procedural burdens placed upon the Member States, and the consequences of their not satisfying them. The Court's jurisprudence, affirming the incompatibility

¹⁴⁴ On the extension of the principles of Community law to the activities of national administrations, see ECJ, 26 April 1988, *Hauptzollamt Hamburg-Jonas v. Firma P. Kruecken*, Case 316/86, at paragraph 22. For academic commentary, see E. CHITI, C. FRANCHINI, *L'integrazione amministrativa europea*, op. cit., p. 110.

¹⁴⁵ On the distinction between autonomous and derivative procedural harmonization, see K.D. KERAMEUS, *Procedural Harmonization in Europe*, op. cit., p. 407.

¹⁴⁶ Accordingly, see Directive 2006/123/EC at whereas (42): “The rules relating to administrative procedures should not aim at harmonising administrative procedures, but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of service undertakings therefrom”.

¹⁴⁷ From this, the awareness that the standards of “good administration” tend not to overlap perfectly with those standards generally invoked with reference to Community administrative activity. See *supra*, at note 63. Directive 2006/123/EC, at whereas (43), comes into contact with the Community “good administrative practice” in the principles of simplification of procedures.

¹⁴⁸ E. CHITI, *Diritto europeo e diritto amministrativo nazionale nella disciplina procedurale dei «sistemi comuni»*, in G. FALCON (ed.), *Il diritto amministrativo dei paesi europei*, Milan, 2005, pp. 65, 68.

with the Treaty of national norms lacking determinate procedural protections, would seem an essentially formalistic evaluation. The lack of such protections would thus be sufficient grounds for invalidating national regulatory decisions, without going to the decision's substantive merits (and without considering how respect for these protections would have influenced the decision).

Community jurisprudence, however, also includes principled affirmations of the irrelevance of procedural defects that have not influenced the outcome of a decision.¹⁴⁹ This approach, incidentally consistent with recent Italian legislation,¹⁵⁰ seems to emerge in the secondary legislation as well. As we have seen,¹⁵¹ the secondary legislation seems at times to focus its attention on the relationship between the national regulatory authority and national undertakings, rather than on the administrative proceeding and the decision that comes out of it.

However, the Court's formalism seems to be inspired by a different logic, ultimately consistent with its substantive approach to Community proceedings. The Court, in its decisions on the proportionality of national regulations of services,¹⁵² has addressed the fact that national regulations can discourage the intra-Community provision of services¹⁵³. The Court has evaluated this discouragement in the abstract, and in light of formal legal norms. This perspective is intrinsically indifferent to the specific consequences of the procedural defects.

A final common feature is that Community law reveals a certain indifference with respect to the formal legal categories used by the Member States, and considers national doctrines in light of their effects. In determining the exercise of rights, for example, Community law does not care whether domestic norms set up a system of concessions or authorisations, but only whether the exercise of a certain activity is formally conditioned by a governmental decision.¹⁵⁴ Equally irrelevant is whether the

¹⁴⁹ ECJ, 10 July 1980, *Distillers company limited v. Commission*, Case C-30/78, at paragraph 25 and the following sections.

¹⁵⁰ See the new Article 21-*octies*, section 2, of Law n. 241/1990.

¹⁵¹ *Supra*, sections 3.1. and 3.3.

¹⁵² *Supra*, section 2.3.

¹⁵³ The topic is resumed by Directive 2006/123/EC, at whereas (43): "such modernising action, while maintaining the requirements on transparency and updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects that arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the "red tape" involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted, and disproportionate fees and penalties."

¹⁵⁴ On this point, see the affirmation of Article 4, paragraph 1, Directive 2003/55/EC, that "In circumstances where an authorisation (e.g. licence, permission, concession, consent or approval) is required for the construction or operation of natural gas facilities[...]. More generally, Directive 2006/123/EC, Article 4, nr. 6, defines as authorisation scheme "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from the competent authority a formal decision or an implied decision, concerning access to a service activity or the exercise thereof". The Directive includes in the implied decisions either the silence from the competent authority or those mechanisms similar to our "declaration of commencement of an activity" (see whereas 39).

governmental power exercised in the domestic system is legislative or executive in nature.¹⁵⁵

5.2. The minimum standard of “good administration” in national administrative proceedings

Starting from the Court-articulated Treaty principles and the secondary norms, we can construct a minimum standard of “good administration” for those national regulatory proceedings which yield decisions creating (or preserving) obstacles to the intra-Community market in services.

One aspect of this minimum standard at the level of organisational structure is that national regulatory authorities must not have economic interests in the markets that they regulate. The authorities ought therefore to be formally and substantively independent from the regulated enterprises. They must have their own resources, which are not intermingled with those of the targets of the regulation. So, for example, when a Member State is entrusted with the property of one or more regulated entities, it must respect an “adequate structural separation” between its functions as a regulator and its functions as a property-holder.

The regulatory authority must not itself constitute an obstacle to the exercise of community freedoms. The Member States have the duty to guarantee “easy access” procedures, which also means avoiding excessive complication and opacity in the allocation of administrative competences, which can discourage or obstruct the average economic operator.

National proceedings must be preceded by a determination of the decision-making criteria, which themselves must be made public, or at least reasonably knowable to potentially interested actors. If the number of service providers is limited, due to natural limits or limits otherwise compatible with the Treaty, the duty of publicity assumes an even greater formal and symbolic importance. This duty obtains for both the general decision to limit the number of service providers as well as the selection of specific service providers to be granted rights to exercise an activity (see the case of service concessions).

The degree of the participation of interested parties depends on the nature of the proceeding. The right to be heard is not an indispensable requirement in authorisation proceedings, even though it might be implied by the duty to guarantee “objective and impartial” treatment. Even in the secondary legislation, the defence of the interested party within an administrative proceeding is provided by a relatively limited number of norms. More numerous instead are the cases in which the defence before the Courts is privileged.

The final decision must be issued within a reasonable time, meaning at the least that the proceeding not be so protracted as to itself constitute an obstacle to market access. The secondary law sets forth different time frames in different areas, none of which however exceed a few months. There may be some flexibility in the determination of the final time limit,

¹⁵⁵ See the definition of special and exclusive rights in Directive 2002/77/EC, Article 1, n. 6.

including the possibility of extensions and suspensions to meet specific procedural needs.

Decisions that adversely affect the free provision of services must be motivated by reasons. The stated reasons must be sufficient to guide the formulation of a judicial appeal,¹⁵⁶ which is itself another fixed requirement in both the Court's jurisprudence and the secondary legislation.

5.3. Sectoral requirements in the national regulation of services

The standard of "good administration" discussed above derives from general Treaty principles. Good administration is a minimal standard, in the sense that it ought to be respected in every national proceeding potentially influencing the freedom of circulation or right of establishment.

The secondary law, however, imposes more exacting standards in specific sectors. The sectoral requirements do vary by sector, and they reach an high degree of complexity in the models of European joint administration which involve the national administrations¹⁵⁷

Some procedural doctrines or institutions recur in various sectors, and perform (in whole or in part, and independently of the administrative model in which they reside) the function of protecting the enterprises of one Member State hosted in another. Limiting our analysis to these cases, there are basically two categories of doctrines or institutions to consider: participation and the institutional links between national administrations and the Commission and other Member States.

Looking at participation, this doctrine is rather widespread in the secondary law, in reference to general regulatory measures (see the examples of the communications sector, airport services and technical norms). Other sectors, though more recently regulated, do not mention it, not even in reference to proceedings before national regulatory authorities (see the examples of electrical energy and gas sectors, which do however hold public consultations for the decisions of intermediate bodies, like the European Regulators' Group.)¹⁵⁸

National regulatory measures do not necessarily create obstacles to the exercise of the basic freedoms provided by the Treaty, and even if they did, some obstacles could be justified by the national interests that the Treaty itself recognises or by the mandatory requirements recognised in the Community jurisprudence. The purpose of participation in the policy-formation phase, for example, is not defence but rather collaboration, as has

¹⁵⁶ The relationship between motivation and legal action for the decisions of Community institutions is affirmed in the case law. See Court of First Instance, 19 July 1999, *Rothmans International BV v. Commission*, in Case T-188/97, according to which "the obligation to state reasons means that the reasoning of the Community authority which adopted the contested measure must be shown clearly and unequivocally so as to enable the persons concerned to ascertain the reasons for the measure in order to protect their rights and the Community judicature to exercise its power of review"; likewise, Court of First Instance, 6 February 1998, *Interporc v. Commission*, in Case T-124/96, paragraph 53).

¹⁵⁷ The most important example is the communications sector, which manifests the newest generation of Community administrative models.

¹⁵⁸ See Commission Decision 2003/796/EC, Article 4.

been mentioned, and increasing the number of observers able to exercise a certain control.

This is a useful fortress against obstacles to the free circulation of services, but it moves the protection back to a time in which the prejudice to intra-Community trade is merely speculative. It does not therefore seem possible to generalise the application of such participation beyond the specific provisions of the secondary law. Doctrines of participation could evolve along the lines of good administration, with its holistic application to the activities of national administrations which perform Community functions. But this is still quite a hypothetical scenario.¹⁵⁹

It can however be said with more certainty that participation rights affect regulatory proceedings in an indirect (and unexpressed) way, specifically in influencing the reasons given for the final decisions. Opening up the proceeding to the observations, comments and information provided by the public – or even by more limited categories of interested parties – has a “useful effect” only if the consideration given to that participation is embodied in the final decision. This argument has already been recognized in the Italian jurisprudence, which has applied the duty to state reasons even to the kinds of measures that would have been otherwise excluded on the mere basis of the domestic law.¹⁶⁰

The other practice recurring in multiple sectors is the creation *institutional links* between the host Member State, on the one hand, and the Commission and other Member States, on the other, for certain categories of national decisions. While this link may directly involve the competent authorities within each Member State, this does not change the features relevant to our purposes. These links are characterised by mutual obligations of providing timely information.

We can see similar practices in the area of decisions revoking authorisation, decisions adopting regulatory measures having a great impact on markets, and for the derogations which, in certain circumstances, national authorities can give for obligations arising out of Community law.¹⁶¹ For these kinds of decisions – clearly chosen for their particular ability to hinder foreign enterprises from accessing national markets – the vertical and horizontal opening of the proceeding increases the degree of transparency and intra-Community deliberation, and exposes the national decision – or in some cases, the draft decision – to a timely challenge by the Commission or other Member States.¹⁶² The other Member States, in particular, can play a role in the defence of their domestic businesses, not only representing them and promoting their interests, but also advancing technical arguments as to the coherence of the national decision with the Community norms of reference.

¹⁵⁹ On a possible new generation of Community rights to participate in the formation of legislative and administrative policies, see F. BIGNAMI, *Tre generazioni di diritti di partecipazione*, in *Il procedimento amministrativo nel diritto europeo*, S. CASSESE, F. BIGNAMI (eds.), op. cit., pp. 87, 103 and the following sections.

¹⁶⁰ Italian Council of State, n. 2007/2006, op. cit..

¹⁶¹ See sections 3.1 and 3.3, respectively.

¹⁶² It is assumed that this phase is not proceduralised and that it is not therefore part of a composite proceeding (at least not necessarily).

The institutional links, and in particular the duties of timely information that accompany them, seem capable of going beyond the individual norms of the secondary law providing for them. The fact that a Member State is obliged to notify the Commission and other Member States of a specific measure can be seen as an expression of the principle of “good faith cooperation.”¹⁶³ This is a cardinal principle of the EC Treaty (in general, judicially-derived from Article 10), which imposes reciprocal obligations of action and abstention upon the Member States and Community authorities,¹⁶⁴ within the limits fixed by the Treaty and the secondary law.¹⁶⁵ Even from this point of view, the secondary law has codified a judge-created obligation, applying it in the context of the duty of consultation, information and more generally, to duties not typically comprehended by mutual cooperation.¹⁶⁶ The connotation is essentially formal in this case, because the directives only lay down procedural rules, and disregard their concrete outcomes in the Member States. Substantive features are left to the Commission, which may exercise its powers of policy-making and veto. These powers may play a role in preventing or correcting procedural defects effected at the national level.

6. The interaction of Community principles with the national regulation of services

Bearing in mind the mechanism for the formation of Community principles,¹⁶⁷ we can also see (abstracting and simplifying somewhat) that these principles interact with the national regulation of services in two ways. In the first case, the Community principles are addressed to procedural protections that are already provided by the national administrative law, and they serve to affirm, reinforce or extend the otherwise national protections. In the second case, Community law introduces new procedural protections, otherwise unknown to national legal systems as such or to individual Member States (which can have further and not necessarily desirable effects, from the standpoint of the Community law). The limits of this study preclude a comparison of the different national legal systems. But an examination of the Italian legal system enables us to deepen our understanding of both modes of interaction.

¹⁶³ On good faith cooperation as a form for the functioning of polycentric powers, cf. F. MERLONI, *La leale collaborazione nella repubblica della autonomie*, in *Dir. pubbl.*, 2002, 3, *passim*.

¹⁶⁴ The administrative (and not only constitutional) relevance of this principle is demonstrated in E. CHITI, C. FRANCHINI, *L'integrazione amministrativa europea*, op. cit., pp. 110-111. In the case law, cf. the ECJ decisions of 8 July 1999, *Maria Amélia Nunes e Evangelina de Matos*, in Case C-186/98, paragraph 13, and 14 July 1994, *Milchwerke Koeln/Wuppertal Eg v. Hauptzollamt Koeln-Rheinau*, in Case C-352/92, paragraph 23.

¹⁶⁵ On the integrative function of the principle of good faith cooperation, cf. ECJ, 14 May 2002, n. 383, *Commission v. Germany*, in Case C-383/2000. The duties of cooperation have an independent foundation and their proper fulfilment can be subject to judicial review. Cf. ECJ, 13 July 1990 (Order of the Court), *Zwartveld*, Case C-2/88, paragraph 24.

¹⁶⁶ See whereas 35-37 and Articles 3 and 16 of Directive 2002/21/EC.

¹⁶⁷ *Supra*, section 5.1.

Italian law recognises such procedural protections as the prior determination and the publicity of decision-making criteria. Community law attributes a particular weight to these principles in the protection against arbitrary treatment and discrimination. We have also seen that Community law makes these principles applicable to every decision affecting the entry of a Community enterprise into the market of another Member State. From this standpoint, it does not matter whether the relevant proceeding is for the granting of an authorisation, a concession of services or the awarding of a procurement contract. All of these decisions are subject to Community law because of their practical ability to influence market entry or presence.

In principle, the situation should not be any different under Italian national law. In procurement contracts, for example, the requirements for the predetermination and publicity of the selection criteria have solid roots and can be applied even when precise legal and regulatory rules are lacking, so that it falls upon the adjudicating commission to apply them to the particular case.¹⁶⁸ But there are many situations, in addition to public tendering procedures, in which Italian law has downplayed the requirement of open and transparent procedures.

Illustrative are the cases of airport services, telecommunications services and local public services. In all three, the national law sets forth rules regulating the competition for market access, but it also contains exceptions related to the public nature of the enterprise¹⁶⁹ or a public interest not based on “transparent and objective” criteria.¹⁷⁰ Concessions of airport services, for example, have traditionally been assigned through the direct entrustments provided by special laws.

These are the criteria employed by the Italian domestic system. Concessions decisions are highly discretionary, aimed at protecting a plurality of public interests; public undertakings cannot be equated with private corporations. But these criteria cannot be reconciled with the Treaty requirements of equal treatment and open national markets. According to the Treaty, foreign enterprises’ access to the Italian market can be limited only in proportion to “mandatory requirements,” a condition not satisfied by a wide discretion, unfettered by predetermined criteria, nor by the arbitrary preference for a national enterprise, albeit a public one.

The relationship between the modes of interaction – national conformity with Community law by reinforcing national procedural protections – can be seen even at the semantic level, where Community principles and

¹⁶⁸ Of the recent decisions, see Council of State, sez. V, 21 November 2003, n. 7581, in *Foro amm.-Cons. Stato*, 2003, 3388.

¹⁶⁹ For telecommunications, see the Presidential Decree of 29 March 1973, n. 156, art. 198, according to which “The Administration, whenever it intends to give a concession of telecommunications services, shall invite organisations, companies and specialised firms meeting the requirements for obtaining the concession to set forth the conditions upon which they would be willing to perform the service, taking into account the specifications prepared by the Administration itself.” For local public services, in the case of mixed public-private companies, cf. the Legislative Decree of 18 August 2000, n. 267, art. 113, co. 5.

¹⁷⁰ This is true for the entrustment of aeronautical property. See the Italian Navigation Code, art. 37, co. 3.

concepts are invoked by national norms.¹⁷¹ National protections of “good administration” can also be carefully designed to meet the minimum requirements of the Community standard of market access. In practice, the openness of national proceedings is tailored to the Community standard, through its incorporation into national law.¹⁷²

The conformity of national regulations to Community law, as we have seen, is not limited to tweaking the procedural protections already present in the domestic administrative law. There are situations in which Community law introduces wholly new protections into a national system, or universalises protections that are applied only in individual Member States or in different sectors. This can be illustrated by the principle of regulatory independence, which is affirmed by the Community case law as an expression of the principle of non-discrimination and is widely applied in the secondary law.

The Court’s justification for this principle and the individual norms determining its scope indicate that the purpose of the duty of separation is to avoid potential conflicts of interest. This is thus an application of the procedural principle, *nemo iudex in causa propria*, the origins of which trace back to natural law, placing it on the same level as the principle of *audi alteram partem*.¹⁷³

But the principle of the independence of the decision-making body, in contrast with the right to be heard, has not been independently developed by Italian administrative law.¹⁷⁴ Italian administrative law recognises the principle of impartiality with respect to the public and private interests involved in the proceeding, but this does not prevent two contrasting public interests from existing within a single administrative authority.¹⁷⁵ The

¹⁷¹ For airport concessions, see art. 704, co. 2, of the Navigation Code, as updated by the Legislative Decree of 15 March 2006. On public service concessions in general, see the Legislative Decree of 12 April 2006, n. 163, art. 30, co. 3.

¹⁷² See the Legislative Decree n. 267/2000, art. 113, co. 5, lett. c), taking up the *Teckal* clause from the ECJ’s jurisprudence. The evolution of the Court’s jurisprudence, moreover, seems to have almost completely eroded the scope for the application of this norm. See ECJ, 11 January 2006, *Stadt Halle*, in Case C-26/03, as well as *Consorzio Aziende Metano v. Comune di Cingia de’ Botti*, op. cit..

¹⁷³ The relationship to natural law is particularly meaningful in common law systems. See S.A. DE SMITH, *The right to a hearing in English administrative law*, op. cit., p. 569; B. SCHWARTZ, *Administrative procedure and natural law*, op. cit., p. 177. Likewise, cf. M. D’ALBERTI, *La visione e la voce: le garanzie di partecipazione ai procedimenti amministrativi*, op. cit., pp. 5-6. On the role of the principle *nemo iudex in causa sua* in English procedural law, see V. VARANO, *Organizzazione e garanzie nella giustizia civile nell’Inghilterra moderna*, Milan, 1973, p. 257 and the following section.

¹⁷⁴ The right to be heard, in its early applications in administrative jurisprudence, was expressly tied to a requirement of natural justice. See Council of State, 8 January 1891, n. 1, G.A., 1891, I, 22 ss, cited by A. SCOGNAMIGLIO, *Il diritto di difesa nel procedimento amministrativo*, Milan, 2004, 6. For the French system, see Cons. Et, 20 June 1913, *Tèry*, Rec. 763, in *Le grands arrêts de la jurisprudence administrative*, Paris, 2005, 161-162.

¹⁷⁵ The independence of the regulator from the operator should not be confused, on the conceptual level, with the independence of administrative authorities from political bodies, which characterises many different recently established administrative authorities, but which is not based on Community law. In the Italian system, independence has been associated with a precaution to be taken in the privatisation process, in order to balance the loss of ownership control by the State (Law n. 474/1994). The logic of Community law is

prohibition against interested bodies or functionaries taking part in specific decisions can take various forms, such as incompatibility or the duty of abstention.¹⁷⁶ But the administrative body as such can be both an enterprise and the regulator of other enterprises,¹⁷⁷ specifically for the purpose of striking a balance between the governmental interest (in economic profit) and the interest of the users of the services.

7. The beneficiaries of Community standards: the transboundary application of procedural protections and the balancing of interests

The Treaty principles of non-discrimination and freedom of circulation – from which the Community standards for the national regulation of services mainly emerge — are structured in such a way as to protect enterprises in one Member State when they seek to provide services to citizens in another Member State, either through transboundary trade or by establishing a permanent agent in another Member State. The legal situations that emerge from the Treaty and the secondary law are thus by nature “transboundary.”

The procedural features of these legal situations have some peculiar functions, some of which have already been examined.

Some procedural doctrines seek to enable actors from other Member States who wish to exercise a Community freedom to protect their legal position in an autonomous and effective way. All of the doctrines of transparency and protections in individual proceedings that we have examined can be associated with this purpose: the awareness of the proceedings and their rules, the opportunity to be heard, the right to a response within a reasonable time and, in the case of a negative response, the right to reasons in order to develop the arguments for a judicial or quasi-judicial appeal. The right to judicial review is a gap-closing norm, insofar as questions originating in national courts can be brought all the way up to the Court of Justice, in order to be resolved in conformity with the Treaty. Here, conformity with Community standards does not change the structure of national proceedings, but just affects individual segments of them. Simply put, there is a widening of the typical targets of the norms.

The other procedural protections mentioned above seem to have additional motivations and implications.

contrary to this, because the regulator has to be independent from the administration holding shares in the regulated enterprise until the shares are passed to private parties. While these two concepts of independence might overlap, this is just a coincidence.

¹⁷⁶ See Council of State sez. II, 20 October 2004, n. 8487/04, in *Cons. Stato*, 2004, I, 2288, according to which “Impugning situations of conflict of interest in the system of public law is not optional, but such conflicts can be raised one at a time, in relation to the violation of the principles of impartiality and good administration embodied by Article 97 of the Constitution, when there is a conflict and an incompatibility, albeit only potential, between the subject and the functions attributed to it.”

¹⁷⁷ A case that has long been very frequent. See the case of postal services in the rules provided by Presidential Decree n. 156/1973. Currently, this double role is played by the Independent Agency for State Monopolies, which both operates and regulates gambling activities (Law 18 October 2001, n. 383, art. 12; Presidential Decree 24 January 2002, n. 33; Law 8 July 2002, n. 138).

The duties of timely information and the institutional links with the Commission and both public and private bodies in other Member States all characterise the more complex systems of Community administration. Here the purpose is not only basic legal regulation but also the balance of the relevant interests (for example, in electronic communications, energy markets or airport and groundhandling services).¹⁷⁸

In such systems, the issue is not only discrimination or hindered access in the entry of individual entrepreneurs into the markets of other Member States. In addition to this more traditional issue, there is the further problem that the regulations of the individual Member States can create undesirable effects upon the markets of other Community Member States.¹⁷⁹ This is illustrated by the decisions on the division of air traffic or passenger routes, or also by the evaluation of markets and dominant enterprises in the telecommunications sector.¹⁸⁰

The interested administrations can react to these indirect effects in a competitive or a cooperative way, and through the exchange of information.¹⁸¹ In each case – when the Community recognises a certain zone of subsidiarity and declines to issue detailed rules – the procedural openings provide a space for sharing knowledge, preventing and addressing controversies in the exercise of national powers, and for the direct involvement of interested private actors. With respect to this process, the Community institutions promote the working together of different national powers and step in to make final decisions when this collaboration fails.¹⁸²

8. *The domestic application of Community procedural standards*

The Community standard for national regulatory proceedings enjoys a remarkably wide reach in applying to a broad scope of actors. While operating through different techniques, it has extended its scope to now include almost every possible combination of nationalities involved in the provision of services, including those involved in controversies otherwise governed exclusively by domestic law.

We are not interested here in the effect of the secondary law. This law, both when it seeks the approximation of national legislation and in the less frequent case in which it operates directly through regulations, is inherently able to attribute rights to individual citizens, independently of the transboundary or domestic character of the proceeding. If, for example, a

¹⁷⁸ On regulatory proceedings as mechanisms for bringing together private interests, see E. CHITI, *La disciplina procedurale della regolazione*, *Riv. trim. dir. pubbl.*, 2004, 678.

¹⁷⁹ An analogous situation can be seen in environmental law. On this, cf. MACRORY, TURNER, *Participatory rights, transboundary environmental governance and EC law*, op. cit., p. 495.

¹⁸⁰ *Supra*, section 3.3.

¹⁸¹ For this classification, cf. D. LAZER, *Global and Domestic Governance: Modes of Interdependence in Regulatory Policymaking*, in *European Law Journal*, 2006, pp. 455–468.

¹⁸² On the representation of interests in the creation of Community norms, see D. OBRADOVIC, J.M. ALONSO VIZCAINO, *Good governance requirements concerning the participation of interest groups in EU consultations*, in *CML Rev.*, 2006, 1049.

secondary norm fixes a specific procedural rule, the violation of this rule can be impugned by any enterprise within the Community, in any State in which it operates, including its State of origin.

The situation is more complicated when there are no specific Community implementation measures. Here, Community jurisprudence has played an essential role in filling the gap. The Court, in particular, has progressively expanded its criteria in order to extend Treaty obligations even to the provision of services which, from the point of view of the actors involved, would hardly seem to have a transboundary character.¹⁸³

Putting aside the criticisms that can be lodged against this judicial trend – not so much for its outcomes as for the forced interpretations upon which it is based¹⁸⁴ — it is worth noting that in the Court’s jurisprudence, even a merely indirect and hypothetical connection is now sufficient to trigger the Treaty standard of protection (including for purposes of transparency, participation and rule of law).

The Court has employed another technique, which sets aside this analysis of the transboundary character of the facts of the specific case (notwithstanding its very liberal standard for characterising a controversy as such) when the national law grants citizens rights that would, in virtue of Community law, have to be granted to citizens of other Member States.¹⁸⁵ This immediately affects controversies that have an exclusively domestic character. This appeal to Community law in challenging a national law also pushes the Court in its pursuit of a uniform interpretation of Community law.

Cases such as those hypothesised by the Court can also be seen in the Italian legal system, though not expressly in the form of “reverse discrimination.” It can instead happen that principles of Community law are invoked in national norms regulating services, a sort of general reference which has to be completed, case by case, on the basis of the substantive content of the principles involved. In these cases – which frequently arise, for example, in the concession of services in general, and local public services in particular – one can argue whether the Community principles ought to be extended to controversies which, in their objective dimension, would not have any Community relevance. It is however certain that the subjective designation of a controversy as merely domestic is increasingly irrelevant. The Court, in its part, could always give its interpretative support to a national court seeking to apply Community law, not because of the

¹⁸³ This approach is described in P. OLIVER, W.H. ROTH, *The internal market and the four freedoms*, in *CML Rev.*, 2004, pp. 407, 429-434. Of the decisions marking this evolution, see ECJ, 10 May 1995, *Alpine Investments*, in Case C-384/93; ECJ, 7 May 1997, *Pistre*, Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94, paragraphs 44-45; ECJ, 6 June 2000, *Angonese*, in Case C-281/97, and 6 June 2002, *Sapod Audic*, in Case C-159/00; ECJ, 11 luglio 2002, *Mary Carpenter*, in Case C-60/00, paragraphs 28-30.

¹⁸⁴ See, among the many works, N. REICH, *Citizenship and family on trial: a fairly optimistic overview of recent court practice with regard to free movement of persons*, in *CML Rev.*, 2002, pp. 615, 628.

¹⁸⁵ ECJ, *Servizi ausiliari dottori commercialisti*, cit., paragraph 29. For a recent precedent, see also ECJ, 17 February 2005, Court Order, *Mauri*, in Case C-250/03.

intrinsic force of the law itself, but in virtue of the national provision granting its jurisdiction.

The dialogue between Italian judges and the European Court of Justice on the importation of Community principles into national controversies could, because of a recent decision of the Italian Parliament, come to have broad implications. Administrative activity, according to the most recent legislation, “shall pursue the ends set forth by the law and shall be grounded in [among other things] the principles of Community law.”¹⁸⁶ This formulation is so wide as to eventually comprehend even the principles guiding Community administrative procedure, to the point that (however much it might be willed by the national legislature) the distinction between Community principles and the more restricted set of national principles of administrative procedure would erode.¹⁸⁷

9. Conclusion

This analysis of Community legislative norms and jurisprudence suggests the following conclusions.

First, there is a minimum standard of transparency, participation and rule of law that Community law sets forth for all national regulatory proceedings which could generate discriminations on the basis of nationality or hinder the exercise of Community freedoms. This procedural standard is both derived by the Court of Justice from certain substantive principles of the Treaty (in particular, the principles of non-discrimination and proportionality) and is also widely present in the secondary legislation. It includes doctrines and principles of procedural protection – like the transparency of the decision-making criteria, the right of defence, the duty to state reasons, the independence of the regulator – with which Community law supplements national procedural law where necessary. This has not (yet) become a general procedural model, to substitute the corresponding national models, but is rather a body of procedural protections to be applied as required by economic integration.

Nevertheless, in the secondary law, the conformation of national regulatory proceedings to Community standards can become much more complicated, though varying from sector to sector. In the most advanced models of Community administration, the secondary law introduces principles of participation in the creation of national regulations as well as institutional and procedural links with the Commission and the administrations of other Member States. These solutions increase the degree of procedural transparency and enable a transboundary discussion which multiplies the *fora* in which national regulations may be reviewed. Regulatory proceedings thus become sites for an encounter between the many different interests affected by the regulations.

¹⁸⁶ Art. 1, co. 1, l. 7 August 1990, n. 241, as modified by the Law of 11 febbraio 2005, n. 15.

¹⁸⁷ For a specific application of this possibility, see, F. MERUSI, *Il diritto amministrativo comune nelle comunicazioni elettroniche*, op. cit., 1273.

The interaction of Community standards with national proceedings can take different forms. On the objective level, the Community standard for procedural protections reinforces and universalises any analogous national procedural protections. Conformity with Community law also introduces new principles – either original or adapted from individual national systems – or principles already applied, but in different regulatory sectors. On the subjective level, Community law extends the number of subjects protected by its procedural standard and anticipates the participation of interested parties in resolving their differences to the early stage in which the national regulations are deliberated. Still at the subjective level, national conformity to Community procedural standards enables national bodies to transcend the limits deriving from the nationality of the interested parties, making possible the application of Community standards even in exclusively domestic cases. These developments are paralleled in the national law, which incorporates individual principles of Community law and applies them as such to national proceedings.

And it is thus – in a gradual and, in certain respects, spontaneous way – that Community law is starting to define a common procedural model in the regulation of services, a model which does not depend on either the exclusively domestic or the transboundary character of the exchanges at issue.

SUPRANATIONAL PRINCIPLES GOVERNING NATIONAL AUTHORITIES' EXERCISE OF DISCRETIONARY POWER

MARIANGELA BENEDETTI AND SABRINA QUINTILI*

SUMMARY: 1. Goal of this study and methodology. – 2. The review of discretionary power. – 2.1. WTO review of discretionary power. – 3. The interpretation of necessity in justifying protective measures. – 4. The interpretation of necessity in justifying regulatory measures. – 4.1. The interpretation of necessity in justifying national regulatory measures: the Accountancy Sector disciplines. – 5. Comparative evaluations. – 6. Conclusion.

1. *Goal of this study and methodology*

The States members of the World Trade Organization have committed to respecting the rules established by the multilateral Agreements, sharing the idea (expressed for example in the Preamble to the GATS) that international liberalisation can contribute to growth and development of the world economy. By adhering to this Agreement, each State gives up a degree of its sovereignty in managing its own trade policy in the area of services. Participation in the WTO implies that the Member States must adapt their own national laws to WTO law, with the consequence that conflicting domestic measures must be brought into conformity.

One of the difficulties in the GATS thus consists in balancing two contrasting needs: to protect national authorities' right to regulate, including both the formulation of national policy goals and their development, on the one hand; and to limit this power, in order to guarantee the maximum openness of national markets, on the other.

The States are thus required to refrain from adopting measures restricting the trade in services; at the same time, by invoking certain exceptions, they may be able to derogate from the rules imposed by the global regulation and thus enjoy some autonomy. On the basis of these exceptions, the signatories of the GATS may adopt measures that would otherwise be illegitimate, thus regaining some discretionary power.

The balance between the free market and the other interests pursued by individual States is not calculated in the abstract by a global legislator. Because it must be determined in light of the specific, concrete case, it is left to the judgment of the Dispute Settlement Body. The form and depth of its scrutiny represents a further limit upon national discretion.

* This work is the result of a joint effort by Mariangela Benedetti and Sabrina Quintili. Mariangela Benedetti wrote the sections on the review of discretion in general, the review of discretion in the WTO system, on the necessity of protective measures, comparative evaluations and the conclusion; the sections on necessity, in reviewing regulatory measures in general and in the law governing the accountancy sector in particular, were written by Sabrina Quintili.

This study examines the relationship between the “authority” exercised by individual Member States as part of their own sovereign power and the “freedom” guaranteed to the economic operators of the 149 parties to the GATS. This relationship can be seen by looking at the standard of review employed by the Dispute Settlement Body in resolving controversies arising from the tension that exists between national goals and the international goal of liberalisation. The examination of the exercise of judicial review enables us to see the degree of deference paid by the adjudicating body to the national authorities, the depth of this global judicial review, and finally, the extent to which States have ceded their sovereign power to regulate their own economic and social policies.

After briefly outlining the mechanisms for reviewing national discretion, we will examine the techniques employed in the global context. This analysis focuses on the necessity test set forth by the GATS for evaluating the legitimacy of both protective measures taken in application of the exceptions clauses (Article XIV) and national regulations (Article VI). Some conclusions will follow.

2. The review of discretionary power

Market freedom and regulatory autonomy can often conflict with each other. Decisions and rules adopted at the State level can indirectly restrict market access, even if they do not have directly protectionist goals. It is hard to define the demarcation line between an intentionally protectionist measure, which aims at imposing discriminatory and unjustified costs upon a free market, and a non-protectionist measure, which also happens to restrict the market in an attempt to protect national values. This complexity has increased with sovereign States’ assumption of international free trade obligations. The pursuit of free trade creates a need to reconcile the different legal and administrative systems of individual Member States. National measures and behaviours must now simultaneously respect domestic “internal” goals and supranational “external” goals. The incompatibility between goals governed by different rules can be resolved by means of both legislative instruments and judicial review. In the case of legislative instruments, global rules establish a point of reference, providing a set of values which States are obliged to pursue and the possibility that national objectives may justify an exception to them.

In the case of judicial review, supranational bodies must evaluate the trade-off between the harm to global values and the benefit to national public policies. In the absence of a predetermined legal criteria for assigning priority among the interests in conflict, it falls upon the adjudicating body to “develop an appropriate, balanced criteria for distinguishing the measures which constitute a legitimate exercise of sovereignty by the Member States

from those which constitute an unjustified detriment to the subjective positions guaranteed by the Agreement”¹.

The review of discretionary power is one of the central issues in both civil law and common law legal systems. Its importance depends mainly on the inverse relationship between ‘discretionary power’ on the one hand, and ‘civil rights and civil liberties’ on the other².

In the national context, the analysis of the balance between the ends to be pursued and the means adopted to reach them is especially familiar in the continental *droit administratif* tradition. Though characterised by an uneven application of the principle of the separation of powers, these legal systems do exemplify this most clearly in their determination of the figure of *détournement de pouvoir* and in their instruments for ascertaining it³.

In federal systems in which multiple legal systems co-exist, the review of discretionary authority takes place within the context of a delicate allocation of powers between different levels of government, all pursuing their own policies. In this perspective, the instruments which have developed in the American and European areas (with different degrees of maturity) are significant. In more than thirty years of applying the dormant commerce clause,⁴ American courts have developed a test to determine the consistency of state rules with the federal regulation of interstate commerce. This test is articulated in two phases: the first determines whether the state rule is discriminatory, the second applies a standard of review which varies according to the degree of the burden on interstate commerce. A discriminatory rule is considered *per se* illegitimate. For this reason, it cannot be upheld unless the State can demonstrate “under rigorous scrutiny, that it

¹ See E. CANNIZZARO, *Il principio della proporzionalità nell’ordinamento internazionale*, Milano, 2000, p. 15.

² M.S. GIANNINI, *Diritto amministrativo*, vol. II, Milano, 1993, p. 229: “if, using verbal syntheses derived from philosophy and sociology, we agree to regard as freedom the active situations that advantage private persons [...], we can also say that the exercise of authority necessarily reduces such freedoms, and in reducing authority, freedom re-expands in the areas that it had lost. We can thus agree with the sociologists who see, in the concepts of authority and freedom, two moments in a continuous dialectical process”.

³ The concept of the excess of power is familiar in common law countries as well. In the United States, under section 706 of the Administrative Procedure Act, an agency action can be voided when it exceeds of the agency’s statutory powers. The tool used to determine this excess of power is the arbitrary and capricious test. See B. MARCHETTI, *Pubblica Amministrazione e corti negli Stati Uniti. Il judicial review sulle amministrative agencies*, Padova, 2005, p. 220; M. BUCKLEY, *Administrative Law: De Novo Review of Administrative Action-What Are The Limits?*, in 15 *Washburn Law Journal* (1976) 477.

⁴ See D.H. REGAN, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, in 84 *Michigan Law Review* (1986) 1091 et. seq.; T.W. MERRILL, *Toward a principled interpretation of the commerce clause*, in 22 *Harvard Journal of Law & Public Policy* (1998-1999) 31 et. seq.; L.J. PETRICONE, *Dormant Commerce Clause*, in 27 *Santa Clara Law Review* (1987) 443 et. seq.; N.T. DOWLING, *Interstate Commerce and State Power-Revised Version*, in 47 *Columbia Law Review* (1947) 547 et. seq.

has no other means to advance a legitimate local interest”⁵. By contrast, if the rule is not discriminatory, but incidentally produces “an undue burden on interstate commerce” it is presumptively legitimate and can be struck down only if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits”⁶. This kind of analysis, known as the Pike test, requires the court to review the validity of the state rule by balancing between its costs to interstate commerce and its benefits⁷. Only when the benefits outweigh the costs may the state rule be held consistent with the dormant commerce clause.

In the absence of an unambiguous standard for comparing “the burdens on interstate commerce” with “the benefits to the state or local government,” American courts using the Pike test have subjected state rules to different levels of scrutiny or tests: ‘rational basis’⁸, ‘rational basis with bite’⁹, ‘intermediate scrutiny’¹⁰ and ‘strict scrutiny’¹¹.

The European Court of Justice, by contrast, uses the principle of proportionality¹² to ensure that the discretion of the individual Member States is exercised with respect for Community objectives. Proportionality

⁵ *C&A CARBONE, Inc. v. Town of Clarkstown*, New York, 511 U.S. 383 (1994). See J.D. FOX, *State Benefits Under The Pike Balancing Test of The Dormant Commerce Clause: Putative or Actual*, in 1 *Ave Maria Law Review* (2003) 186 et. seq.

⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁷ *Pike v. Bruce Church, Inc.*, cit., p. 3: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities”.

⁸ J.D. FOX, *State Benefits Under The Pike*, cit., p. 191: “to pass the rational basis test a law must pursue a legitimate state objective. Further, there must at least be a rational relationship between these goals and the means chosen to preserve them; that is, the legislature must not have acted in a completely arbitrary or irrational way”. See *Exxon Corp v. Governor of Maryland*, 437 U.S. 117 (1978).

⁹ J.D. FOX, *State Benefits Under The Pike*, cit., p. 191: “to pass the rational basis with bite test a law must advance a legitimate government interest, even if the law seems unwise or worked to the disadvantage of a particular group, or if the rationale for it seems tenuous. The law must be narrow enough in scope and grounded in a sufficient factual context to ascertain some relation between the law and the purpose it serves”.

¹⁰ *Ibid.*: “to pass the intermediate scrutiny test the law must serve important governmental objectives and must be substantially related to the achievement of those objectives”.

¹¹ *Ibid.*: “to pass the strict scrutiny test a law must be justified by a compelling state interest and the means employed to meet this interest must be substantially effective, necessary, and the least restrictive means available of accomplishing the goal”.

¹² Originating in the German legal system, in the area of police law and then extended to the entire sphere of administrative law. See D.U. GALETTA, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Milano, 1998, p. 11 et. seq.; A. SANDULLI, *La proporzionalità dell'azione amministrativa*, Padova, 1998; J. UEDA and M. ANDENAS, *Proportionality in EU environmental law*, in www.soc.nii.ac.jp/eusa-japan/download/eusa_ap/paper_MadsAndenas_JunkoUeda.pdf; S. MORETTINI, *Community principles affecting the exercise of discretionary power by national authorities in the service sector*, in this volume.

implies an analysis of the proper intensity of a State's measure, made by evaluating its conformity to three parameters: suitability, necessity and adequacy¹³. In other words, conceding that one interest can be privileged over others, it is necessary to determine the degree to which this is legitimate. This principle, which until recently overlapped with reasonableness in the Italian system¹⁴, implies that "the public administration must adopt the proper and adequate solution, implying the least possible sacrifice of the participating interests"¹⁵.

2.1. WTO review of discretionary power

Beyond the national borders, managing the dialectical relationship between freedom and authority requires the adaptation of doctrines and institutions developed in other contexts. As in federal systems, participation in a supranational agreement such as the GATS obliges Member States to take interests beyond the merely domestic into account in determining national policies. On the basis of this obligation, the WTO Dispute Settlement Body (hereafter DSB) is charged with resolving cases "in which a Member considers that any benefit accruing to it directly or indirectly under the cover agreements are being impaired by measures taken by other Members"¹⁶. WTO judicial review presents some particularities with respect to other legal systems¹⁷. For example, the WTO's review regards only 'vertical' relationships, in which a hierarchically superior body examines an act or decision of an 'inferior body,' in light of its conformity

¹³ See D.U. GALETTA, *Principio di proporzionalità*, cit., p. 359 et. seq.

¹⁴ See the decisions of the Regional Administrative Tribunal (TAR), Lecce, Bari, sez. III, from 2483/04 to 2493/04 in <http://www.giustizia-amministrativa.it>. For commentary, see the recent contribution of D.U. GALETTA, *La proporzionalità quale principio generale dell'ordinamento*, in *Giornale di diritto amministrativo*, 2006, n. 10, p. 1106 et. seq.

¹⁵ Consiglio di Stato, sez. IV, 22 giugno 2004, Decisione n. 4381, paragraph 3: "With regard to the censure arising out of an imbalance between private sacrifice and public interest, which could be satisfied by other means, the College observes that, on the basis of the principle of proportionality, the realisation of the public interest has to imply the least possible sacrifice of private interests. The principle of proportionality is a general principle of the Italian legal system: it implies that the public administration must adopt the proper and adequate solution, implying the least possible sacrifice of the participating interests" in <http://www.giustizia-amministrativa.it>.

¹⁶ Dispute Settlement Understanding, Article 3.2.

¹⁷ On this topic, see T. COTTIER and K.N. SCHEFER, *The Relationship between World Trade Organization Law, National and Regional Law*, in 1 *Journal of International Economic Law* (1998) 83-122; W.F. DAVEY, *Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by The System to Member Government Decisions and Its Use of Issue-Avoidance Techniques*, in 79 *Journal of International Economic Law* (2001) 79-110.

with the law dictated by the superior¹⁸ and not ‘horizontal’ relationships as well¹⁹.

The DSB’s power to review national measures depends on two factors: the first is the standard of review, established by the law to limit the scope of the judicial review; the second is the judicially-developed test for determining the correspondence between national measures and the criteria fixed by the global law.

The GATT (1944) system did not make any provisions regarding standards of review²⁰, and most of the signatories of the Uruguay Round likewise opposed the introduction of an explicit reasonableness standard, out of fear of imposing “too many constraints on the panels and undermin[ing] the consistency of GATT/WTO law by granting the national administrations a very wide margin of discretion to develop their own particular approach vis-à-vis international obligations”²¹.

Only the Anti-Dumping Agreement defines the standard applicable to the relative procedures²². The Anti-Dumping provision, which to some commentators²³ draws on the American *Chevron* doctrine²⁴ for the judicial review of agency decisions, prohibits the panel “from overturning the national authorities even though it may have reached a different

¹⁸ C.M. VAZQUEZ, *Judicial Review in the United States and in the WTO: Some Similarities and Differences*, in 36 *George Washington International Law Review* (2004) 595.

¹⁹ C.M. VAZQUEZ, *Judicial Review*, cit., p. 596: “Horizontal review is the judicial review of the acts of the federal legislative branch for conformity with constitution. [...] horizontal review is largely unknown in the WTO system. It is difficult to conceive how such review might develop. The most controversial form of such review – review of the legislative act of a coordinate branch – is possible only if the legal system includes a legislative power and if that power is subject to limits”.

²⁰ T.W. MERRILL, *Judicial Deference to Executive Precedent*, in 101 *Yale Law Journal* (1992) 971: “The attitude of courts toward administrative interpretations of statutes has ranged between two extremes. At one pole, courts ignore the administrative view [...] at the other pole, courts frame the inquiry in terms of whether the administrative interpretation is one that a reasonable interpreter might embrace. In this deference mode, a court implicitly acknowledges that the statute is susceptible to multiple readings”.

²¹ S. ZLEPTNIG, *The Standard of Review in WTO Law. An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, in <http://eiop.or.at/eiop/texte/2002-017.htm>; see S.P. CROLEY and J.H. JACKSON, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, in 90 *The American Journal of International Law* (1996) 199.

²² Article 17.9 of the Anti-Dumping Agreement provides that: “the panel shall interpret the relevant provisions of the agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations”.

²³ D.K. TARULLO, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, in 34 *Law & Policy in International Business* (2002-2003) 109. In contrast, see C.M. VAZQUEZ, *Judicial Review in the United States and in the WTO*, cit., p. 587 et. seq.

²⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

conclusion.” The law takes a restrictive approach to the WTO DSB’s scope of review, requiring it to defer to the decisions taken at the national level²⁵. So, with this one exception, the WTO Agreements are not concerned with defining the standard of review, and leave its determination mainly up to the DSB’s judicial lawmaking process. The DSB, in the Underwear Report, identifies Article 11²⁶ of the Dispute Settlement Understanding as the source of law²⁷ applicable to all of the Agreements; in its report of the EC-Hormones controversy, it rejects both *de novo* review as well as the total deference to the Member States²⁸.

The standard of review at the global level thus defines not only the role of the adjudicative body in relation to the other actors in the system, but also delineates the delicate relationship of power between the norms produced by the international organisation and the sovereignty of its Member States²⁹. The application of this parameter enables us to analyse the content of the norms adopted by the Member States, in the sense of determining the correspondence between the global rules and the national measures adopted in pursuit of public ends. The necessity (or ‘cost effectiveness’) test aims at determining whether a measure is necessary to the pursuit of a predetermined objective or, in other words, if there are commercially less costly means to its pursuit.

²⁵ H. SPAMANN, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, in 38 *Journal of World Trade* (2004) 511.

²⁶ Some scholars argue that the source of law of the WTO standard of review ought to be traced to Article 3.2 of the DSU. See J.H. JACKSON, *WTO Dispute Procedures, Standard of Review and Deference to National Governments*, in J.H. JACKSON, *The Jurisprudence of GATT and the WTO. Insights on Treaty Law and Economic Relations*, Cambridge, 2000.

²⁷ WTO, PANEL REPORT, *United States – Restrictions on imports of cotton and man-made fibre Underwear*, WT/DS24/R, 8 February 1996, paragraph 7.10. See S. ZLEPTNIG, *The Standard of Review in WTO law*, cit., p. 433: “concluding that art. 11 DSU provides for an appropriate standard of review, the panel pronounced that its review should neither completely substitute the national determinations (de novo review), nor totally defer to the member states’ findings. Applying an objective assessment test, the underwear panel provided a more precise meaning for art. 11 DSU. The panel asked whether the national authorities (1) had examined all the relevant facts before it; (2) had given an adequate explanation of how the facts supported the determinations and (3) whether the determination made was consistent with the international obligations of the member state”.

²⁸ WTO, APPELLATE BODY REPORT, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, paragraph 116: “so far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither de novo review as such, nor total deference, but rather the objective assessment of the facts. Many panels have in the past refused to undertake de novo review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, total deference to the findings of the national authorities, it has been said, could not ensure an objective assessment as foreseen by Article 11 of the DSU”.

²⁹ H. SPAMANN, *Standard of Review for World Trade Organization*, cit., p. 511: “In the international context of the World Trade Organization (WTO), it therefore partly defines the relationship between the nation state Members and the international organization WTO (and, by the same token, the scope of the obligations binding Members vis-à-vis each other under the WTO agreements)”.

The sections that follow illustrate the test provided by the GATS, according to the two contexts in which it is provided: Article XIV (*general exceptions*) and Article VI (domestic regulation).

3. *The interpretation of necessity in justifying protective measures*

The international liberalisation of services requires the removal of all barriers to competition. Depending on the nature of the obstacles to market entrance, this can imply the modification of the content of national regulations. In the sectors in which States have spontaneously assumed specific commitments, any protectionist measure is presumptively illegitimate. Article XVI, paragraph 2 of the GATS sets forth the limitations that are presumed to be illegal for their violation of the market access principle. Such measures cannot be maintained or adopted – neither on a regional nor on a national basis – unless there is a provision to the contrary in one of the individual schedules³⁰.

In wholly liberalised sectors, the GATS allows Member States to preserve protectionist measures that are directed towards one of the specific goals set forth by the global law³¹.

Where a Member requests the activation of a panel to challenge a national measure for its restrictive effects, the State interested in its preservation is obliged to justify its particular choice. This justification implies the demonstration of the necessity of the measure adopted with respect to the social policy goals that it seeks to pursue.

The GATS does not allow just any interest to justify a derogation from the liberalisation regime; on the contrary, Article XIV sets forth an exhaustive list of the goals that States can legitimately invoke as exceptions to the rule, in order to defend their contested measures. Its provisions are formulated in a way that makes them ‘almost equivalent’³² to those of

³⁰ A concrete example is provided by Legge 29 dicembre 1994, n. 747, Ratifica ed esecuzione degli atti concernenti i risultati dei negoziati dell’Uruguay Round.

³¹ Exceptions to this principle are set forth in GATS, Article XIV, paragraph 2: “(a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety; (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members; (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound”.

³² P. DELIMATISIS, *Towards a Necessity Test for Services: Completing the GATS Article VI.4 Mandate A Little Less Conversation, a Little More Action, Please!*, NCCR Trade Regulation, Working Paper n. 16, 2006, in http://www.nccr-trade.org/images/stories/publications/IP8/WTF_necessity_paper_FINAL_DELMATISIS.pdf, p. 17: “One important difference in the wording of the two provisions is that Art. XIV(a)

GATT Article XX³³: both GATT and GATS use a similar language and make similar provisions in their respective chapeaux, recognising Member States' right to pursue certain domestic policies.

An overall coherence between the two Agreements seems to be confirmed by an analysis of the case-law. In its only decision in the area of services³⁴, the DSB evaluates the exceptions provided by Article XIV in light of concepts and interpretations developed in the area of GATT Article XX.

In analysing the 'necessity' of the (federal and state) laws preventing internet gambling, both the Panel and the Appellate Body³⁵ evaluate the 'public morals' exception provided by Article XIV (a), making reference to the analysis in the *Korea-Various Measures on Beef* case³⁶, in the GATT context. The Appellate body explains that the standard of necessity ought to be understood by means of "a comparison between the challenged measure and possible alternatives" and that "the results of such comparison should be considered in the light of the importance of the interest at issue." This comparison ought to demonstrate that there exists no "reasonably available WTO-consistent alternative measure"³⁷.

After the Korea decision (the "most important of the post-Uruguay round on the subject of necessity"³⁸), determining the necessity of a protective

GATS considers as GATS consistent a measure that is necessary not only for the protection of public morals, but also for the maintenance of public order. The public order exception is broadly defined to allow its invocation when a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. According to Matsushita et al., this additional element in Art. XIV GATS makes this provision more inclusive than Art. XX GATS and hence the list of possible measures that could fall under this provision is wider. Viewed from this perspective, then, Art. XIV allows for greater regulatory flexibility and can hardly be regarded as a provision imposing some kind of deregulation".

³³ GENERAL AGREEMENT ON TARIFFS AND TRADE, Article XX.

³⁴ So far, only two cases in the area of services have led to the activation of a panel: WTO, PANEL REPORT, *Mexico – Measures affecting telecommunications services*, WT/DS204/R, 2 April 2004 and WTO, PANEL REPORT, *United States-Measures affecting the cross-border supply of gambling and betting services*, WT/D285/R, 10 November 2004. It is only in the latter case however that the DSB decided on the merits of the Article XIV exceptions clause.

³⁵ WTO, APPELLATE BODY REPORT, *United States-Measures affecting the cross-border supply of gambling and betting services*, WT/DS285/AB/R, 7 April 2005, paragraph 312.

³⁶ WTO, APPELLATE BODY REPORT, *Korea-Various Measures on Beef*, WT/DS161/AB/R, 11 December 2000, paragraph 164. On this subject, see J. NEUMANN and E. TURK, *Necessity Revisited: Proportionality in World Trade Organization Law After Korea-Beef, EC-Asbestos and EC-Sardines*, in 1 *Journal World Trade* (2003) 199 et. seq.

³⁷ The determination of a reasonably available WTO-consistent alternative does not imply the often impossible reconstruction of the whole universe of trade-restrictive alternative measures by the responding party. Rather, the complainant party must signal the concrete existence of a WTO-compatible reasonable alternative, while the responding party must demonstrate that this alternative is not reasonably available, does not guarantee the same level of protection or does not meet the goal pursued. See WTO, APPELLATE BODY REPORT, *United States-Gambling*, cit., paragraph 309-311; WTO, APPELLATE BODY REPORT, *Japan-Measures Affecting Agricultural Products*, WT/DS76/AB/R, 19 March 1999, paragraph 137.

³⁸ P. DELIMATSI, *Towards a Necessity Test for Services*, cit., p. 13.

measure taken in the services sector now means undertaking a process of weighing and balancing a number of factors. Preeminent among these factors are the measure's contribution to the application of the law or regulation, the relative importance of the interests and values pursued, and finally, the measure's restrictive impact on trade. Concretely, the WTO DSB performs a two-tiered analysis. First, it determines whether the measure is directed at one of the goals set forth in Article XIV. This requires a complex evaluation aimed at determining that the measure is designed³⁹ to meet the pursued objective and is also 'necessary' to its pursuit.

At the second level, the DSB examines "the way in which the measure is applied"⁴⁰, through the reasonableness requirements set forth in the *chapeaux* ('opening clauses')⁴¹. The responding party must demonstrate that the measure does not constitute an 'arbitrary' or 'unjustifiable' discrimination, nor a 'disguised restriction on trade in service,' and thus an abuse of the derogation allowed by the exceptions clause⁴². This requires both that the measure pursues the interest set forth by one of the paragraphs of the article and that there exists a sufficient connection between the measure and the interest⁴³.

The restrictive and literal interpretation of the doctrine of necessity in the *US-Gambling* decision, like that in the *Korea-Beef* decision, modifies the interpretation of the exceptions clause (GATT Article XX). The interpretation, aimed at guaranteeing the application of the derogation in the goods sector, defines the delicate relationship between the DSB's standard of review and the degree of deference that it must guarantee to national governments. Attempts to apply this interpretation have raised doubts and significant changes of direction.

The Panel report in the case *United States-337 of the Tariff Act of 1930*⁴⁴, was the first to clarify the kinds of review applicable when the principle of necessity figures into the evaluation of the controversy⁴⁵. The 1989 decision

³⁹ WTO, APPELLATE BODY REPORT, *US-Gambling*, cit., paragraph 294.

⁴⁰ WTO, APPELLATE BODY REPORT, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 22: "the chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied".

⁴¹ WTO, APPELLATE BODY REPORT, *US – Gasoline*, cit., p. 15.

⁴² WTO, APPELLATE BODY REPORT, *US – Gasoline*, cit., p. 22: "In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirement imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX (g); second further appraisal of the same measure under the introductory clauses of Article XX".

⁴³ This relationship is specified through the use of various terms like 'relating to,' 'involving' or 'necessary to'. See WTO, APPELLATE BODY REPORT, *US-Gambling*, cit., paragraph 292.

⁴⁴ GATT PANEL REPORT, *United States-Section 337 of the Tariff Act of 1930*, BISD 36S/345, 7 November 1989.

⁴⁵ GATT PANEL REPORT, *United States-Section 337*, cit., paragraph 5.26: "It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT

views the existence of alternative measures as the main criteria in determining the necessity of the contested measure. The analysis seems to take the form of a “least trade restrictive alternative test”⁴⁶ which considers a measure to be necessary and thus legitimate only if it is indispensable to the pursuit of national domestic policies. This criteria renders the analysis particularly severe and pointed: it limits States’ freedom to avail themselves of the exceptions clause by going beyond the ordinary meaning⁴⁷ of the term necessity and requiring them to meet the higher burden of establishing the measure’s indispensability⁴⁸. The reason for the GATT dispute resolution body’s insensibility to the goals of national legislators can perhaps be attributed to the 1947 GATT’s particular view of the conditions that would have guaranteed the creation of a free common market⁴⁹. As an instrument protecting the liberalisation commitments assumed by the signatories, the determination of the standard of necessity was focused on minimising and controlling harmful effects on trade. In line with this framework, the judicial analysis “used the effects on trade as a benchmark to calibrate the less GATT-inconsistent measure”⁵⁰, thus adopting a policy of intolerance for all but the measures strictly indispensable to the pursuit of the objective.

This interpretation was partially modified, first in the 1990’s and then with the constitution of the World Trade Organization. Many reports adopted by dispute resolution panels seem to accept a less rigid framework for the determination of necessity. In the *US – Gasoline* report⁵¹, the

provision as necessary in terms of Article XX (d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The Panel wished to make it clear to this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provision, it would be required to do so”.

⁴⁶ See P. DELIMATIS, *Towards a Necessity Test for Services*, cit., p. 13.

⁴⁷ Vienna Convention, Article 31.

⁴⁸ The New Shorter Oxford English Dictionary, (Clarendon Press, 1993), vol. II, p. 1895: “The word necessary normally denotes something that cannot be dispensed with or done without, requisite, essential, needful”. See WTO, PANEL REPORT, *United States – Restriction on Imports of Tuna (Tuna Dolphin II)*, 16 June 1994, paragraph 3.15: “It was necessary to interpret Article XX (b), in its context, in accordance with the rules of treaty interpretation expressed in the Vienna Convention on the Law of Treaties”.

⁴⁹ See E. RUOZZI, *I principi di necessità e di proporzionalità all’interno dell’articolo XX GATT*, in *Il Diritto dell’Economia*, vol. 1, 2007, p. 142.

⁵⁰ D.A. OSIRO, *GATT/WTO Necessity Analysis: Evolutionary Interpretation and Its impact on the Autonomy of Domestic Regulation*, in *29 Legal Issues of Economic Integration* (2002) 127.

⁵¹ WTO, APPELLATE BODY REPORT, *U.S. – Gasoline*, cit., p. 28: “It is of some importance that the Appellate Body point out what this does not mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the General Agreement contains provisions designed to permit important

Appellate Body affirmed that, in determining a measure's necessity, account had to be taken not only of its indispensability to the objective but also of its ability to reach it⁵²; in its *Korea-Beef* report, it openly observes that "while one meaning of necessary in ordinary language is indispensable this is not the only meaning"⁵³. Thus it passes from a 'least-trade restrictive approach' to a 'less-trade restrictive test'⁵⁴.

The inclusion of a reasonably available alternative among the elements to consider in a balancing process also reflects a greater deference to the States. Though the DSB must evaluate "whether a WTO-consistent alternative measure is reasonably available"⁵⁵, the alternative measure appears to be reasonably available when, for example, it can be effectively implemented in the State⁵⁶, or it is just as able as the discriminatory measure to meet the goals established by the Member State⁵⁷. In the *EC-Asbestos* decision, the Appellate Body again invoked *Korea-Beef*⁵⁸, to argue that the importance of objective that the measure was designed to obtain was one of the factors to consider in determining its WTO-consistency.

We can thus argue that the WTO's attention to the public policies invoked under the exceptions clause to justify national discretion has

state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements".

⁵² WTO, APPELLATE BODY REPORT, *Korea-Various Measures*, cit., paragraph 159: "we believe that, as used in the context of Article XX (d), the reach of the word necessary is not limited to that which is indispensable or of absolute necessity or inevitable. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX (d). but other measures, too, may fall within the ambit of this exception. As used in Article XX (d) the term necessary refers, in our view, to a range of degrees of necessity. At one end of this continuum lies necessary understood as indispensable, at the other end, is necessary taken to mean as making a contribution to. We consider that a necessary measure is, in this continuum, located significantly closer to the pole of indispensable than to the opposite pole of simply making a contribution to".

⁵³ WTO, APPELLATE BODY REPORT, *Korea-Various Measures*, cit., paragraph 161.

⁵⁴ WTO SECRETARIAT, *GATT/WTO Dispute Settlement Practice relating to GATT Article XX*, WT/CTE/W/203, paragraph 42.

⁵⁵ WTO, APPELLATE BODY REPORT, *Korea-Various Measures*, cit., paragraph 165.

⁵⁶ See WTO, PANEL REPORT, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996, paragraph 3.40 et. seq.

⁵⁷ In the *Gambling* decision, the panel, in order to determine the 'reasonably available measure' required a consultation of the interested States. It intended the consultation to be the place to evaluate and negotiate the alternative measure for the pursuit of a certain public interest, thus becoming an indispensable element of its reasonableness.

⁵⁸ WTO, APPELLATE BODY REPORT, *Korea-Various Measures*, cit., paragraph 162: "the more vital or important the common interests or values pursued, the easier it would be to accept as necessary measures designed to achieve those ends".

changed over the years. This change, hastened by the impact of sectoral rules protecting non-trade domestic policy (in particular, the TBT and SPS)⁵⁹, can be understood through the different interpretative approach of the judicial bodies. The greater deference given to domestic policy choices has generated a test that is increasingly respectful of national legislative choices. As demonstrated by some observers, the basic doctrine of the *Korea-Beef* case illustrates this change; the Appellate Body stresses that “there are situations where the claim may be that a measure is indispensable, i.e. the only available measure to achieve a member’s chosen level of protection, and there are other situations in which a member may be able to justify its measure as necessary within the meaning of Article XX even if the fit is not that close”⁶⁰. So the Member State may therefore demonstrate the necessity of a non-indispensable measure as well⁶¹.

The innovative aspect of the Korea decision is thus the greater margin of flexibility in evaluating the parameters of necessity. This flexibility creates an ‘additional margin of appreciation’ in the regulatory policies adopted by the States in pursuit of the goals set forth in Article XX. The case-law and academic commentary⁶² in this area demonstrate that today the importance of the public policies listed in the exceptions clause is such as to prohibit their sacrifice *tout-court* in the face of harm to the free movement in services. It cannot, for example, “be required that a Member replace one of

⁵⁹ On this subject, see G. MARCEAU and J.P TRACHTMAN, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade*, in 36 *Journal of World Trade* (2002) p. 811 et seq.; F. FRANCONI, *Environment, Human Rights and the liberalization of international trade*, Portland, 2001.

⁶⁰ R. HOWSE and E. TUERK, *The WTO impact on internal regulations-a case study of the Canada-EC asbestos dispute*, in G.A. BERMANN and P.C. MAVROIDIS, *Trade and Human Health and Safety*, New York, 2006, p. 324.

⁶¹ SOUTH CENTRE ANALYTICAL NOTE, *GATS Dispute Settlement Case: Practical Implication for Developing Countries*, SC/TADP/AN/SV/10 SC/TADP/AN/DS/1, January 2005, paragraph 7: “The analysis for this necessity test involved weighing and balancing several factors, namely: the importance of the interests or values that the measure is intended to protect; the extent to which the challenged measure contributes to the realization of the end pursued; and the trade impact of the measure, including whether a reasonably available WTO-consistent alternative measure exists. The important thing to note here is that the Panel found that public morals and public order can be very important societal interests, which can be characterized as vital and important in the highest degree. This puts the two interests at par with the protection of human life and health. The importance of this is that the higher the interest or value pursued by a measure, the more likely it is that the measure will be seen as necessary. It should be recalled that the footnote to Article XIV (a) provides that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. The Panel did not address this footnote expressly, but merely found that public order is a very important societal interest. To some extent, this makes it easier for Members to invoke the public order exception. And, by holding public morals and public order in such high regard, the Panel has widened the scope for Members to pursue these non-trade objectives”.

⁶² See WTO, WPDR, *Necessity tests in the WTO*, Note by the Secretariat, S/WPDR/W/27, 2 December 2003; F. ORTINO, *From Non-Discrimination To Reasonableness: A Paradigm Shift In International Economic Law?*, in Jean Monnet Working Paper, n. 1, 2005, in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922524.

its measures with an alternative that is both less trade restrictive but also less protective”⁶³ than the one under examination⁶⁴.

4. *The interpretation of necessity in justifying national regulatory measures*

In respect of Members’ right to regulate the supply of services within their territories, the Preamble to the General Agreement on Trade in Services recognises:

“[...] the right of members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulation in different countries the particular need of developing countries to exercise this right”.

National regulations can affect trade in services, sometimes generating commercial barriers⁶⁵. The determination of rules that prevent the protectionist use of domestic regulations is thus vital, but such rule must not deprive national regulators of the freedom to pursue legitimate social objectives⁶⁶. Article VI introduces provisions aimed at preventing ‘qualitative’ measures of domestic regulation⁶⁷ from being used to conceal

⁶³ M. KENNET, J. NEUMANN and E. TUERK, *Second Guessing National Level Policy Choices: Necessity, Proportionality and Balance in the WTO Services Negotiations*, Center for International Environmental Law, August 2003, in www.ciel.org/Publications/necessity_3Sep03.pdf, p. 3: “a Member cannot be required to substitute a measure for an alternative that is less protective simply because it is also less trade restrictive. Importantly this interpretation of necessity only applies to measures that are not indispensable for the attainment of a legitimate goal and for the particular level of protection”.

⁶⁴ The EC-Asbestos case confirms this. The Appellate Body not only upheld the French measure defending an established margin of protection, but also observed that “the more vital or important the common interests or values pursued the easier it would be to accept, as necessary measures designed to achieve those ends”. See WTO, APPELLATE BODY REPORT, *EC-Asbestos*, WT/DS135/AB/R, 5 April 2001, paragraph 162.

⁶⁵ Regarding the influence of domestic regulation on trade in services, see for example, European Commission Report to the Council and European Parliament, *The state of the internal market in services*, COM (2002) 441 def., 30 July 2002, p. 6: “[s]ervices are much more prone to Internal Market barriers than goods and are harder hit. Because of the complex and intangible nature of services and the importance of the know-how and the qualifications of the service provider, the provision of services is often subject to much more complex rules covering the entire service activity than is the case for goods”.

⁶⁶ On this topic, see M. KRAJWESKI, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, London-New York, 2003; P. SAUVÉ and A. MATTOO, *Domestic regulation and Services Trade Liberalization*, Washington, 2003; M. DJORDJEVIC, *Domestic Regulation and Free Trade in Services - A Balancing Act*, in 29 *Legal Issues on Economic Integration* (2002) 305-322.

⁶⁷ The GATS, as we have discussed in section 4, also addresses quantitative or numerical restrictions in Articles XVI-XVII, regarding them as protectionist measures and subjecting them to scheduling obligations. For case-law on this point, see WTO, PANEL

protectionist ends and thus create useless barriers to trade. This rule, balancing the right to regulate with the goal of trade liberalisation, applies a ‘policed decentralization’, so that “regulators can operate independently in different jurisdictions and may adopt substantive regulations but must do so subject to a number of constraints”⁶⁸. This policy does not create substantive obligations, but requires the Member States to adopt provisions that are consistent, rather than requiring them to respect specific criteria that would rein in their regulatory power⁶⁹.

Article VI imposes a series of obligations on state authorities, in both adjudication as well as in rule-making proceedings. With regard to the former, Article VI, paragraph 1 requires that, in the sectors for which no specific commitments have been undertaken, state authorities must administer all measures of general application “in a reasonable, objective and impartial manner”⁷⁰. In reference to the latter, paragraph 4 mandates a WTO administrative body, the Council for Trade in Services (hereafter, GATS Council) – which makes use of an expert committee, the Working Party on Domestic Regulation (hereafter the WPDR)⁷¹ – to develop the global disciplines:

“with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

REPORT, *US-Gambling*, cit. and, for commentary, see J. PAUWELYN, *Rien Ne Va Plus?*, 4 *World Trade Review* (2005) 131-170; P. DELIMATISIS, *Towards A Necessity Test For Services*, cit., p. 5-12.

⁶⁸ F. KOKOTT, H. HAUSER and H. NETTESHEIM, *Electronic Services: Its Regulatory Barriers and the Role of the WTO*, St. Gallen, July 2001, in www.cid.harvard.edu/cidtrade/Papers/wunsch.pdf, p. 31.

⁶⁹ On this topic, see M. KENNEDY, J. NEUMANN and E. TUERK, *Second Guessing National Level Policy Choices*, cit.

⁷⁰ GATS, Article VI: “In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner”. On this topic, see B. CIMINO, *Reasonableness, impartiality, objectiveness and participation: the Gats standards*, in this volume.

⁷¹ See WTO, CTS, *Decision on Domestic Regulation*, Adopted by the Council for Trade in Services on 26 April 1999, S/L/70, 28 April 1999; this group of experts is empowered “to develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade”. The WPDR replaced the previous Working Party on Professional Services (or WPPS), established by the decision of 1995. See WTO, CTS, *Decision on Professional Services*, Adopted by the Council for Trade in Services on 1 March 1995, S/L/3, 4 April 1995.

Paragraph 5 of Article VI specifies moreover that, in the period preceding the adoption of these disciplines, the States must refrain from introducing new national measures that could undermine or compromise the basic ends set forth in paragraph 4⁷².

The global disciplines on domestic regulation to be developed by the WPDR⁷³ aim at binding the Member States⁷⁴, with respect to the different steps taken in the process of liberalisation. Recognising state sovereignty and regulatory autonomy, they allow that state action be considered legitimate in principle, absent a demonstration that it is more restrictive than necessary to ensure the quality of the service. Confirming the benevolent treatment accorded to domestic norms⁷⁵, the burden of proof rests upon the States challenging the conformity of another State's regulation.

The 'new' disciplines on domestic regulation, once adopted, will affect measures relative to "qualification requirements and procedures, technical standards and licensing requirements"⁷⁶. The four categories of measures

⁷² GATS, Article VI, paragraph 5: "(a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made".

⁷³ The only discipline in the sense of Article VI, paragraph 4, presented so far in regards the accountancy sector (see WTO, CTS, *Disciplines on Domestic Regulation in the Accountancy Sector*, Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, 17 dicembre 1998); see section 4.1, supra.

⁷⁴ On this topic, see E. GOULD, *How the GATS Undermines the Right to Regulate*, Canadian Centre for Policy Alternatives, Briefing Paper, vol. 6, 2005 in http://policyalternatives.ca/documents/National_Office_Pubs/2005/brief6_4_GATS_and_Gambling.pdf; J.P. TRATCHMAN, *International Trade as a Vector in Domestic Regulatory Reform: Discrimination, Cost Benefit Analysis, and Negotiation*, in 24 *Fordham International Law Journal* (2000) 726.

⁷⁵ Because the rules governing commercial trade are designed to ensure the freedom of market access, and only indirectly to promote efficiency or social well-being, some Member States – especially developing countries – are concerned that the future disciplines might impede States' discretion in choosing legitimate policy objectives of domestic regulation. See L.A. MAJLUF, *Domestic Regulation and the GATS: Challenges for Developing Countries*, Policy Paper on Trade in Services and Sustainable Development: Domestic Regulation, in http://www.ictsd.org/dlogue/2006-02-28/Dom_Reg.pdf. On the possible intrusion of the WTO into the Member States' freedom to regulate beyond the original meaning of the GATS Agreement, we can distinguish two different positions. On the one hand, there is the extreme position that "there should be no role for the WTO in over-seeing non-discriminatory regulation. This exercise represents a wholly unwarranted intrusion of trade law into important domestic public safety laws" (see Canadian Environmental Law Association, CELA Report 397 (2000), *General Agreement on Trade in Services: Negotiations Concerning Domestic Regulation under GATS Article VI(4)*, submitted to the Department of Foreign Affairs and International Trade and to Industry Canada, November, p. 1); on the other hand, there are those who argue that the disciplines on domestic regulation are necessary to complete the market access obligations that could otherwise be undermined by regulations applied strictly for protectionist purposes.

⁷⁶ See WTO, WPDR, *Disciplines on Domestic Regulation pursuant to GATS Article VI:4*, Consolidated Working Paper, Note by the Chairman, JOB(06)/225, July 2006, p. 4: "Licensing requirements are substantive requirements, other than qualification requirements and technical standards, with a service supplier is required to comply in order

indicated by the Agreement include a vast number of domestic regulations⁷⁷, defined by both the WPDR Secretariat⁷⁸ and by the Members themselves⁷⁹.

The States' regulatory "measures relating to qualification requirements and procedures, technical standards and licensing requirements" must therefore respect the criteria of objectivity, transparency and necessity set forth in paragraph 4 which, in this sense, constitutes a genuine derogation norm. More specifically, paragraph 4(a) provides that the regulation must be based on objective⁸⁰ and transparent criteria. The required standard of

to obtain or renew authorization to supply a service. Licensing procedures are administrative or procedural rules relating to the administration of licensing requirements for the supply of a service, including those relating to submission and processing of an application for a license or renewal thereof. Qualifications requirements are substantive requirements relating to the competence to supply a service supplier is required to demonstrate prior to obtaining authorization to supply a service. Qualification procedures are administrative or procedural rules relating to the administration of qualification requirements, including those aiming at verifying the compliance of candidates with qualification requirements as well as those relating to acquiring or supplementing such qualifications. Technical standards are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards".

⁷⁷ Qualification and licensing requirements involve both substantive and procedural law. Qualifications include the prerequisites that a provider must possess in order to provide the service (for example, passing a qualification exam or possessing an authorisation); licensing, by contrast, concerns the administrative rules governing the proceedings for the granting of licenses and certificates (for example, the payment of taxes or the registration of a business. The technical standards consist in a series of parameters inherent to the characteristics of the service (for example, the prescriptions of a professional code of conduct).

⁷⁸ The Secretariat, in part, asking for the contribution of the Member States and in part taking up the work of the WPPS, included as licensing requirements: "Restrictive regulations relating to zoning and operating hours, to protect small storse. Federal and sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states. Too many licenses required in order to operate a business. Overly burdensome licensing requirements (e.g. minimum age required for a physiotherapist 25 years old). Branches of a foreign company are required to regularly submit plan of activities to the government authority in order to be eligible to renew registration. Lengthy censorship procedures; too many censoring agencies with different criteria". Qualification requirements include: "Only persons who have specific certification from a government agency can take up managerial posts (e.g. managers of an insurance company must have certification from the insurance agency in that country). Requirement for fluency in language of the host country which in some cases not relevant to ensure the quality of service. Different sub-federal regulations for recognition of qualifications. Minimum requirements for local hiring (accountancy)". See WTO, WPDR, *Examples of measures to addressed by disciplines under GATS Article VI:4*, Informal Note by the Secretariat, Job (02)/20/REV.7, 22 September 2003; see also WTO, WPDR, *Report on the Meeting Held on 3 december 2003*, Note by the Secretariat, S/WPDR/M/24, 22 January 2004 and WTO, WPDR, *Report on the Meeting Held on 2 october 2001*, Note by the Secretariat, S/WPDR/M/13, 21 November 2001.

⁷⁹ See WTO, WPDR, *Definitions of Qualification Requirements, Qualification Procedures, Licensing Requirements, Licensing Procedures and Technical Standards*, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, S/WPDR/W/37, 6 October 2005.

⁸⁰ The expression 'based on' implies a relationship between the regulatory measure and objective criteria that are external to the regulation. This formulation is logical when a

objectivity, still up for discussion within the WPDR, does not have a precise meaning and includes the following qualities: “not arbitrary, not biased, relevant to the ability to perform or supply the service, not subjective, the least-trade-restrictive alternative”⁸¹. In particular, a non arbitrary would allow differential treatment only if justified by the different characteristics of the service providers⁸²; according to the American terminology, the measure must not be “capricious, or not otherwise in accordance with the law”⁸³. Not biased would imply a prohibition upon the national regulator from favouring one party to the detriment of another in the decision-making process⁸⁴. Finally, the determination of the measure least-trade-restrictive alternative implies a comparison between the less available alternative measures. Not subjective means the elimination of individual discretion⁸⁵. Domestic regulations must not be “more burdensome⁸⁶ than necessary to ensure the quality of the service”⁸⁷. The principle of necessity affects the

regulatory measure is based on a body of scientific knowledge (for example, risk assessment) or on a standard (for example food safety standards). Problems arise when a law gives regulators full power to decide whether a license is fair, reasonable or designed to a public interest.

⁸¹ Memorandum of 1 March 2007 regarding the *GATS proposal that domestic regulations must be “objective”*, Harrison Institute, p. 3 (available at <http://www.tradeobservatory.org/library.cfm?refID=97673>).

⁸² European Communities and their Member States, *Schedule of Specific Commitments*, Supplement 3, GATS/SC/31/Suppl.3, 11 April 1997.

⁸³ See L. GIANI, *Spunti di riflessione in tema di controllo della discrezionalità nell’ordinamento giuridico statunitense*, in *Diritto Amministrativo*, 1996, vol. 2, p. 769 et seq.; G.A. BERGMANN, *Standards for the Exercise of Discretion in American Administrative Law*, in *26 American Journal of Comparative Law* (1977-78) 416 et seq.

⁸⁴ European Community, *Report on United States Barriers to Trade and Investment*, December 2004, paragraph 44: “This definition is more intrusive than ‘not arbitrary’ because laws like small business preferences or affirmative action were enacted specifically to create preferences in order to overcome historical disadvantages or market failures. The European Commission has specifically questioned the trade restrictive effects of “[a]ffirmative action schemes favouring small business or particular types of business (e.g. minority-owned) (available at http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_121929.pdf).

⁸⁵ This fourth quality was taken up by the Philippines in the WPDR, in response to the Colombian proposal for procedures for granting a visa, affirming “that if there was discretion not based on objective criteria in the application of visa procedures, these became the subject of the work under Article VI:4, i.e. the development of disciplines to ensure that such administrative procedures were based on transparent and objective criteria”. See WTO, WPDR, *Report on the Meeting Held on 24 September 2004*, S/WPDR/M/27, 15 November 2004, paragraph 45.

⁸⁶ Interpretative doubts arise surrounding the concept of ‘burdensome’. During the work of the WPDR, the European Community, taking up the NAFTA Agreement (which, having similar rules in the area of services, provides for the illegitimacy of national measures that are “more burdensome than necessary to business”), proposed to read the phrase “no more burdensome than necessary” as “no more trade restrictive than necessary”. See WTO, WPDR, *Report on the Meeting Held on 3 July 2001*, S/WPDR/M/12, 16 August 2001.

⁸⁷ The Member States cooperate with the Secretariat of the Council for Trade in Services in the periodic development of a list indicating the measures potentially “more burdensome than necessary to ensure the quality of the service” and thus incompatible with the Agreement. Among the qualification requirements included in this list are: “requirement for fluency in language of the host country; different sub-federal regulations for recognition of qualifications; minimum requirements for local hiring; need for in-country experience

substantive content of the national disciplines, constraining policy choices and limiting the determination of legitimate national objectives⁸⁸ and the relative level of protection. Regarding licensing requirements⁸⁹, and the residency requirement in particular, the necessity test implies a duty upon individual Member States to determine the existence of means which are less trade restrictive while still enabling the pursuit of the same objectives sought by the requirement⁹⁰. In relation to the qualification requirements, States are obliged to ensure that the procedures for the verification and evaluation of the service provider's qualifications are based on pre-determined and objective criteria, and applied to both local and non-local applicants alike⁹¹. It then requires that the competent authorities carrying out such verification and evaluation procedures consider both professional

before sitting examinations; requirements of previous working experiences in host markets: natural persons applying for professional licenses should have certain years of working experiences in the host markets". The list of disfavored procedures for licensing requirements includes: the "absence of pre-determined, clear criteria for licensing requirements (including postal and courier, and distribution services); restrictive licensing practices (tourism); unreasonable restrictions on licensing (legal services); unclear licensing and approval requirements (energy services); restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects". See WTO, WPDR, *Examples of measures to addressed by disciplines under GATS Article VI:4*, Informal Note by the Secretariat, Job(02)/20/REV.2, 18 October, 2002.

⁸⁸ The Accountancy disciplines include an open-ended list of legitimate objectives that each Member may invoke to justify the necessity of its own regulatory measures.

⁸⁹ This expression includes every substantive requirement for the attainment of authorisation to provide a service. It includes not only the "licensing of professionals, but also licensing or concessions for companies to operate (e.g., utilities, transportation or education)". As argued by the United States, this would also comprehend "permits related to construction, operation or use of facilities, use of natural resources, or that service to implement and enforce certain laws, e.g., food safety inspections, vehicle safety and emission inspection, environmental protection, etc". See *Briefing Memo* of 28 May 2007, regarding the *WPDR chairman's third draft on domestic regulation* of 18 April 2007, Harrison Institute (available at <http://www.tradeobservatory.org>).

⁹⁰ See WTO, WPDR, *Communication from Australia; Chile; Hong Kong; China; The separate customs territory of Taiwan; Penghu; Kinmen and Matsu, Article VI:4 Disciplines – Proposal for Draft Text*, JOB(06)/193, 19 June 2006, paragraph 29: "Where residency requirements not subject to scheduling under Article XVII of the GATS apply in qualification requirements, each Member shall consider whether alternative less trade restrictive means could be employed to achieve the purposes for which these requirements were established. Residency requirements non subject to scheduling under Article XVII of the GATS shall not be a pre-requisite for taking part in competency assessment including examinations". This discipline will create a significant limitation on regulators. For this reason, some states, including Australia, have proposed the use of temporary licensing as a less trade-restrictive alternative than the residency requirement (see WTO, WPDR, *Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S/WPDR/W/34, 6 September 2005).

⁹¹ See WTO, WPDR, *Communication from Australia; Chile; Hong Kong; China; The separate customs territory of Taiwan; Penghu; Kinmen and Matsu*, cit., paragraph 23: "Where qualification requirements are applied to the supply of a service, each Member shall ensure that mechanisms exist for the verification and assessment of qualifications held by services suppliers including those of any other Members. Such mechanisms shall be based on criteria that are pre-established and objective and apply to both local and non-local qualifications".

experience, as a complement to academic qualifications, as well as the applicant's membership in important professional organisations in the country of origin or in a third country⁹².

On the basis of paragraph 4 of Article VI, the objective justifying the burden imposed by “qualification requirements and procedures, technical standards and licensing requirements” is its necessity in ensuring the ‘quality of the service’. The inconsistency of national measures is gauged not only in relation to their capacity to negatively affect free trade, but also to their inadequacy in ensuring the quality of the service. More specifically, the necessity test applied to national regulations implies a three-step analysis: first, a determination of the degree of trade restrictiveness; second, the adequacy of the measure in ensuring the quality of the service; third, the existence of available alternative means for attaining the same quality of services⁹³.

A non-discriminatory national measure, which negatively affects free trade, can thus be maintained if its trade restrictive effect is justified by the need to ensure the levels of quality fixed by States exercising their full powers of discretion. By providing as such, the Agreement defers to the policies animating state regulation.

4.1. The interpretation of necessity in justifying national regulatory measures: the Accountancy Sector disciplines

Article VI, paragraph 4, charges the Council for Trade in Services, through the WPDR, with developing global disciplines on “qualification requirements and procedures, technical standards and licensing requirements”; presently, the only disciplines adopted regard the accountancy sector⁹⁴. With regard to the principle of necessity, the focus of this study, paragraph 2 of the Accountancy disciplines provides that:

⁹² See WTO, WPDR, *Communication from Australia; Chile; Hong Kong; China; The separate customs territory of Taiwan; Penghu; Kinmen and Matsu*; cit., paragraph 26: “Each Member shall ensure that, in verifying and assessing qualifications, the competent authorities take into account professional experience of the applicant as complement to academic qualifications, and also take into account the membership of the applicant in the relevant professional associations in the home country or a third country”.

⁹³ L.A. MAJLUF, *Domestic Regulation and the GATS: Challenges for Developing Countries*, cit., p. 20-21: “To assess a particular measure it would not be enough to demonstrate that a measure is more burdensome, or costly, than necessary and directly deriving from that fact that it is a trade restrictive measure, as some tend to suggest. A measure can be burdensome but not necessarily trade restrictive. The notion of more burdensome than necessary should be understood in the context of Article VI:4 as referring to ‘more trade restrictive than necessary’. Once a measure is found to be trade restrictive, the following test would be to determine if it is more restrictive than necessary to achieve the policy objective. Determining necessity in this context is certainly a very complex issue”.

⁹⁴ See WTO, CTS, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64, cit.; WTO, CTS, *Decision on Disciplines Relating to the Accountancy Sector*, S/L/63, 15 December 1998; WTO, WPPS, *Guidelines for Mutual Recognition Agreements*

“Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession” (italics added).

This provision affects the substantive content of state regulation, setting forth an ‘open’ list of objectives, including consumer protection, the quality of the service, professional competence and integrity⁹⁵, that a Member State may legitimately pursue by means of domestic regulation measures⁹⁶.

The formulation of paragraph 2 of the Accountancy sector disciplines seems identical to that contained in Article 2.2. of the Agreement on Technical Barriers to Trade (TBT)⁹⁷. In this context as well, the list of legitimate national objectives is preceded by an *inter alia* clause, providing that:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall

or Arrangements in the Accountancy Sector – Revision, S/WPPS/W/12/REV.1, 20 May 1997; WTO, WPPS, *Recommendation of the Working Party on Domestic on Professional Services to the Council of Trade in Services*, S/WPPS/W/14/REV.1, 15 May 1997; WPPS, *Recommendation of the Working Party on Domestic on Professional Services to the Council of Trade in Services*, S/WPPS/W/14/REV.1/Corr.1, 22 May 1997.

⁹⁵ As in the TBT Agreement, there are doubts about the possibility of calibrating a domestic measure’s effects on trade, in light of the importance of the legitimate objective pursued, without reviewing its validity. The presence of an open list of legitimate objectives would seem in fact to attribute greater discretionary power to the dispute resolution body. On the basis of studies undertaken in the area of the TBT, many authors argue that the provision of an open list of legitimate objectives could therefore increase the judicial review of the DSB, allowing it to review the ‘legitimacy of pre-determined objectives’ as well.

⁹⁶ The States have thus agreed upon four objectives that the DSB ought to consider as ‘legitimate’ when examining the necessity of the measure adopted.

⁹⁷ Both of these Agreements, out of respect for the different social, cultural and legal characteristic of the 149 WTO Members, do not in fact list the objectives in an exhaustive way, but use an open formula of exemplification. The presence of similar wording in the TBT and the Accountancy disciplines not only enables their comparison, but also the use of TBT jurisprudence in interpreting the meaning of the necessity embodied in Article VI, paragraph 4.

not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products” (italics added).

Using the *inter alia* clause, and thus leaving the Member States the possibility of exercising their discretion to increase the number of legitimate objectives⁹⁸, the global law grants deference to the States. At the same time, this provision would seem to legitimate a more searching review by the global judicial body, aimed not only at evaluating whether the means adopted are fitted to the objective pursued, but also the objective itself. The provision of an open list of objectives to pursue in fact implies a widened scope of judicial review to include a review of the wisdom of the chosen objectives⁹⁹. The review of necessity would thus bring it closer to

⁹⁸ With regard to future Article VI, paragraph 4, disciplines, Australia, by contrast, has argued in favour of the introduction of an illustrative list of objectives (WTO, WPDR, *Communication from Australia*, S/WPDR/W/1, 19 July 1999, paragraph 5; WTO, WPDR, *Communication from Australia, Necessity and Transparency*, S/WPDR/W/8, 15 September 2000, paragraph 4-5), proposing the inclusion of professional competence, professional integrity, administrative efficiency and fairness. Paragraph 5 reads: “The necessity test will be used to determine whether measures to implement a policy objective are the least trade-restrictive available. In Australia's judgement, Members should draft a necessity test which, while drawing on the concepts of Article VI:4 (a-c), is narrower and more consistent with other WTO Agreements. Members need to establish what would constitute a *necessary* barrier to trade in services. For example, the following definition of the necessity test in the SPS Agreement could be revised so that it applied to services: ‘a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade’ (SPS Article 5, footnote). For ‘the appropriate level of sanitary or phytosanitary protection’, Members could consider substituting ‘a legitimate policy objective’. Although the SPS language is similar to that in TBT Article 2.2, the former is more concise and the concepts are more relevant to services” (WTO, WPDR, *Communication from Australia*, S/WPDR/W/1, cit.).

⁹⁹ J. NEUMANN AND E. TURK, *Necessity revisited: proportionality in World Trade Organization Law after Korea-Beef, EC-Asbestos and EC-Sardines*, in 1 *Journal of World Trade* (2003) 218.

proportionality, that form of review so dear in Europe¹⁰⁰, with a consequent diminution of deference to the States¹⁰¹.

To conclude, the analysis of the substantive review of regulatory measures, together with the sparse jurisprudence in the area¹⁰², highlights the instability of a sector in which the balance between States' right to regulate and the purpose of avoiding 'unnecessary barriers to trade in services' is hard to achieve. The delicacy of this area is also demonstrated by States' reluctance to accept limitations upon their national policies affecting fundamental, rather than merely market, values (so called 'trade-ands')¹⁰³.

¹⁰⁰ According to the EC, a measure that is not the least restrictive, but is still proportionate to the established objective, ought to be understood as necessary. It argues that the validity, rationality or adequacy of policy objectives ought not to be reviewed by the WTO judicial body. Its proposed necessity test takes various factors into account, including the risk of not reaching the objective, a given State's level of development and the specific nature of the sector in question (see WTO, WPDR, *Communication from Australia, Domestic regulation: Necessity and transparency*, S/WPDR/W/8, cit., and WTO, WPDR, *Report on the Meeting Held on 3 July 2001*, cit., paragraph 52).

¹⁰¹ See WTO, WPDR, *Communication from Japan, Draft Annex on Domestic Regulation*, Revision Job, (03)/45/REV/1, 2 May 2003. The Japanese proposal is peculiar, in as much as it contains a series of necessity tests, each one of which is formulated in a different way and applicable to different types and aspects of domestic regulation. For example, for all measures of a general application in relation to "licensing requirements and procedures, qualification requirements and procedures, as well as technical standards", paragraph 6 establishes that "each Member shall ensure [...] that measures of general application [...] are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in services" and that to this end, every Member shall ensure that such measures "are not more burdensome than necessary in order to fulfil its national policy objectives". Paragraph 7 moreover provides that "each Member shall examine [...] the possibility of modifying or terminating existing measures of general application [...] if the circumstances or objectives giving rise to their adoption no longer exist or if new circumstances or objectives can be addressed in a less trade restrictive manner". On the other side, See WTO, WPDR, *Communication from the United States, Outlines of US Position on a Draft Consolidated Text in WPDR*, JOB(06)223, 11 July 2006, paragraph 3: "We do not support any type of operational necessity test or standard in any new disciplines for domestic regulation. However, we share the concerns raised by many Members that the right to regulate should not be used in practice to avoid trade obligations. In the regard, we are open to discussing non-operational language in the preamble, expressing that Members' objective in developing any new disciplines is to establish that principle".

¹⁰² The panel and the Appellate Body also preferred to evaluate the U.S. rules in light of the exceptions clause, rather than in light of Article VI. 4 on domestic regulation in the US-Gambling case as well.

¹⁰³ This tension can be seen in the difficulty of adopting disciplines in other sectors besides the accountancy sector. In the attempt to overcome this impasse, the WPDR is discussing the wisdom of adopting a horizontal approach aimed at the development of a common discipline for all services (see a WTO, WPDR, *Report on the Meeting Held on 17 May 1999*, Note by the Secretariat, S/WPDR/M/1, 14 June 1999; WTO, WPDR, *Report on the Meeting Held on 14 July 1999*, Note by the Secretariat, S/WPDR/M/2, 2 September 1999; WTO, CTS, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, Note by the Secretariat, S/C/W/96, 1 March 1999 and WTO, CTS, *International Regulatory Initiatives in Services*, Note by the Secretariat, S/C/W/97, 1 March 1999; South Centre, *The development dimension of the GATS Domestic Regulation Negotiations*, 2006, in <http://www.southcentre.org>). According to some authors, the benefits of a horizontal approach are expressed in terms of political economy, economising

5. Comparative evaluations

So far we have examined the necessity test, distinguishing the test employed for protective measures from that applied to regulatory measures.

This distinction seems justified by both the legal provision for the review of necessity in the paragraphs dedicated to exceptions clauses and domestic regulation, as well as by the different nature of the measures adopted and subjected to review¹⁰⁴.

These differences ought to manifest themselves in the type of judicial scrutiny carried out as well. In the United States, for example, the judicial application of the dormant commerce clause implies a ‘less strict’ scrutiny¹⁰⁵ when measures that are characterised by a ‘stronger presumption of validity’¹⁰⁶ are under review, and ‘strict’ scrutiny for measures that are *tout-court* illegitimate for being clearly discriminatory. Analogously, at the global level it is possible to imagine that the judicial body would vary its scrutiny according to the type of measure adopted by the Member State. When the measure is *per se* illegitimate, the review ought to be particularly searching, and ultimately uphold only those national measures that create less significant restrictions on trade. Such measure ought to represent an *extrema ratio*, in the sense that the State that has adopted it must concretely demonstrate the impossibility of pursuing its national interests by other means. This interpretation, which conflates the term necessity with indispensability, rests on the determination of possible alternative measures that are less restrictive to trade. By contrast, when necessity comes into conflict with the recognition of national legislative or regulatory autonomy, the DSB ought to grant greater deference to the State. The exercise of regulatory power is not a derogation from an international obligation, but

the costs of negotiations, enabling the creation of disciplines for all service sectors and lowering the risk that the negotiations register only group sectoral interests. On the inadequacy of the sectoral approach, see G. FEKETEKUTY, *Assessing and Improving the Architecture of GATS*, in P. SAUVÉ and R.M. STERN, *GATS 2000: New Directions in Services Trade Liberalization*, Washington, 2000, p. 85-111. In favour of a horizontal approach, see instead A. MATTOO, *Shaping Future Rules For Trade In Services: Lessons From The GATS*, cit., p. 11: “A horizontal approach will economize negotiating efforts, would lead to the creation of disciplines for all services sectors rather than only for politically important ones, and would also reduce the likelihood that negotiations will be captured by powerful sectoral interests groups” (available at <http://www.heisummer.ch/pdf/shaping%20future%20rules.pdf>).

¹⁰⁴ Note that protective measures are illegitimate at birth, in as much as they constitute a violation of the norms of the Agreement, and can thus be tolerated only if their connection to a limited number of objectives, listed in the Agreement (public order, protection of life and health), can be demonstrated. Domestic regulation, by contrast, involves a right expressly granted to States to satisfy potentially unlimited domestic policy needs. Domestic regulations are thus legitimate, unless it can be demonstrated that they are excessively burdensome in relation to the objective pursued. These different perspectives are manifested at the procedural level: in challenging protective measures, the respondent party bears the burden of proof; for regulatory measures, it is borne by the complainant party.

¹⁰⁵ L.J. PETRICONE, *The Dormant Commerce Clause*, cit., p. 10.

¹⁰⁶ L.J. PETRICONE, *The Dormant Commerce Clause*, cit., p. 10.

rather the legitimate exercise of a State's own sovereign power. So the judicial review of regulatory measures ought not to end with the mere determination of the measure's indispensability, but rather undertake a more complex evaluation which takes additional elements, like the measure's adequacy in relation to the result obtained, into account.

The different nature of the measures under analysis ought therefore to condition the level of judicial scrutiny, modulating the degree of the review's stringency and its intrusiveness into national sovereign power.

The analysis of necessity in the GATS, though unilluminated by significant case-law in the area of regulatory measures, suggests that the distinction between the scrutiny of protective measures and the scrutiny of regulatory measures is not so clear-cut. The discussion of the jurisprudential evolution in the interpretation of protective measures has shown that the concept of necessity is no longer limited to indispensability. In evaluating these measures, the DSB has paid increasing respect to national policies, like environmental protection, the protection of public health and safety, that could justify the measure's adoption. This attention has made the necessity test more sophisticated as well as more deferential. More specifically, up until now, the DSB has taken three factors into consideration in determining the necessity of a measure: the importance of the common interests or values protected by that law or regulation; the measure's ability to protect those interests and values; the measure's impact on international trade.

After analysing these conditions, the judicial body must examine the measure's conformity with the *chapeau* of Article XIV; this provides that no measure shall be adopted whose application would constitute an arbitrary or unjustifiable discrimination.

According to some commentators¹⁰⁷, this test would bring the standard of necessity closer to the standard of proportionality¹⁰⁸, which is applied in a particular way in the Community area. This is supported both by scholarly views¹⁰⁹, and by the jurisprudence of the DSB. The dispute resolution bodies specifically use the term disproportionate¹¹⁰ to indicate that a

¹⁰⁷ See A. DESMEDT, *Proportionality In WTO Law*, in 4 *Journal of International Economic Law* (2001) 441 et. seq.; M. KENNET, J. NEUMANN and E. TUERK, *Second Guessing National Level Policy Choices: Necessity*, cit., p. 324 et. seq.

¹⁰⁸ The judicial body of the European Community has over time developed an articulated proportionality test, that can be broken down into three distinct analyses: adequacy (the measure must be appropriate for fulfilling the purpose); necessity (the purpose cannot be pursued by a less trade-restrictive alternative measure than the one adopted); proportionality *stricto sensu* (the measure's effects must not be disproportionate or excessive in relation to the interests pursued). Proportionality is in fact used both as a parameter of reasonableness in the determination of the discretionary standard set by the Member State, and also as a parameter of necessity with respect to the acts adopted in realisation of this standard.

¹⁰⁹ S. ZLEPTNIG, *The Standard of Review in WTO Law*, cit., p. 449: "measures remain lawful when they are enacted in a reasonable and proportionate manner".

¹¹⁰ See WTO, APPELLATE BODY REPORT, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paragraph 141: "focusing

measure does not fall under the one of the derogations provided by the exceptions clauses; it also pays increasing attention to the way in which the measure is applied¹¹¹, and thus to its suitability.

A direct consequence of this sophistication is that the judicial body becomes able to evaluate both measures which are *per se* discriminatory as well as those that are at legitimate at birth. The sensitivity of the necessity standard to values beyond the strictly commercial makes it appropriate for the evaluation of protectionist discriminatory measures, and even more so for the analysis of measures adopted in the free exercise of state sovereign power. The change is reflected in the type of review exercised over state discretion.

This analysis suggests that the DSB's judicial scrutiny is characterised by a greater complexity and a greater deference to the Member States than that carried out in the past¹¹².

In light of these considerations, it is therefore possible to argue that the differences between the level of scrutiny could ultimately turn on whether or not the measure pursues an interest recognised by the supranational law (be it a protective or a regulatory measure), rather than its characterisation as regulatory or protective. Judicial review in this case would imply a greater penetration into state discretion, requiring an initial determination of the reasonableness of the purposes that the State claims to pursue.

6. Conclusion

on the design of the measure here at stake it appears to us that Section 609, cum implementing guidelines is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 (that is, the measure at issue) and the legitimate policy of conserving and exhaustible, and in fact, endangered species, is observably a close and real one".

¹¹¹ WTO, APPELLATE BODY REPORT, *U.S.-Gasoline*, cit., p. 22: "the chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied".

¹¹² However, in the only discipline adopted in application of Article VI. 4 on domestic regulation, the *inter alia* clause recognises the States' rights to pursue an unlimited number of objectives. Understanding the impossibility of making a closed list of the ends that could be legitimately pursued by the 149 Members of the WTO, it grants deference to the States. The *inter alia* clause permits the States, at least in theory, to increase the list of objectives at their discretion. This legislative recognition of the impossibility of reining in States' freedom to pursue national policies, however, could correspond to a decrease of judicial deference. The Accountancy sector rules would in fact expand the scope of judicial scrutiny, which would be justified in evaluating not only the measure adopted, but also the purpose chosen by every single member. In this way, the judicial body would come to determine not only the measure's adequacy in relation to the objective pursued but also the sincerity of the objective itself. In the absence of jurisprudence giving a basis to these theories, it is only possible to argue that, for regulatory measures, the Agreement's greater deference to States is manifested in a scrutiny that places reasonableness at the centre of its evaluation of the both the measure adopted and the end pursued.

WTO law sets forth standards of behaviour for its Members. They are obliged to adopt legal and administrative measures which conform to rules fixed at the supranational level. In light of this obligation, the goal of this study has been to determine the existence and content of the limits imposed by the global law upon the discretion of national authorities in the regulation of services. We specifically sought to determine the degree of the adjudicating body's deference to national authorities, the penetration of global judicial review and, finally, the extent to which State sovereign power to regulate social and economic policies has been eroded. We have looked at the substantive review of national measures by the WTO dispute resolution bodies. This review seeks to determine the correspondence of national rules and measures to the public ends pursued. This study has focused on a discussion of the standard used by the 'judicial' bodies to determine the legitimacy of national measures. To this end, GATS Articles XIV (on general exceptions) and VI, par. 4 (on domestic regulations) were analysed in depth.

With reference to discriminatory measures, we discussed the fact that the GATS directly embodies the necessity test. The principle of necessity is thus supposed to condition the action of Member States in pursuit of public interests that conflict with the economic freedoms protected by the Agreements, by defining the validity of the acts adopted to that end. The discussion of the standard applied to these measures demonstrates that the WTO is presently paying greater attention to national policies and thus granting greater deference to the Member States pursuing them. Demonstrating this recognition is the adoption of a very refined and detailed standard of scrutiny, compared to the one employed by the dispute resolution body prior to 1994, supporting – though not with unanimity¹¹³ – the application of the principle of proportionality within the WTO. Setting aside questions about the effective supranational application of a principle originating in German law, a national provision restricting freedom of movement of services can be compatible with global law not only when it does not create greater limitations than those strictly indispensable to meeting the goals set by supranational law. Thanks to the judicial application of a necessity test, in the form of weighing and balancing, the global judicial body can recognise even a national provision that is not indispensable as necessary nonetheless.

The effect of this is to widen the scope of State autonomy, in as much as the national provision aimed at protecting public non-economic interests can be legitimate as long as it is 'proportionate'. In this analysis, the principle of necessity can be read as a 'criteria of administrative validity' which guarantees the protection of the rights of foreign service providers against the abuse of administrative, legislative and judicial powers by the host State. To counterbalance this deference, however, a judicial review which scrutinises the importance of the values protected by the adopted measure could promote a 'particular judicial activism and a situation of legal uncertainty'. The attention paid to non-economic objectives and the

¹¹³ Of a different opinion is D.A. OSIRO, *Proportionality in the WTO*, cit., p. 232.

evaluation of their weight could in fact open the door to an ‘analysis differentiated according to the subject matter in question’¹¹⁴.

With reference to non-discriminatory measures, this study has shown that the GATS does not directly provide for a necessity test, but entrusts the Council for Trade in Services with the job of adopting disciplines aimed at ensuring that domestic regulations do not create “unnecessary barriers to trade in services”. So far, only the accountancy sector discipline has been adopted. In this sector, the global law has conditioned the content of national regulatory measures upon the pursuit of three specific public interests: consumer protection, the quality of the service and professional competence and integrity.

In determining that measures regarding qualification requirements and procedures, technical standards and accreditation requirements do not constitute unnecessary barriers to trade, the dispute resolution body must determine that they have been adopted in such a way as to ensure the realisation of the public interests established by the negotiations. Though we lack concrete confirmation, the study of the judicial application of the necessity standard does suggest that judicial review is aimed at determining the appropriateness of the decision to pursue the protected public interest. In other words, this scrutiny would investigate whether, in the process of the formation and implementation of national policies, there were circumstances demonstrating or suggesting that the public interest was not being properly pursued. In this way, the review would be sensitive to excesses of power, as in continental *droit administratif*. National administrative discretion would in fact be conditioned upon a proper decision-making process carried out within the general parameter of logic and reasonableness aimed at avoiding the *abus de droit*.

We have also addressed the discussions being held within the Working Party on Domestic Regulation on proposals to extend the Accountancy regulation to other sectors. The difficulty of developing other disciplines signals States’ reluctance to subject otherwise legitimate national regulatory measures to judicial review. The proposals set forth in the Consolidated Draft put out by the Chairman and in the informal proposals of the Secretariat signal the search for ‘symptomatic figures’ that can help national legislators to avoid adopting measures that constitute disguised restrictions on trade in services. The WTO’s position seems in fact to address state action in a moment prior to the adoption of the regulation, signaling those situations that can constitute improper restrictions on trade.

Supranational review of national discretion in the adoption of domestic regulation measures thus seems to be ambivalent. On the one hand, the supranational law’s provision of a necessity test for regulatory measures reduces the scope of national autonomy in as much as it conditions the legitimacy of State action upon a standard; on the other hand, the global law seems reluctant to recognise the degree of judicial review that it does carry out for protective measures. The particular attention paid to such provisions

¹¹⁴ E. RUOZZI, *I principi di necessità e di proporzionalità*, cit., p. 160.

as those for transparency and objective criteria seems aimed at avoiding the judicial scrutiny of the decision-making phase of state regulation.

For domestic regulation measures, it is now possible to recognise a progressive reining in of national discretion, not so much by the global judicial body, which has not yet been called upon to exercise judicial review of these acts, as by the law-makers¹¹⁵.

This affirmation could however be destined to change. The comparative analysis carried out above demonstrates how the tools currently being used by the WTO dispute resolution bodies is so refined and evolved as to bring it closer to those instruments adopted by other courts – both national and supranational – like reasonableness and proportionality. This change creates new spaces for global judicial review. Global judicial review has an increasing number of tools for evaluating national regulatory measures that can be in conflict with each other, in so far as they seek different objectives. In this sense, the passage from necessity to proportionality can be interpreted as a tool for enabling judicial bodies to define the new boundaries of national discretion in the area of domestic regulation.

¹¹⁵ The scope of this conditioning can be appreciated by an analysis of the informal proposals of the WPDR Secretariat. These proposals regard an increasing variety of governmental regulation measures, like professional accreditation, certification of competence, television licenses, university accreditation, hospital certifications and garbage disposal permits, applied in all of the service sectors, and thus not only those in which the Member States are involved. The increase of the measures subjected to such determination opens new doors in particular to those essential public services that ought to be protected from the allocational inefficiencies of the market. In Canada, where there is a public health service, a coalition of private hospitals in the United States has argued that the fees required by the Canadian health system were the equivalent of a commercial transaction and as such, prevented United States enterprises from entering the Canadian market, thus denying them of their NAFTA right to exploit that market (North American Free Trade Agreement – NAFTA, the GATS's twin brother).

COMMUNITY PRINCIPLES AFFECTING THE EXERCISE OF DISCRETIONARY POWER BY NATIONAL AUTHORITIES IN THE SERVICE SECTOR

SIMONA MORETTINI

SUMMARY: 1. Introduction – 1.1. The goal of this study – 1.2. Methodology – 2. Community limits on the discretionary power of national lawmakers – 2.1. The principle of non-discrimination – 2.2. The evaluation of overriding needs – 3. Community judicial review of the discretionary power of national lawmakers – 3.1. Application of the proportionality test – 3.2. Observations – 4. Community limitations on the discretionary power of national administrative authorities – 4.1. Evaluation of the proportionality of administrative restrictions – 4.2. Observations – 5. The limits upon the discretionary power of national administrative authorities introduced by Community legislation: sectoral directives – 5.1. The Directive on the internal market for services: a possible solution to the problem of administrative restrictions? – 6. The European network of Solvit centres – 7. Final observations.

1. *Introduction*

In looking at the European integration process¹, the internal market² can be analysed through two different lenses³. The internal market is, first of all, a political goal that Community institutions are charged to pursue. It also represents a limitation upon the action of Community institutions and Member States, in the sense that both can limit the free circulation of goods, persons, services and capital in the pursuit of their policies only within the limits embodied in the EC Treaty, the Directives and the jurisprudence of the European Court of Justice.

This signifies that the Member States, independently of Community harmonisation measures addressed to national law-makers, are obliged to remove internal barriers to the Community freedoms of circulation, as they hinder market integration.

This study seeks to examine the concept of the internal market as a limit upon the action of the Member States in relation to the freedom to provide services.

In the regulation of this freedom, Community law aims to prevent the erection of legal and administrative barriers which hinder free circulation by providing for different treatment of services originating in other Member States.

¹ See W. MOLLE, *The Economic of European Integration. Theory, Practice, Policy*, Vermont, Ashgate, 1997, p. 16. According to the Author: “The main objective of the European Union is to enhance the allocational efficiency of the economies of the member states by removing barriers to the movement of goods, services and production factors”. Likewise, see J. SNELL, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms*, Oxford, 2002, p. 89.

² The terms “common market,” “single market” and “internal market” have succeeded each other over time, without it being possible however to determine relevant legal differences in their meaning.

³ See J. BAQUERO CRUZ, *Between Competition and Free Movement. The Economic Constitutional Law of the European Community*, Oxford, 2002, pp. 67-68.

The realisation of the free movement of services⁴ has encountered more complicated problems than the realisation of the other freedoms of circulation envisaged by the Treaty⁵. The area of services in fact presents some peculiar characteristics compared to goods, labour and capital. In the area of services, national barriers and differences are both stronger and more difficult to eliminate or neutralise, because they affect not only the service provider's access to the market, but also domestic administrative practices for providing that service and the relationship with that service's beneficiaries⁶.

To give just one example, local authorisation provisions imply that in order to perform an activity in the domestic national territory of a Member State, multiple permits must be obtained, which is certainly more difficult for a business originating in another State than for a national one⁷.

The principle difficulties in the achievement of the internal market in services are not the mere differences of national laws, but rather the behaviour of some administrations and the differences in administrative practices and procedures, particularly the discretionary power of national administrations, the complexity of some formal requirements and the allocation of decision-making powers to many different actors.

It is significant that regulatory and administrative burdens in the Member States are, to this day, the main reason that the internal market in services has not yet been achieved in the European Union⁸.

This situation has given rise to a significant number of legal disputes in the area of the free circulation of services that has enabled the Court of Justice to articulate general principles, usually in favour of enlarging the Community competence and consequently narrowing the discretionary power of the Member States.

1.1. *The goal of this study*

This study seeks to analyse the ways and the extent to which Community rules and principles affect the discretionary choices of national administrative authorities in the regulation of services.

⁴ See the Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 def., pp. 5-6.

⁵ On the subject of the internal market, see L. DANIELE, *Il diritto materiale della Comunità europea: introduzione allo studio del mercato interno e delle politiche comunitarie*, Milano, 2000; P. CRAIG e G. DE BURCA (eds.), *The Evolution of EU Law*, Oxford, 1999; K. MORTELMANS, *The common market, the internal market and the single market, what's in a market?*, in *Common Market Law Review*, 35, 1, 1998, pp. 101-136.

⁶ For example, the provision of services, insofar as it is an activity and not a product, creates a stable relationship between a provider and service user, located in different Member States, that does not exist instead for the importation and exportation of goods. In particular, on this point, see L. TORCHIA, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo*, Bologna, 2006, p. 100.

⁷ European Commission Report to the Council and European Parliament, *The state of the internal market in services*, COM (2002) 441 def., p. 6.

⁸ See the Opinion of the European Economic and Social Committee on the subject, *Better implementation of EU legislation*, 2006/C 24/13 of 28 September 2005, paragraph 1.4.

We have already seen that the discretionary power of national administrative authorities lies at the origin of numerous restrictions, since it makes the national authority's final decision unpredictable and enables it, behind a mask of neutrality, to make decisions disadvantaging operators from other Member States

To give an example: in regulating the procedure for granting an authorisation, the administrative authority can request the intervention of bodies which include competing operators, already present in the national territory.

The criteria for the granting of an authorisation or a license thus confer a significant margin of discretion upon the competent authorities and, though doing this in a less obvious way than would a *prima facie* discriminatory policy, they still have the effect of favouring established operators over new ones. Moreover, excessive formalism, costly procedures and the lack of transparency all have a particularly discouraging effect on service providers from other Member States, since they are not as familiar with the administrative culture of other countries. For example: some administrations may require certificates that do not exist in the provider's country of origin or translations certified by a qualified translator in the country in which the service is provided. Another example: to obtain a certificate, a real estate developer must personally appear before the artisans' council in the town in which the service is to be provided. It is clear that all of these requirements can be fulfilled much more easily by a national provider than by a provider from another Member State.

Testifying to the scope of these kinds of problems, the Court of Justice has repeatedly evaluated these new administrative practices, addressing both the discretionary interpretation as well as the high cost and excessive burden of certain authorisation procedures.

The Court of Justice has thus begun to review the wide discretionary power that national legislation leaves to administrative authorities in establishing domestic methods and procedures for the implementation of Community law. National administrative authorities must also be required to conform to the Community objectives for the free circulation of services. Regulation, like legislation, must assume the burden of determining the most appropriate measure for pursuing the predetermined policy objective.

In other words, national administrations, as an integral part of the European Union, have the duty to act in good faith to fulfil their specific duties and enable the realisation of the Community's tasks without compromising the objectives set forth in Article 10 of the EC Treaty.

Community law thus requires both national legislatures and national administrations to further the protection of a determinate public interest and conditions the legitimacy of the domestic least restrictive measure upon its congruence with goal.

In this light, it is interesting to examine the parameters employed by the Court of Justice in reviewing the consistency of national administrative

measures restricting the free provision of services with the public end pursued.

What are the limits of the judicial review of the national administrative discretion exercised by the European Court? What are the parameters and the evaluation criteria used by the Court of Justice to review such discretion? Is there, as under the domestic law, an area that is immune from judicial review?

These are the issues that this study seeks to address.

1.2. Methodology

This primary objective of this examination is to assess how the freedom to provide cross-border services, set out in Article 49 and following sections of the EC Treaty, limits the discretionary power of the administrative authorities of the Member States.

To do this, it will first be necessary to conduct a preliminary analysis of the Community limitations upon the discretion of national legislatures. There are two reasons for this. The first is that, especially in the non-harmonised sectors, the review of legislative discretion is often preliminary to the review of the discretion of administrative authorities. The second is that the technique used by Community courts to review the restrictive national measure is useful in understanding the type of control they exercise over the national administrative scheme.

To this end, I will examine five court cases which discuss the compatibility of Community law with different formal administrative requirements (administrative authorisation, licence, entry on a professional registry) determined by national legislatures to be necessary in performing or using a particular service outside the national boundaries, or applicable to foreign operators on the national territory.

The first case⁹ derives from a referral presented by the Commission, on the basis of EC Treaty Article 226, for a declaration that the Italian Republic, in requiring that tour guides travelling with tourists from other Member States be licensed, violated the duties required of it by Article 49 of the Treaty.

The second case¹⁰ originates from the appeal presented by a certain Mrs. Smits, a Dutch citizen affected by Parkinson's disease, against the decision of the national insurance authority denying her reimbursement for the expenses incurred for medical treatment in a German clinic. The Community court was asked, in substance, to determine whether national rules requiring a prior authorisation from the national sickness insurance fund in order to claim entitlement benefits for treatment in a clinic outside the Member State were compatible with Community law.

⁹ ECJ, 26 February 1991, Case C-180/89, *Commission v. Italian Republic*.

¹⁰ ECJ, 12 July 2001, Case C-157/99, *Smits and Peerbooms*.

In the third case¹¹, Mr. Corsten, a self-employed architect, contracted with an undertaking established in the Netherlands to lay floors as part of a building project based in Germany. The undertaking entrusted with the work lawfully carried out such work legally in the Netherlands, but was not entered on the Skilled Trades Register in Germany. The undertaking charged a price per square metre for laying floors that was considerably lower than the price that would have been charged by German skilled trade undertakings for the same work. The competent German Workplace Inspectorate imposed an administrative penalty for breach of the German legislation against black market work. Mr. Corsten challenged that decision, raising doubts as to the compatibility of the German rules, in particular with regard to the requirement of entry on the Register, with the Community law on freedom to provide services.

In the fourth case¹², the association, Analir had asked a Spanish court for the annulment of Royal Decree n. 1466, for being inconsistent with Community law, in particular Regulation No 3577/92, concerning the application of the principle of the freedom to provide services to maritime transport within Member States (maritime cabotage), insofar as it permits the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation.

Finally, in the last case¹³, Canal Satélite Digital challenged Article 2 of Spanish Royal Decree 136/1997, approving the Technical Regulation on Provision of Satellite Telecommunications Service, for violating Community law. According to this rule, the Spanish authorities would have created a compulsory register in which operators of conditional-access services would have not only to be registered, but also to provide information about the type and model of the conditional-access telecommunications apparatus, equipment, devices or systems which they offer or market. Registration in that register is by no means automatic, but is subject to a prior administrative decision which may be negative. The referring Court thus asked the European Court of Justice whether Article 49 of the Treaty, combined with the provisions of Articles 1-5 of Directive 95/47/EC, precludes a national rule subjecting operators of conditional-access services to the aforementioned administrative requirements.

Through an examination of these decisions, we will be able to analyse the parameters and evaluation criteria used by the Court of Justice in reviewing the discretion of both national legislatures and national administrations. In particular, we will see that the Community court does in fact review the discretionary power of the legislature whether (*an*) to adopt a certain provision into the domestic law in the first place as well as the form and content of the particular provision (*quid*). Finally, we will see that the Court can also review the discretionary decisions of national administrative authorities determining the concrete implementation of national legislation adopted in conformity with Community law (*quomodo*).

¹¹ ECJ, 3 October 2000, Case C-58/98, *Josef Corsten*.

¹² ECJ, 20 February 2001, Case C-205/99, *Analir et al.*

¹³ ECJ, 22 January 2002, Case C-390/99, *Canal Satélite Digital Sl.*

2. Community limits on the discretionary power of national lawmakers

The European Community legal system, created specifically to guarantee the total mobility of productive factors between Member States, is grounded in a general prohibition of national legislation restricting the provision of services¹⁴.

It is thus necessary to examine from the outset the restrictiveness of a national provision, on the basis of the principle of non-discrimination.

It is then necessary to verify whether that restriction falls under those derogations permitted by the Treaty or by the jurisprudence of the Court of Justice. It is only within the scope of these derogations that national lawmakers are in fact able to exercise discretion.

Still, even if embraced within the national discretionary power, a restrictive measure is compatible with Community law only if it is consistent with the public-interest objective pursued.

Therefore, a third limit on national discretion can be derived from the breadth of the Court of Justice's review of the consistency of national legislation, through the balanced application of the principle of proportionality. The Court of Justice, in fact, considers this to be a principle of general application, directed at reducing the discretion of national institutions in relation to the public end pursued.

2.1. The principle of non-discrimination

The Court of Justice must first decide whether a national prior authorisation scheme for performing a service or using that service is a restriction on the freedom to provide services, in the sense of Article 49 of the Treaty.

In interpreting Community law, the Court of Justice has progressively extended the concept of restrictions in the sense of Art 49 EC Treaty, thus extending the limits upon the Member States' competences and discretionary power.

First of all, the States cannot introduce *de jure* discriminatory measures into their domestic law. Secondly, they are equally prohibited from introducing measures of a general application that undermine the freedom to provide services or are *de facto* discriminatory or, in the case of restrictions upon the provision of services imposed by the country of origin, measures which hinder access to foreign markets. Finally, in virtue of the principle of mutual recognition, States may not apply their own law to an activity that is

¹⁴ For scholarly analysis, see: P.J. SLOT, *Harmonisation*, in *Eur. Law Rev.*, 1996, p. 378; S. WEATHERILL, *Law and integration in the European Union*, Oxford, 1995, p. 49 et. seq.; K.D. KERAMUS, *Procedural Harmonization in Europe*, 43 *Am. J. Comp. Law* (1995) 401 et. seq.; N. BERNARD, *Discrimination and free movement in EC Law*, in 45 *Int. Comp. Law Quart.* (1996) 82 et. seq.; U. DRAETTA, *Elementi di diritto comunitario*, Padova, 1997, p. 68 et. seq.; J. STEINER, L. WOODS, *Textbook on EC Law*, Oxford, 8th ed., 2003, p. 259 et. seq. In particular, see A. TONETTI, *Harmonisation and equivalence in the European service regulation*, in this volume.

already governed by the rules of another legal system¹⁵. On this subject, it is worth remembering that, according to settled case-law, Article 49 of the Treaty prohibits the application of any national measure that has the effect of making the provision of services between Member States more difficult than the purely domestic provision of services within one Member State¹⁶.

In its judgment in *Commission v. Italy*, the Court of Justice held that the licensing requirement contained in the Italian law constituted a restriction. In fact, “by subordinating the provision of services of a tour guide, travelling with a group of tourists from another Member State, to the possession of a specific qualification, the Italian rule prevented both tour companies from providing this service using their own employees and prevented independent tour guides from offering their services to these companies in the course of organised tours”¹⁷. Moreover, this rule prevented tourists participating in such organised tours from freely choosing the services in question.

In the *Smits*¹⁸ case, the Court of Justice held that Dutch legislation, in requiring a prior authorisation from the national sickness insurance fund in order to claim entitlement benefits for treatment in a clinic outside the Member State, did in fact deter, or even prevent, insured persons from applying to providers of medical services established in another Member State and thus constituted, both for insured persons and service providers, a barrier to freedom to provide services¹⁹.

Under the facts in *Corsten*, the Court of Justice affirmed that the duty, imposed upon an undertaking established in one Member State which sought to exercise its freedom to provide services in practicing a skilled trade in another Member State, to enter on the trades register of the host State, constitutes a restriction, in the sense of Article 49 of the Treaty²⁰.

In the *Analir* judgment, the Court of Justice concluded that a national measure, such as Article 4 of the Spanish Royal Decree No 1466, which conditions the provision of marine cabotage services on prior administrative authorisation, effectively impedes or renders less attractive the provision of services, and therefore constitutes a restriction on the freedom to provide them²¹.

Finally, in the *Canal Satellite Digital* case, the Court of Justice held that the compulsory register in which operators of conditional-access services would have not only to be registered, but also to provide information about

¹⁵ See V. HATZOPOULOS, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Athènes Bruxelles, 1999, p. 177.

¹⁶ ECJ, 5 October 1994, Case C-381/93, *Commission v. France*, paragraph 17 and *Smits*, cit., paragraph 61.

¹⁷ Judgment *Commission Italian Republic*, cit., paragraph 16.

¹⁸ Judgment *Smits*, cit., paragraph 69.

¹⁹ See, in this sense, ECJ, 28 January 1992, Case C-204/90, *Bachmann*, paragraph 31 and 28 April 1998, Case C-158/96, *Kohll*, paragraph 35.

²⁰ Judgment *Corsten*, cit., paragraph 34.

²¹ See *Analir* judgment, cit., paragraph 22. See, in this sense, ECJ, 9 August 1994, Case C-43/93, *Vander Elst*, paragraph 15 and 9 March 2000, Case C-355/98, *Commission v. Belgium*, paragraph 35.

the type and model of the conditional-access telecommunications apparatus, equipment, devices or systems which they offer or market constitutes a restriction on the freedom to provide services²².

According to the Court of Justice, therefore, every measure which has the effect of prohibiting, impeding or simply rendering less attractive the provision of services between Member States constitutes a restriction²³.

In other words, from the examination of these judgments we can conclude that, according to the Court of Justice, scheme requiring formal administrative obligations (such as prior administrative authorisation, granting of a license, compulsory entry in a professional register) always constitutes a restriction on the freedom to provide services.

That having been established, the next step in the analysis is to determine whether such restrictive measure can be objectively justified.

2.2. *The evaluation of overriding needs*

It is necessary, in the second place, to consider whether a prior administrative authorisation scheme, however restrictive, may be justified as a means for the pursuit of public or general interest objectives. Speaking of this, it is worth remembering that the freedom to provide services, insofar as it is a fundamental principle of the Treaty, can only be limited by norms justified by imperative reasons of public interest and that this applies to every person or undertaking that exercises an activity on the territory of the host Member State²⁴.

For this, we first need to identify the imperative or overriding needs or requirements that can be taken into consideration in order to justify the barriers to the freedom to provide services in a specific area. Then, taking such imperative needs into account, we have to determine whether the prior authorisation scheme can be justified.

Measures that limit the freedom of the circulation of services can be adopted in the cases expressly provided by Article 46 of the EC Treaty, that is for reasons of public policy, public security and public health; they can also be adopted for reasons, set forth in the jurisprudence of the Court of Justice, regarding the concept of "imperative needs of a general interest"²⁵.

These two kinds of derogations apply in different contexts. The reasons expressly provided by the Treaty are able to justify any kind of restrictive norm, even if discriminatory *de jure*. Imperative needs of a public interest,

²² See *Canal Satélite Digital* judgment, cit., paragraph 29.

²³ See judgment of the ECJ, 5 October 1994, Case C-381/93, *Commission v. France*, paragraph 17 and *Kohll*, cit., paragraph 33.

²⁴ See the key judgments of the ECJ: 17 December 1981, Case C-279/80, *Webb*, paragraph 17; 25 July 1991, Case C-76/90, *Säger*, paragraph 15; *Vander Elst*, cit., paragraph 16.

²⁵ The concept of "imperative reasons of a general interest" has been progressively elaborated by the Court of Justice in its EC Treaty, Articles 43 and 49 jurisprudence, and could continue to evolve.

by contrast, can only justify measures of a general application that are not *prima facie* discriminatory²⁶.

In the *Commission v. Italy* case, the Italian government tried to justify the restrictive measures for tour guides as aimed to protect the general interest, specifically in protecting consumers and preserving the national artistic and historical heritage. In particular, “in the specific case of an organized tour of foreign tourists, the protection of that interest is important inasmuch as, regard being had to their different cultural origins and the limited duration of such visits, the tourists retain only such image and knowledge of the cultural asset as may be conveyed to them by the tourist guide”²⁷. In light of these arguments, the Court observed that the general interest in consumer protection and in the conservation of the national historical and artistic heritage can constitute an overriding reason justifying a restriction on the freedom to provide services.

In the context of medical and hospital services, the Court of Justice in the *Smits* case held that “it cannot be excluded that the possible risk of seriously undermining a social security system's financial balance may constitute an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide services”²⁸. The Court recognised that, as regards the government's objective of maintaining a balanced medical and hospital service open to all, that objective, even if intrinsically linked to the method of financing the social security system, may also fall within the derogations on grounds of public health under Article 46 EC Treaty, to which Article 55 refers, in so far as it contributes to the attainment of a high level of health protection²⁹.

In the *Corsten* judgment, the Court recognised that the objective of guaranteeing the quality of skilled trade work and of protecting those who have commissioned such work is an overriding requirement relating to the public interest capable of justifying a restriction on freedom to provide services³⁰.

In the *Analir* judgment in the area of maritime cabotage, the Court had to recognise in the first place that the objective pursued, namely to ensure the adequacy of regular maritime transport services to, from and between islands, is a legitimate public interest³¹.

Finally, in the *Canal Satélite Digital* case, the Court held that it is undisputed that informing and protecting consumers, as users of products or services, constitute legitimate grounds of public interest which are in principle capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty³².

²⁶ In its judgment of 16 January 2003, Case C-388/01, *Commission v. Italy*, paragraph 19, the Court confirmed that discriminatory measures “are compatible with Community law only if they can be covered by an express derogating provision, such as Article 46 EC Treaty ...namely public policy, public security or public health.”

²⁷ See *Commission v. Italian Republic* judgement, cit., paragraph 19.

²⁸ See *Smits* judgment, cit., paragraph 72.

²⁹ See *Smits* judgment, cit., paragraph 73 and *Kohll*, cit., paragraph 50.

³⁰ See *Corsten* judgment, cit., paragraph 38.

³¹ See *Analir* judgment, cit., paragraph 27.

³² See *Canal Satélite Digital* judgment, cit., paragraph 34.

Nevertheless, the fact that a measure (such as a prior administrative authorisation requirement), restricting the freedom to provide services, is justified by the reasons permitted by Article 46 EC Treaty or by overriding requirements relating to the public interest is not by itself sufficient to render it compatible with Community law.

In this regard, it is important to recall that, according to the Court, the justifications that can be asserted by a Member State, in order to be legitimate, must be backed up by an analysis of the appropriateness and the proportionality of the restrictive measure adopted by that State in the particular case³³.

For this reason, a restrictive national provision can be justified by the reasons permitted by Article 46 EC Treaty³⁴ or by imperative needs of a general interest only if they are proportionate³⁵.

3. Community judicial review of the discretionary power of national lawmakers

According to settled case-law, even when the restriction can be justified by the Treaty or as an overriding or imperative need of general interest, it is still necessary to ensure that the national measures adopted in that sense do not exceed that which is objectively necessary and that they are proportional to the public-interest objective pursued, meaning that this objective could not be achieved using measures less restrictive of the free circulation of services³⁶.

The balancing between the single market and other interests cannot be carried out by the legislator in the abstract, since it has to be determined in light of the specific, concrete case. Under Community law, this concrete balancing is undertaken by means of a proportionality test³⁷, which has three levels of analysis. First, is the national measure suitable for the achievement of a legitimate end (suitability test)? Second, is the measure necessary to reach the goal and is it the least restrictive measure capable of

³³ See, in this sense, the judgments of the ECJ of 30 November 1995, Case C-55/94, *Geghard*, 26 November 2002, Case C-100/01, *Oteiza Olazabal* and 13 November 2003, Case C-42/02, *Lindman*.

³⁴ In the *Omega* judgment of 14 October 2004, Case C-36/02, the Court asserted in paragraph 36 that “measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.”

³⁵ See J.H. JANS, *Proportionality Revisited*, 3 *Legal Issues of Economic Integration* (2000) 239-265.

³⁶ See judgments of the ECJ, 4 December 1986, Case C-205/84, *Commission v. Germany*, paragraphs 27 and 29; 20 May 1992, Case C-106/91, *Ramrath*, paragraphs 30-31, as well as *Smits*, cit., paragraph 75.

³⁷ See F. ORTINO, *Basic Legal Instruments for the Liberalisation of Trade, A Comparative Analysis of EC and WTO Law*, Oxford and Portland Oregon, 2004, p. 402 et. seq. According to the Author, the principle of proportionality “generally requires that a Member State’s measure be appropriate and necessary to achieve its objectives or, put somewhat differently, that there be a reasonable relationship between a particular objective and the administrative or legislative means used to achieve that objective”.

producing the same result (the necessity, or least restrictive alternative test)? Third, even if there are no less restrictive alternatives, it still has to be proved that the measure does not have an excessive effect on the Community interest (proportionality *stricto sensu*).

3.1. Application of the proportionality test

Let us now turn to the application of the proportionality test in the five cases described above.

In the *Commission v. Italy* judgment, according to the Court, the requirement in question contained in the Italian legislation went beyond what is necessary to ensure the safeguarding of that interest inasmuch as it makes the activities of a tourist guide accompanying groups of tourists from another Member State subject to possession of a licence. A licence requirement imposed by the Member State of destination has the effect of reducing the number of tourist guides qualified to accompany tourists in a closed group, which may lead a tour operator to have recourse instead to local guides employed or established in the Member State in which the service is to be performed. However, that consequence may have the drawback that tourists who are the recipients of the services in question do not have a guide who is familiar with their language, their interests and their specific expectations. It follows that in view of the scale of the restrictions it imposes, the legislation in issue is disproportionate in relation to the objective pursued³⁸.

In the *Smits* case, the Court of Justice argued that a requirement that the assumption of costs, under a national social security system, of hospital treatment provided in another Member State must be subject to prior authorisation appears to be a measure which is both necessary and reasonable. In particular, the Court considered that the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible. This kind of planning therefore broadly meets a variety of concerns. For one thing, it seeks to achieve the aim of ensuring that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned. For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources³⁹.

The *Corsten* judgment affirmed that a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services⁴⁰. In this case, the national law of the host Member State made no distinction, as regards undertakings of other Member States wishing to provide skilled trade services in the host State,

³⁸ See *Commission v. Italian Republic* judgement, cit., paragraphs 22-24.

³⁹ See *Smits* judgment, cit., paragraphs 76-80.

⁴⁰ See *Säger* judgment, cit., paragraph 13.

between those who are established only in the Member State from which they come and those who are also established in the host Member State. Those two categories of undertaking are subject in the same way to the requirement of entry on the Register before they can carry out skilled trade work in the host Member State. Even if “the requirement of entry on that Register, entailing compulsory membership of the Chamber of Skilled Trades for the undertakings concerned and therefore payment of the related subscription, could be justified in the case of establishment in the host Member State, which was not the situation in the main proceedings, the same is not true for undertakings which intend to provide services in the host Member State only on an occasional basis, indeed perhaps only once”⁴¹. For these reasons, the Court held that the rules in question go beyond what is necessary attain such objectives.

The Court in *Analir* did not directly resolve the question of the necessity of a prior authorisation requirement with respect to the objective pursued in the case at hand, but rather limited itself to formulating guidelines for what the principle of proportionality requires, leaving the application of this principle on the basis of the specific circumstance of the concrete case to the national court. The Court of Justice, in particular, established that, in the case in question, the combined provisions of Articles 1 and 4 of Regulation No 3577/92 permit the provision of regular maritime cabotage services to, from and between islands to be made subject to prior administrative authorisation only if: “a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated; it is also demonstrated that that prior administrative authorisation scheme is necessary and proportionate to the aim pursued; such a scheme is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned”⁴².

Finally, in the *Canal Satélite Digital* case, the Court was asked to evaluate the proportionality of a national rule subjecting the provision of services by operator of conditional-access services to a prior authorisation procedure. In this case as well, the Court held that it fell to the national court to evaluate whether the national norms impugned in this case complied with that principle. The Court limited itself to formulating the following general criteria. First of all, a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State. Second, it is incompatible in principle with the freedom to provide services to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded by the rules to which the provider is subject in the Member State where he is established⁴³.

⁴¹ See *Corsten* judgment, cit., paragraph 45.

⁴² See *Analir* judgment, cit, paragraphs 34-36.

⁴³ See, in particular, *Canal Satélite Digital* judgment, cit., paragraph 34 and ECJ, 17 December 1981, Case C-279/80 *Webb*, paragraph 17; 23 November 1999, Case C-369/96, *Arblade*, paragraph 34.

3.2. Observations

The three-level proportionality test has been confirmed in the case-law over time⁴⁴. Still, the Court of Justice often underestimates the hierarchical relationship traditionally linking the three constitutive elements of the principle, overturning their order of application⁴⁵.

The Court of Justice often applies only the suitability and necessity tests⁴⁶, without arriving at an examination of the third level, in the following way: “that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must...be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it”⁴⁷.

The level of intensity varies, moreover, according to the public interest pursued by the national legislation. For example, in the cases of restrictions justified by the protection of domestic public health and safety, the review is less searching, insofar as these areas are closely related to national sovereignty and there is not always unanimity between the States as to the adequate level of protection⁴⁸. In the case of consumer protection⁴⁹, by contrast, the Community court is able to carry out a more penetrating review, insofar as this is an area of Community competence and there is agreement among the Member States as to the appropriate level of protection⁵⁰.

To recapitulate, the application of the principle of proportionality by the Court of Justice is characterised by a wide flexibility, which varies according to the interests in play. This analysis has shown that there is not just one uniform test in the Community law, insofar as the principle is very flexible in its application and “it has been applied differently in different

⁴⁴ See, for example, ECJ 4 October 1991, Case C-159/90, *Grogan* and 11 November 1990, Case C-331/88, *Fischeries and Food*.

⁴⁵ See F. ORTINO, *Basic Legal Instruments for the Liberalisation of Trade, A Comparative Analysis of EC and WTO Law*, cit., p. 412. According to the Author: “the three normative criteria constituting the proportionality principle are like the famous Russian dolls, where the smaller doll fits in the bigger doll. If a measure is deemed to be “necessary” or the “least restrictive” alternative to achieve a certain objective, it is also implicit in such a finding that that same measure is also “suitable”. Similarly, a finding that a measure complies with the “proportionality *stricto sensu*” test should be understood as also complying with both the suitability and necessity criteria. Clearly, the opposite is not true”.

⁴⁶ See, T. TRIDIMAS, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in E. ELLIS (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford, 1999, p. 69. According to the Author: “Because of that distinct characteristic, proportionality is often perceived to be the most far-reaching ground of review, the most potent weapon in the arsenal of the public law judge”.

⁴⁷ See *Geghard* judgment, cit., paragraph 37.

⁴⁸ See, for example, *Smits* judgment, cit.

⁴⁹ See, for example, *Commission v. Italian Republic* judgment, cit.

⁵⁰ See F. ORTINO, *Basic Legal Instruments for the Liberalisation of Trade, A Comparative Analysis of EC and WTO Law*, cit., p. 417. According to the Author: “The Court recognises a wider margin of discretion to Member States with regard to public safety regulation than for environmental protection laws, connected with the division of labour between the Community and the Member States themselves”.

contexts to protect different interests and entails varying degrees of judicial review”⁵¹. Many factors play a role in the Court’s evaluation. For example: the purpose of the measure and the kind of interest that it seeks to protect (public health requires less scrutiny than would merely economic interests); the temporal duration of the measure (temporary restrictions are easier to justify); the urgency of the situation (a pressing need to regulate the market justifies a greater national discretion). The Court is also more reluctant to intervene in technical areas that require a high level of experience.

This flexibility and uncertainty has negative consequences at the national level. In fact, national courts often find it difficult to review the proportionality of a national restrictive measure independently, without referring the case to the Court of Justice to obtain guidelines which they can then apply in the concrete case⁵².

4. Community limitations on the discretionary power of national administrative authorities

Member States are thus allowed to require a prior administrative authorisation for the practice of an activity in their legitimate pursuit of public interest needs, as long as the relevant restrictive measure is held by the Court to be consistent, proportionate and necessary to attain the legitimate objectives indicated by the national legislator.

However, we have also seen how domestic administrative procedures for granting authorisations can create barriers to the free provision of services. Also relevant from this perspective are the discretion of administrations and the lack of transparency of their procedures. Fulfilment of the administrative burdens implies a higher cost of market entry, in particular when, for example, it implies that the enterprise must make use of professional services. Moreover, when authorisation procedures are not transparent and not based on objective criteria, the barriers to market entry can become quite insidious. A particularly wide discretionary power of national administrations can therefore represent a serious limitation on the free movement of services.

In light of the above considerations, the Court of Justice has begun to limit the discretionary power of national administrations both where there was a total lack of a minimal administrative norms as well as where there was a sectoral directive, but this directive contained no provisions on the administrative procedures for the implementation of the obligations incumbent on the Member States by virtue of the directive itself⁵³.

⁵¹ J. SNELL, *Goods and Services in EC Law, A Study of the Relationship Between the Freedoms*, cit., p. 217.

⁵² J. SNELL, *Goods and Services in EC Law, A Study of the Relationship Between the Freedoms*, cit., according to the Author: “It will be very difficult for a national court to decide a case concerning the free movements of goods or services if it is unclear how to define the concept of proportionality, whether it contains two or three elements and whether (and, if so, to what extent) it has a different content depending on the situation, that is to say, primarily on the nature of interests involved”.

⁵³ See R. C.A. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, 2004, p. 49. According to the Author: “In some areas, Community law has

This can be illustrated with some examples. In the area of the realisation of the internal market in advanced television technology, Directive 95/47 aims at encouraging an accelerated development of wide-screen (16:9) television services and the introduction of High Definition Television in Europe. To this end, it makes provisions relative to the new market in conditional-access television services (“pay television”), including provisions on the duties of conditional-access service operators and the characteristics of the equipment rented or sold by them. Directive 95/47 does not however contain any provision for the administrative procedures followed in the implementation of the duties incumbent on Member States in virtue of this directive. This fact, as we have seen in the Canal Satélite Digital case, does not mean that the Member States cannot establish an prior authorisation procedure consisting in a compulsory registration accompanied by a prior opinion or technical report of the national authorities. Still, as we will see, in establishing an administrative procedure of this kind, the authorities of the Member States must always ensure respect for the fundamental freedoms guaranteed by the Treaty.

Another example is Directive 64/427, which concerned only the recognition of activities as part of examination of the substantive conditions relating to the exercise, for the first time, of an activity in another Member State, but did not regulate the procedure for being entered on the trades register. Still, according to the interpretation of the Court of Justice, the host Member State does not have complete freedom in this matter, but is required to lay down the procedure for the grant of authorisation in such a way as to ensure that Directive 64/427 is not deprived of its effectiveness⁵⁴.

In other words, the administrative authorities of the Member States have to exercise their discretionary powers in respect of both the fundamental freedoms guaranteed by EC Treaty Article 49, as well as of the effectiveness of a directive laying down transitional measures⁵⁵. This applies not only to the substantive conditions governing access to those activities, but also to the requirements of a procedural nature provided for by national law.

The Court of Justice, after evaluating whether registry in the skilled trades register is proportional, then has to examine whether the national administrative authority’s procedure for granting authorisation is consistent with the principle of the free provision of services and does not prejudice the effectiveness of the sectoral directive⁵⁶. It is therefore necessary that even the discretionary choices of national administrations on the merits of granting such authorisation are justified with regard to the overriding needs described above and that they satisfy the proportionality requirement⁵⁷.

In the presence of formal requirements, the Court first reviews the national measure’s proportionality and consistency with Community law,

intervened and harmonized the applicable rules, but in other cases matters remain very firmly in the hands of the Member States”.

⁵⁴ See *Corsten* judgment, cit., paragraph 30 and 29 October 1998, Joined Cases C-193/97 and C-194/97, *De Castro Freitas and Escallier*, paragraph 19.

⁵⁵ See *De Castro Freitas e Escallier* judgment, cit., paragraph 23.

⁵⁶ See *Corsten* judgment, cit.

⁵⁷ See ECJ, 4 December 1986, Case 205/84, *Commission v. Germany*, paragraphs 27 and 29; *Commission v. Italy*, cit., paragraphs 17-18 and *Ramrath*, cit., paragraphs 30-31.

and then goes on to review the discretionary power of the national administrative authorities (known as *quomodo* discretion).

4.1. *Evaluation of the proportionality of administrative restrictions*

In four of the five selected judgments, the Court of Justice held the normative provisions of the formal administrative requirements (administrative authorisation, licence, entry in a professional register), considered by national legislators to be necessary to perform or utilise a specific service outside the national borders, to be consistent with Community law.

Still, as we have seen, even the domestic administrative procedures for granting authorisations can create obstacles to the free provision of services. Let us therefore examine the parameters and criteria used by the Court of Justice in reviewing the discretionary power of national administrations in relation to the criteria and methods employed for the granting of such authorisations.

In the *Corsten* judgment, the Court of Justice held that the examination prior to the grant of exceptional authorisation to be entered on the Register can be one of form alone, since it must be confined to ascertaining whether the conditions laid down in Article 3 of Directive 64/427 are met. The authorisation procedure instituted by the host Member State should neither delay nor complicate exercise of the right of persons established in another Member State to provide their services on the territory of the first State where examination of the conditions governing access to the activities concerned has been carried out and it has been established that those conditions are satisfied. Moreover, any requirement of entry on the trades register of the host Member State, assuming it was justified, should neither give rise to additional administrative expense nor entail compulsory payment of subscriptions to the chamber of trades. The Court declared that “considerations of a purely of an administrative nature cannot justify derogation by a Member State from the rules of Community law, especially where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law”⁵⁸.

In the *Analir* judgment, the Court affirmed that a prior-authorisation scheme cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings⁵⁹. Therefore, if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the

⁵⁸ See *Corsten* judgment, cit., paragraph 42. See, in particular, ECJ, 26 January 1999, Case C-18/95, *Terhoeve*, paragraph 45 and *Arblade et al.*, cit., paragraph 37.

⁵⁹ See *Analir* judgment, cit., paragraph 37. See, to that effect, ECJ, 23 February 1995, Joined Cases C-358/93 and C-416/93, *Bordessa and Others*, paragraph 25 and 14 December 1995, Joined Cases C-163/94, C-165/94 e C-250/94, *Sanz de Lera*, paragraph 25.

undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned. Furthermore, all persons affected by a restrictive measure based on such a derogation must have a legal remedy available to them. According to the Court of Justice, it is for the national court to consider and determine whether the prior administrative authorisation scheme at issue in the case before it satisfies those conditions and those criteria.

In its *Canal Satélite Digital* judgment, the Court held that once examination of the conditions for obtaining registration has been carried out and it has been established that those conditions have been satisfied, the requirement to obtain certification for the apparatus, equipment or conditional-access telecommunication systems after that registration procedure must neither delay nor complicate exercise of the right of the undertaking concerned to market those products and related services. Moreover, the requirements of entry on a register and the obtaining of certification, assuming they are justified, must not give rise to disproportionate administrative expenses⁶⁰.

Recapitulating, the Court of Justice, in the judgments described above, sets forth general parameters for the abstract evaluation of whether a national administrative procedure is consistent or not with the principle of the freedom to provide services, leaving it to the national court to apply these criteria to the concrete case.

Specifically, the referring court, in reviewing the discretion of national administrations, ought to take the following factors into consideration: 1) for a prior administrative authorisation scheme to be justified even though it derogates from those fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily; 2) a prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, on account of its duration and the disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan.

In these cases, therefore, the Court of Justice establishes standards for national courts to use in reviewing the discretionary power of their own national administrative authorities, as it considers the national courts to be more competent to undertake the balancing exercise that is the essence of the principle of proportionality.

In the *Smits* judgment, by contrast, the Court of Justice assumes a different posture. In this case, after having held the condition of prior authorisation by the sickness fund to claim entitlement to reimbursement for the cost of treatment outside the Member State to be consistent with

⁶⁰ See *Canal Satélite* judgment, cit., paragraph 42.

Community law, the Court of Justice went on to review the criteria employed by the national administrative authority for the granting of such authorisation. The Dutch norms subjected the granting of this authorisation upon the double condition that the treatment could be considered as “as normal in professional circles” and that “the treatment abroad must be necessary in terms of the medical condition of the person concerned”.

The Court reasoned from settled case-law that a scheme of prior authorisation cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings⁶¹. Therefore, in order for a prior administrative authorisation scheme to be justified even though it derogates from such a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings.

The Court then applied the above general criteria to authorisation conditions imposed by the national administration in the specific case. It follows from the those requirements that the institution of a system such as that at issue in the main proceedings, under which the authorisation decision needed to undergo hospital treatment in another Member State is entrusted to the sickness insurance funds, means that the criteria which those funds must apply in reaching that decision must be objective and independent where the providers of treatment are established. In other words, to the Court of Justice, the condition that the proposed treatment be normal gives a particularly wide discretionary power to the national administration, which can constitute a serious limitation to the free movement of services.

Such criteria can in fact have various interpretations, depending in particular upon whether it is considered that regard should be had to what is considered normal only in Netherlands medical circles or, on the other hand, to what is considered normal according to the state of international medical science and medical standards generally accepted at international level. Moreover, considering only treatment habitually carried out on national territory and scientific views prevailing in national medical circles to determine what is or is not normal will make it likely that Netherlands providers of treatment will always be preferred in practice. The Court thus considers it necessary to provide an interpretation of the condition that the proposed treatment be normal that is more consistent with Community law.

The Court specifically affirms that only an interpretation on the basis of what is sufficiently tried and tested by international medical science can be

⁶¹ See, to that effect, judgments *Bordessa*, cit., paragraph 25; *Sanz de Lera*, cit., paragraphs 23 to 28 and *Analir*, cit., paragraph 37.

regarded as satisfying the requirements set out in the judgment⁶². Only this condition, which is objective and applies without distinction to treatment provided in the national territory and to treatment provided abroad, is justifiable in view of the need to maintain an adequate, balanced and permanent supply of hospital care on national territory and to ensure the financial stability of the sickness insurance system.

Therefore, according to the Court's interpretation, national administrative authorities "called on to decide, for authorisation purposes, whether hospital treatment provided in another Member States satisfies that criterion must take into consideration all the relevant available information, including, in particular, existing scientific literature and studies, the authorised opinions of specialists and the fact that the proposed treatment is covered or not covered by the sickness insurance system of the Member State in which the treatment is provided"⁶³.

Moreover, in the case under examination, the grant of authorisation allowing assumption of the costs of a medical service provided abroad is subject to a second condition, namely that it be proved that "the insured person's medical treatment requires that service." In other words, according to the Court, "this condition concerning the necessity of the treatment, laid down by the rules at issue in the main proceedings, can be justified under Article 49 of the Treaty, provided that the condition is construed to the effect that authorisation to receive treatment in another Member State may be refused on that ground only if the same or equally effective treatment can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements"⁶⁴.

In this context, the Court specified furthermore that "in order to determine whether equally effective treatment can be obtained without undue delay from an establishment having contractual arrangements with the insured person's fund, the national authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought but also of his past record"⁶⁵.

The *Smits* judgment is emblematic in so far as the Court did not limit itself here to putting forward the abstract conditions under which a domestic administrative procedure for granting an authorisation could be consistent with Community law and then remand the concrete evaluation to the national court. On the contrary, in this judgment, the Court of Justice directly reviewed whether the conditions for the granting of such an authorisation were justified with regard to the overriding needs and whether they satisfied the requirement of proportionality. The Court, in substance, held that the discretionary power granted by the Dutch legislator to the sickness insurance to be excessive and dangerous. In fact, the conditions for the granting of an authorisation, as formulated in the state norm, lent themselves to multiple interpretations and thus could not be considered

⁶³ See *Smits* judgment, cit., paragraph 98.

⁶⁴ See *Smits* judgment, cit., paragraph 103.

⁶⁵ See *Smits* judgment, cit., paragraph 104.

compatible with Community law. The Court of Justice thus intervened to protect the free movement of services, interpreting the above-mentioned conditions restrictively and narrowing in this way the margin of discretion left by the state legislator to the national administrative authorities.

4.2. *Observations*

In the judgments under examination, the Court of Justice emphasised that authorisations schemes' consistency with Community law depends on whether the procedure, in addition to being justified, is also easily comprehensible and does not imply excessive burdens⁶⁶. Thus, for example, for the exercise of professional activity it says that if the access requirements are satisfied, it is inconsistent with Community law to subject the provision of the service to an authorising procedure which could delay or complicate the exercise. A national requirement of entry on the register, even if justified, should neither give rise to additional administrative expense nor entail specific payments⁶⁷.

To recapitulate, according to the Court, an authorisation scheme, in order to be consistent with Community law, must be based on criteria that are non-discriminatory, objectively justified by the general interest and proportional (specific, unambiguous, objective and knowable ahead of time by the interested enterprises). There ought to be the possibility for the judicial review of decisions to refuse authorisation⁶⁸.

The Court, moreover, has intervened directly to limit the discretionary power of administrative authorities in some cases, while in others it only gave national courts guidelines to follow. But in both situations, the Court of Justice went so far as to evaluate administrative discretion and procedural transparency at the national level, by means of a proportionality test.

The principle of proportionality is meant as a bulwark against arbitrary decisions, by both national legislative and executive powers, which hinder the free provision of services by enterprises and individuals. As such, this principle represents the most suitable legal doctrine for distinguishing permitted activities from forbidden ones (abuse of power) in the scope of particular areas⁶⁹.

In particular, according to some writers, "its development as a ground of review can be seen as the judiciary's response to the growth of administrative powers and the augmentation of administrative discretion"⁷⁰.

The Court of Justice thus tends to exercise an ever more substantive review of the discretionary power of national administrations; this review is

⁶⁶ ECJ, 31 May 1993, Case C-19/92, *Kraus*.

⁶⁷ See *Corsten* judgment, cit..

⁶⁸ See *Analir* judgment, cit., paragraph 27.

⁶⁹ See M.C. CICIRIELLO, *Il principio di proporzionalità nel diritto comunitario*, Editoriale scientifica, Napoli, 1999, p. 169.

⁷⁰ See T. TRIDIMAS, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, cit., p. 65. According to the Author: "The usefulness of the proportionality test lies in the fact that it gives the courts maximum flexibility in reviewing administrative discretion within acceptable limits".

aimed at evaluating their respect for the principles that ought to govern administrative action, especially reasonableness and proportionality.

Such review was exercised by the Court of Justice in a recent judgment⁷¹, delivered in response to a referral by the Commission against the Grand Duchy of Luxemburg, in the area of the freedom of establishment for European lawyers. In this case, the Court considered whether the national law, requiring a European lawyer wishing to practice law in Luxemburg to annually produce a certificate of registration with the competent authority in the home Member State, violated Directive 98/5/CE, aimed to facilitate the permanent exercise of the legal profession in a Member State other than that in which the professional qualification was obtained. The Court observed, first of all, that the obligation to produce each year a certificate of registration imposes an obligation that has not been directly provided by Directive 98/5. Moreover, this burden is contrary to the objectives pursued by this Directive and the means used to achieve it. The Directive embodies the principle of mutual assistance according to which the competent authority of the Member State of origin must inform the host Member State that a disciplinary proceeding has been initiated against a European lawyer. In the opinion of the Court, the obligation imposed by Luxemburg law constitutes a disproportionate administrative burden with respect to the objective pursued and is thus unjustified under the Community directive.

5. The limits upon the discretionary power of national administrative authorities introduced by Community legislation: sectoral directives

Since the mid-1990's, the free movement of services has experienced important developments due to the adoption of numerous instruments of secondary legislation. In particular, Community legislation began to harmonise the essential requirements in important sectors, such as financial services, and extended mutual recognition and control of the State of origin (which had already been introduced by the Court). Through the active harmonisation of the law of the Member States, Community law became more like national legislative and administrative law in the area of services, reducing the diversity that had previously existed between the different national norms.

Nevertheless, even in the harmonised sectors, Community law recognises the power of the Member States to adopt more stringent national (legislative and administrative) measures than those required by the minimum standards set forth in the directive, for the protection of specific interests, as long as they are objectively justifiable and proportionate.

⁷¹ ECJ, 12 September 2006, Case C-193/05, *Commission v. Grand Duchy of Luxemburg*.

So, for example⁷², Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications⁷³, provides for a number of limitations upon the discretionary power of the Member States, but at the same time, is without prejudice to measures necessary to ensure a high level of health and consumer protection⁷⁴. In fact, the Community legislation recognises the possibility that host Member States might impose upon the migrant professional non-discriminatory conditions of pursuit, “provided that these are objectively justified and proportionate”⁷⁵. Host Member States may, where necessary and in accordance with Community law, provide for declaration requirements. These requirements should not lead to a disproportionate burden on service providers nor hinder or render less attractive the exercise of the freedom to provide services. The need for such requirements should be reviewed periodically⁷⁶. In the absence of harmonisation of the minimum training conditions for access to the professions governed by the general system, it should be possible for the host Member State to impose a compensation measure. This measure should be proportionate and, in particular, take account of the applicant's professional experience. Experience shows that requiring the migrant to choose between an aptitude test or an adaptation period offers adequate safeguards as regards the latter's level of qualification, “so that any derogation from that choice should in each case be justified by an imperative requirement in the general interest”⁷⁷. Finally, the Directive establishes that, for the first provision of services, in the case of regulated professions having public health or safety implications, the competent authority of the host Member State may check the professional qualifications of the service provider prior to the first provision of services. Such a prior check shall be possible “only where the purpose of the check is to avoid serious damage to the health or safety of the service recipient due to a lack of professional qualification of the service

⁷² The examples are countless. See Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, Article 30, paragraph 9. “In addition, notwithstanding the provisions referred to in paragraphs 1 and 4, the Member States may, by virtue of provisions laid down by law, authorise the disclosure of certain information to other departments of their central government administrations responsible for legislation on the supervision of credit institutions financial institutions, investment services and insurance companies and to inspectors acting on behalf of those departments. However, such disclosures may be made only where necessary for reasons of prudential control”. Another example is Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Article 14 “This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires.”

⁷³ See A. TONETTI, *Harmonisation and equivalence in the European service regulation*, in this volume.

⁷⁴ See whereas 44.

⁷⁵ See whereas 3.

⁷⁶ See whereas 7.

⁷⁷ See whereas 15.

provider and where this does not go beyond what is necessary for that purpose”⁷⁸.

Council Directive 2004/113/EC of 13 December 2004⁷⁹, provides that differences in treatment in the access to goods and services and in the provision of goods and services are acceptable “only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence, reasons of privacy and decency, the promotion of gender equality or of the interests of men or women, the freedom of association, and the organisation of sporting activities. Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities”⁸⁰.

Another example is Directive 97/13/EC in the area of telecommunications, in which the Community legislator took the principles of proportionality, transparency and non discrimination into account in order to create an environment consistent with the freedom to provide services⁸¹. This Directive does not regulate the licenses that the States may grant, as long as an efficient use and sufficient number of radio frequencies is ensured. Articles 6 and 11 of this Directive, addressing fees and charges, further the policy of favouring competition in the telecommunications market by prohibiting any fees or charges beyond what is “strictly necessary, out of respect for the principles of proportionality, objectivity, non-discrimination and transparency”⁸².

The basic requirements for obtaining an authorisation are governed by the secondary legislation. Thus, in these cases, the authorities of both the State of origin and the destination State carry out the direct implementation of European law.

The secondary legislation thus limits the administration’s very ability to evaluate, consequently shrinking its discretionary sphere. In many sectors, directives have given normative form to principles articulated by the Court of Justice in relation to non-harmonised services, as we have seen above.

The secondary legislation has in fact been able to do what case-law, by its very nature, cannot: construct a stable system of clear rules and procedures, valid in an expressly defined field and not subject to *ad hoc* decisions. Even in the harmonised sectors, national administrative authorities’ discretionary power is constrained by the burden of proving the necessity and proportionality of the rule or practice, in light of the specific imperative needs that cannot be satisfied by any alternative measure.

⁷⁸ See Article 7, paragraph 4.

⁷⁹ Implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁸⁰ See whereas 16. See also Article 4, paragraph 5, “This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

⁸¹ See whereas 1, 2, 4 and 11; Article 3, n. 2.

⁸² See whereas 12.

Therefore, the justifications that can in fact be invoked by a Member State to legitimise such rules and procedures must be accompanied by an analysis of the effectiveness and proportionality of the restrictive measures adopted by that State in the particular case.

Still, the main problem that emerges from looking only at the sectoral directives is the lack of a uniform system at the Community level for evaluating the consistency of Member States' legal and administrative restrictions on the freedom to provide services. In fact, national courts often have trouble reviewing the proportionality of a domestic legal or administrative decision on their own, and often turn to the Court of Justice for guidelines to apply in the concrete case⁸³.

5.1. The Directive on the internal market for services: a possible solution to the problem of administrative restrictions?

Up until now, the analysis has shown that Member States' legal and administrative restrictions upon competition can significantly prevent or slow the development of the internal market for services in the European Union⁸⁴. Community institutions have sought to remedy this problem through Community legislation aimed at establishing and governing a genuine internal market for services⁸⁵. On 12 December 2006, the Council definitively adopted the "Services Directive," 2006/123/EC⁸⁶. Thus was concluded a debate that had lasted more than two years⁸⁷. The purpose of

⁸³ J. SNELL, *Goods and Services in EC Law, A Study of the Relationship Between the Freedoms*, cit. According to the Author: "It will be very difficult for a national court to decide a case concerning the free movements of goods or services if it is unclear how to define the concept of proportionality, whether it contains two or three elements and whether (and, if so, to what extent) it has a different content depending on the situation, that is to say, primarily on the nature of interests involved".

⁸⁴ The barriers preventing or slowing the development of services between the Member States have many common features including the fact that they often derive from excessively burdensome administrative procedures, the legal uncertainty characterising trans-border activity and the lack of mutual trust between the Member States. See, in this regard, the conclusions of European Commission Report to the Council and European Parliament, *The state of the internal market in services*, cit.

⁸⁵ See whereas 6, of the Services Directive.

⁸⁶ For more information, visit <http://europa.eu/scadplus/leg/it/lvb/l33237.htm>

⁸⁷ In the framework of the Lisbon Strategy, the Commission responded to the Council's invitation to develop a policy to suppress the barriers to the free circulation of services and the free establishment of service providers. The Commission thus adopted on 13 January 2004 a "Proposal for a Directive of the European Parliament and of the Council on services in the internal market" (COM(2004) 2), also known as the Services Directive. On 16 February 2006, the European Parliament adopted by a wide majority a number of amendments to the draft law. The compromised reached by the Parliament was taken up by the Commission in its amended proposal for a directive of 4 April 2006 (COM(2006) 160 def.), which constituted the basis of the common position of the Council adopted on 24 July 2006. The Parliament voted on 15 November 2006, without substantial change to the common position, and the Council definitively adopted the Directive on 12 December 2006. The implementation by the Member States is supposed to take place by the end of 2009. Undoubtedly, this Directive represents one of the most important texts recently adopted by the European Union.

the Community legislation is to realise a genuine internal market for services by establishing a legal framework aimed at eliminating administrative and regulatory barriers to the freedom of establishment of service providers and the barriers to the free provision of services between Member States⁸⁸.

The Services Directive applies solely to the requirements that influence access to services or their exercise. To this end, it defines the concept of authorisation scheme which ought to cover, *inter alia*, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession⁸⁹. It also establishes that the possibility of gaining access to a service activity should be made subject to authorisation by the competent authorities only if that decision satisfies the criteria of non-discrimination, necessity and proportionality. That means, in particular, that authorisation schemes should be permissible only where an *a posteriori* inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned *a posteriori*, due account being taken of the risks and dangers which could arise in the absence of a prior inspection. Moreover, it affirms that public health, consumer protection, animal health and the protection of the urban environment constitute overriding reasons relating to the public interest. Such overriding reasons may justify the application of authorisation schemes and other restrictions. However, no such authorisation scheme or restriction should discriminate on grounds of nationality.

The Directive also requires the Member States to simplify procedures and formalities to facilitate access to service activities and their exercise in the internal market⁹⁰. According to the Directive, the rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom. The Directive aims in fact to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the "red tape" involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and

⁸⁸ In view of the realisation of an internal market for services, the Directive puts forward four main objectives: to facilitate the freedom of establishment and freedom to provide services in the EU; to strengthen the rights of service users; to promote the quality of the services; and to establish effective administrative cooperation between the Member States.

⁸⁹ See whereas 39 of the Services Directive.

⁹⁰ This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. This Directive concerns only providers established in a Member State and does not cover external aspects. It does not concern negotiations within international organisations on trade in services, in particular in the framework of the General Agreement on Trade in Services (GATS).

disproportionate fees and penalties⁹¹. To this end, Member States are obliged to simplify administrative procedures and formalities⁹², establish points of single contact where service providers may be able to complete the necessary requirements⁹³, ensure that the necessary information is easily available⁹⁴ and introduce electronic means for completing the formalities.

According to the Directive, the criteria for granting authorisations must be such as to preclude the competent authorities from exercising their power of assessment in an arbitrary manner; specifically, the criteria must be non-discriminatory, justified by an overriding reason relating to the public interest, proportionate to that public interest objective, clear and unambiguous, objective and made public in advance. Member States are obliged to review their authorisation schemes to evaluate whether they might be eliminated or replaced by an *a posteriori* inspection⁹⁵.

The Directive fixes minimum quality standards for the administrative procedures and practices to be followed in granting authorisations. Procedural rules shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially; they shall not be dissuasive and shall not unduly complicate or delay the provision of the service; applicants shall be guaranteed that their application will be processed as quickly as possible and within a reasonable period. Possible negative responses shall be motivated and subject to judicial review.

The Directive introduces an presumption that some common restrictions on competition violate the requirements of necessity and proportionality and are thus always forbidden⁹⁶. For example, Member States shall not: a) condition the granting of an authorisation upon positive demonstration of an economic need or market demand; b) involve competing operators in the procedure for the granting of the authorisation to enter the market (an exception is provided for professional organisations; c) require entry for a determinate period in the registers of the State in question or require the exercise of the activity on the territory for a given period; d) provide for a total ban on advertising; e) impose prohibitions on multidisciplinary activities, exercised by individuals or jointly or in partnership, except for regulated professions and certification, accreditation and technical control. Other restrictions, set forth in a kind of “grey list,” cannot be adopted or maintained unless they are expressly justified by the Member State as

⁹¹ See also, in this sense, the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - *Action Programme for Reducing Administrative Burdens in the European Union*, Brussels, 24.01.2007, COM (2007) 23 def., according to which “Unnecessary and disproportionate administrative burdens can have a real economic impact. They are also seen as an irritant and a distraction for business and are often identified as a priority target for simplification.”

⁹² See Chapter II, Article 5, Services Directive.

⁹³ See Article 6, Services Directive.

⁹⁴ See Article 7, Services Directive. See, also, G. FONDERICO, in this volume.

⁹⁵ See Article 9, Services Directive

⁹⁶ This might be any obligation, prohibition, condition or limit established by law, regulation or administrative procedure of the Member State or derived from its jurisprudence, administrative practice or the rules of professional bodies.

necessary and proportionate. The Member States are required to notify the Commission of the “grey listed” restrictions that they intend to maintain or adopt *ex novo*, setting forth the reasons for their choice. The reports presented by each Member State will be forwarded by the Commission to the other Member States for a multilateral evaluation. For the proposal of new “grey listed” restrictions, the Commission, after an evaluation of their compatibility with Community law, may ask the interested State to forgo adoption of the measure, or in the case that it has already been adopted, to return to the pre-existing situation.

From this analysis of the text of the Directive, we can clearly see the legislator’s purpose of realising a uniform system at the Community level for determining the consistency of the legal and administrative restrictions on competition established by the individual Member States⁹⁷. In particular, the Directive seeks to eliminate the many discriminatory bureaucratic restrictions in place in the various national systems, and set minimum standards for the quality of national administrative procedures and practices to be followed in granting authorisations. In this way, the secondary legislation seeks to limit the scope of the judgment of national administrations, consequently reducing their sphere of discretion, even for the many services that are not and will never be addressed by specific Community directives. It is precisely the Service Directive’s horizontal character that ought to make it more difficult for national legislators and administrations to adopt and maintain restrictions that are unjustified, disproportionate and unnecessary.

6. *The European network of Solvit centres*

To facilitate the removal of obstacles to the internal market for services, many alternative mechanisms have been studied in recent years at the Community level. Among these, the creation of the Solvit network merits particular attention⁹⁸.

We have seen that bureaucratic requirements and the national administrations’ resistance to simplifying their procedures constitute serious challenges to the freedom to provide services. Citizens and businesses often encounter problems that derive not so much from restrictive national laws but rather from the improper application of the internal market norms by the public administration of other States.

The European Union is supposed to respect the diversity of the Member States, as well as the complicated administrative traditions, legal cultures and political systems that characterise them. But in order to avoid distortion

⁹⁷ See Articles 14-15 of the Services Directive.

⁹⁸ Solvit, which has been functioning since 2002, is a network for the on line resolution of problems, in which the Member States cooperate to concretely resolve problems deriving from the improper applicaiton of internal market norms by public administrations. The Solvit centres, present in every State of the European Union, respond to the complaints of citizens and enterprises. There services are free of cost, and they cooperate to solve problems quickly (the maximum time for a resolution is ten weeks) and informally. For more information, see the Solvit website at <http://www.europa.eu.int/solvit>.

or discrimination, it is essential that the different cultures and traditions do not undermine the effective implementation of Community norms.

The Solvit centres specifically aim to identify and resolve the problems encountered by persons and businesses, established or operating in a Member State different from their own, when administrative barriers limit the exercise of the free movement of services. This apparatus seeks to operate through the responsible national administrations and with the European Commission to resolve concrete problems⁹⁹.

Solvit can take on any trans-boundary problem between an enterprise or citizen, on the one hand, and a national public administration, on the other, that regards possible improper application of Community legislation. The kinds of problems faced by citizens and enterprises that can be resolved by Solvit include: the recognition of professional qualifications, access to education, permits to stay, voting rights, border controls, social security, motor vehicle registration, rights to work, access to the market for goods and services, public works contracts, tax returns, establishment as an autonomous worker or business and the free movement of capital and payments.

Most of the cases handled by Solvit regard the failure to recognise profession qualifications¹⁰⁰. For example, a French toxicologist with a French degree and two years of work experience in Italy did not obtain recognition of her qualifications by the Belgian authority. In justification of its refusal, the Belgian authority argued that the applicant had earned insufficient grades in her course of study. The Belgian Solvit centre convinced the Belgian administrative authorities that, the grades being sufficient to earn her degree and the toxicologist being able to demonstrate a sufficient work experience, the refusal of recognition would have been contrary to Community law¹⁰¹.

In another case, an Icelandic doctor, with professional experience acquired in Sweden, Norway and Iceland, was offered a position in the United Kingdom. Before accepting it, he had to have his professional qualification recognised by the General Medical Council (disciplinary and regulatory body for the medical profession in the United Kingdom) which, despite his professional experience in different Member States, refused to recognise his qualifications. When the British Solvit centre asserted that the refusal was contrary to Community norms, the General Medical Council changed its view and agreed to recognise his qualifications¹⁰².

So far, the results of the Solvit centres are significant¹⁰³ and could certainly become more so with a greater awareness of this resource and its

⁹⁹ See Commission Staff Working Paper, *Report on the application of internal market rules to health services*, 28.07.2003, Sec (2003) 900.

¹⁰⁰ The most recent report of cases handled by the Solvit centres revealed that over 50% of them regard the recognition of professional qualifications, products' access to markets, the registration of motor vehicles and permits to stay.

¹⁰¹ The applicant obtained a favourable decision in nine weeks.

¹⁰² The case was resolved in the applicant's favour in ten weeks.

¹⁰³ Last year, the network examined 465 cases, 61% more than in the previous year. 71% were cases brought by citizens, the rest by enterprises. 77% of the cases were resolved, over half of these in ten weeks or less. Data derived from the 2005 Solvit Report.

potential. It is significant that the Community has created its own institutional network to evaluate the discretionary choices of individual national administrations, however much in an informal and extra-judicial way. It is not surprising that, in the end, this evaluation is carried out within the parameters, set forth by the Court of Justice, of proportionality, necessity and reasonableness.

7. Final observations

The initial scope of this study was to analyse how Community principles and rules affect the discretionary choices of national administrative authorities in the regulation of services. After having examined the jurisprudence, legislative norms and the work of Community institutions, it is possible to put forward the following conclusions.

The freedom of movement of services is guaranteed by the EC Treaty and by the secondary Community legislation; it is to be achieved through the gradual elimination of restrictive measures introduced the Member States into their respective legal systems.

From the above analysis, we saw that the main difficulties in the realisation of the internal market for services derive not only from differences between national laws, but also from the behaviour of individual administrations and from differing administrative practices and procedures (specifically, the administration's discretionary power and the complexity of some formal requirements).

To address this issue, the Court of Justice will review the wide scope of discretionary power that national legislatures leave to administrative authorities in establishing domestic procedures in the application of Community law.

The Court of Justice was the first Community organ to exercise a control upon the discretionary choices of national administrative authorities in the regulation of services.

From an analysis of its jurisprudence we have seen that the Court, in addition to reviewing the discretionary power of the legislator over whether or not (*an*) to adopt restrictive domestic provisions, and over the form and content of the provisions themselves (*quid*), also exercises review over the discretion of national administrations over the procedures (*quomodo*) used in giving concrete application to the national provisions.

The examination of the judgments enables us moreover to specify the parameters and criteria of evaluation employed by the Court of Justice in reviewing the discretion of both national legislators and national administrations.

In this regard, the Court has affirmed that the discretionary power of national administrations (just like that of national legislators) ought always to be exercised in conformity with the general principle of proportionality. This principle specifically implies that the public administration ought to adopt that appropriate and adequate solution which involves the least possible sacrifice of the relevant interests. In substance, this means that national authorities may not use administrative decisions to impose duties

and restrictions limiting the individual freedoms guaranteed by Community law more than is strictly necessary to attain the purposes that the authorities are obliged to realise (proportionality). In other words, according to the Court, an authorisations scheme must be based on criteria that are non-discriminatory, objectively justified by needs of a general interest and proportionate (specific, unambiguous, objective and known in advance by the interested undertakings) in order to be in conformity with Community law. There must be the possibility to pursue judicial review of decisions to refuse authorisation. The application of the principle of proportionality thus enables the European court to rectify arbitrary harms wrought by both national legislators and national administrations in regulating services.

A second control is exercised by the Community legislative power, which uses sectoral directives to limit the discretionary power of national administrative authorities. Often, even in the harmonised sectors, national administrative authorities' discretionary powers are circumscribed by the burden of proving the necessity and the proportionality of the rule or practice they seek to introduce, in light of specific imperative needs that cannot be met by using alternative means.

Recapitulating, both in the harmonised and non-harmonised sectors, Community law conditions the scope and legitimacy of possibly discriminatory national administrative measures upon their proportionality. Still, the main problem that emerges here is the lack of a uniform system at the Community level for ascertaining the consistency of legislative and administrative restrictions on the freedom to provide services. For this reason, even in the harmonised sectors, the national courts often find it difficult to review the proportionality of a domestic legislative and/or administrative act, without turning to the Court of Justice for guidelines to apply to the concrete case.

The Court of Justice's evaluation has thus been essential to both the harmonised and non-harmonised sectors. Its application of the principle of proportionality has, however, shown that there does not exist a uniform test, in so far as the principle varies in its application according to the interests in play: "It has been applied differently in different contexts to protect different interests and entails varying degrees of judicial review",¹⁰⁴.

The Court, moreover, generally limits itself to providing guidelines, that the national court must then adapt to the concrete case. Still, in some cases, the Court of Justice does intervene directly to review the proportionality of national administrative measures, thus reviewing not only their basic legitimacy but their merits as well.

It has thus emerged from this study that, of the Community principles affecting the discretionary choices of national administrative authorities in their regulation of services, proportionality assumes a peculiar role. This principle is applied directly by the Court of Justice in evaluating the compatibility of national administrative choices with the articles of the EC Treaty and is expressly invoked by Community legislation in individual

¹⁰⁴ J. SNELL, *Goods and Services in EC Law, A Study of the Relationship Between the Freedoms*, cit., p. 217.

sectoral directives as a criterion to guide domestic administrative authorities.

In any case, we have seen that the traditional strategy for reviewing the discretion of national administrations, based on the *ad hoc* application of Articles 43 and 49 of the EC Treaty by the Court of Justice and the adoption of sectoral directives by the Parliament and Council, would be seriously deficient. It has clearly emerged that the control exercised by the Court of Justice and the Community law-makers is not, by itself, able to eliminate the plurality and diversity within the internal market of as many different national laws as there are different state legal systems. And, in particular, it is not able to eliminate the exercise of discretionary power by the administrative authorities of the Member States.

There are two reasons for this. First, the Court can intervene only in a limited number of cases and its intervention is in any case inadequate when the removal of barriers requires the coordination of the legal systems of the Member States and administrative cooperation. Secondly, the affected services are countless as well as changeable over time; they are therefore ill-suited to being regulated by specific sectoral directives.

Community institutions have sought to remedy this situation by providing alternative tools.

In particular, to encourage the cooperation between national administrative authorities in removing barriers to the movement of services, Solvit was established. This European network can be defined therefore as another institution capable of reviewing – though in an informal and extrajudicial way – the discretionary choices of national administrations in the regulation of services.

To overcome instead the more specific problem of the limited character of sectoral directives, Community institutions have proposed the adoption of a single, “horizontal” directive on the internal market for services. With the final version of the recently approved Bolkestein Directive, the law-makers have finally succeeded in realising a uniform system at the Community level for controlling the consistency of individual Member States’ legal and administrative restrictions on competition, even for the many services which are not and will never be addressed by specific Community directives.

From the framework set forth here, we can conclude that the European institutions, though in many different ways and at many different levels, exercise a substantial control on the exercise of discretionary power by national administrations, a control aimed at ensuring respect for the principles that ought to govern administrative activity, reasonableness and proportionality.

HARMONISATION AND MUTUAL RECOGNITION IN THE GENERAL AGREEMENT ON TRADE IN SERVICES

MAURIZIA DE BELLIS AND ELISABETTA MORLINO¹

SUMMARY: 1. Object of the study and research methodology; 2. The principle of harmonisation in the GATS; 2.1. Which standards are relevant for the services sector?; 2.2. Reference to standards in the GATS: current conditions and options for the future; 2.3. The definition of international standard setting organisations in the GATS and the forms of cooperation between the WTO and the standard setters; 3. Recognition and the agreements; 3.1. Recognition in the GATS norms; 3.2. Mutual recognition agreements in the GATS: appearance and reality; 3.3. The material scope of the agreements and the type of recognition; 3.4. Limitations upon state sovereignty; 3.5. States and private actors in the exercise of regulatory powers; 3.6. Recognition: automatic and subject to the right to scrutinise; 3.7. The role of national administrations in the agreements; 4. Standards in mutual recognition agreements; 5. Summing up.

1. *Object of the study and research methodology*

Global law affects the legislative and administrative power of States through techniques that can be organised under two categories: control and substitution. In the first case, global law recognises national authorities' right to regulate, but subjects it to certain conditions, which are determined at the global level, and to a review by global bodies. In the second case, national regulators are required to cede their power to define the content of domestic laws, letting rules defined beyond its territory come into the national legal order².

Substitution may be implemented through mechanisms that operate in various directions. Substitution can take a "vertical" direction, where a standard set forth by a supranational body is incorporated into the national law. It might also take a "horizontal" direction: this happens when national authorities, pressed by global law, agree to embody rules established by another State into their own legal systems, because of the principle of equivalence.

This essay examines how the two main substitution techniques, harmonisation (of the substantive content of the law, given that the imposition of procedural rules like notice and comment procedures would fall under the control category rather than the substitution one) and equivalence, work within the scope of the General Agreement on Trade in Services (GATS)³. This

¹ MAURIZIA DE BELLIS wrote paragraphs. 1 and 2, while ELISABETTA MORLINO wrote paragraph 3 and 4. Paragraph 5 is the result of a common work.

² About the distinction between control techniques and substitution techniques, see S. BATTINI, *La globalizzazione del diritto pubblico*, Riv. Trim. Dir. Pubbl. (2006) 325 et seq., at 332 et seq.

³ For an overview of the GATS agreement, C. ARUP, *The new world trade organization agreements – globalizing law through services and intellectual property*, Cambridge, Cambridge University Press (2000) 95 et seq.; P. PICONE, A. LIGUSTRO, *Diritto*

analysis thus aims at isolating the main features of two of the core techniques for the globalisation of public law, within a specific sector: international trade in services. The work is divided into two parts: in the first one, the use of international standards within the context of the GATS (i.e. the principle of harmonisation) will be examined; in the second one, mutual recognition agreements (i.e. the principle of equivalence) will be taken into account.

2. *The principle of harmonisation in the GATS*

In the agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), the reference to international standards is formulated in such a way as to foster a genuine shift of the right to regulate, from the States in favour of global standard setters, through the substitution of global rules to national ones. In fact, these agreements contain a comprehensive body of rules relating to the use of international standards. As has been observed by the Secretariat⁴, in this discipline there seem to be three essential elements.

First, Member States must use the standards as a basis for their domestic regulation⁵. An exception is made for the possibility of adopting measures that require a higher level of health protection than the one which would be guaranteed by the global standard (or of adopting technical standards which do not conform to the global ones)⁶, but in this case Member States must demonstrate that there is a scientific ground for this choice⁷ and they must respect a detailed notice and comment procedure⁸.

Moreover – and this is the second core element of the discipline concerning international standards in the TBT and SPS agreements – it is presumed that national norms conforming to international standards respect the obligations binding the States in consequence of their membership in the WTO⁹. Though

dell'organizzazione mondiale del commercio, Padova, Cedam, (2000) 361 et seq.; M. TREBILCOCK, R. HOWSE, *The Regulation of International Trade*, 2nd ed., London – New York, Routledge (1999) 270 et seq. Analysing the impact of the agreement, from a critical perspective, P. SAUVÉ, *Assessing the General Agreement on Trade in Services: Half-Full or Half-Empty?*, 29 *Journal of World Trade* 4 (1995) 125 et seq.; L. ALTINGER, A. ENDERS, *The Scope and Depth of GATS Commitments*, 19 *The World Economy* 3 (1996) 307 et seq.; M. KRAJEWSKI, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, The Hague – London - New York, Kluwer Law International (2003).

⁴ *Article VI:4 of the GATS: Disciplines of Domestic Regulation Applicable to all Services*, Note by the Secretariat, S/C/W/96, 1 March 1999, paragraph 35-42.

⁵ Art. 2.4 Tbt and 3.1 Sps.

⁶ Art. 3.3. Sps; artt. 2.5 and 2.9 Tbt.

⁷ Art. 3.3. Sps. (partially diverging from art. 2.5 Tbt, which refers to the necessity of «explain the justification»). As the APPELLATE BODY REPORT, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/AB/R, 26 November 2003, shows, it is not easy to prove the scientific justification behind the State's decision.

⁸ Art. 2.9 Tbt and Annex B, art. 5 Sps.

⁹ Srt. 2.5 Tbt and 3.2 Sps.

Member States are not obliged to adopt laws that conform to international standards, there are thus strong incentives for them to do so: alongside those set forth above, of particular importance is the chance (which the presumption mentioned at the outset seems to foster) of a State's preventing its national regulations from being challenged before the WTO's dispute resolution system¹⁰.

In addition to the measures concerning the use of international standards by the Member States, there is a third element: measures requiring State representatives to participate in the preparation of standards by the relevant international organisations¹¹.

The GATS, by contrast, embodies only two measures about international standards. The absence in the GATS of a framework analogous to that for sanitary measures and technical norms has led the Secretariat to state that "The current provisions in the GATS do not go as far as the TBT agreement in laying down a general obligation on Members to use international standards when they are available, thereby establishing a rebuttable presumption that any measure which is consistent with international standards would be considered not to create an unnecessary obstacle to trade. Nevertheless, the GATS obligations in this area do seem to point in a similar direction."¹² Thus, according to the subsidiary body of the WTO, the GATS norms concerning international standards do seek the same goal as the more detailed law contained in the SPS and TBT agreements, specifically, harmonisation (however limited) in the services sector¹³. But to what extent is this realised?

¹⁰ Underlines this problem and the cost of process within the WTO dispute settlement system, M.A. LIVERMORE, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 New York University Law Review (2006) 766 et seq., here at 776. See also H. NORDSTROM, *The cost of Wto Litigation, Legal Aid and Small Claim Procedures*, paper presented to the conference *Wto Dispute Settlement and Developing Countries*, University of Wisconsin – Madison, 5 June 2005, available at http://www.wage.wisc.edu/uploads/WTO%20Conference/nordstroem_update.pdf

¹¹ Art. 2.6 TBT, 3.4 and 3.5 SPS.

¹² See *The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services*, Note by the Secretariat, S/WPPS/W/9, 11 September 1996, paragraph II (iii).

¹³ About the principle of harmonization within the WTO, see D. KALDERIMIS, *Problems of WTO Harmonization and the Virtues of Shields over Swords*, 13 Minn. J. Global Trade (2004) 305 et seq.; G. MAYEDA, *Developing Disharmony? The SPS And TBT Agreements And The Impact Of Harmonisation On Developing Countries*, 7 Journal of International Economic Law (2004) 737; A. REICH, *The WTO as a Law-Harmonizing Institution*, in 25 U. Pa. J. Int'l Econ. L. (2004), p. 321 et seq.; A. O. SYKES, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 Journal of International Economic Law (1999) 49 et seq.; L. M. WALLACH, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. Kan. L. Rev., (2001-2002) 823 et seq.

The GATS embodies two explicit references to international standards. We find the first one in Article VI, about Domestic Regulation¹⁴. The fourth paragraph of this norm demands to the Council for Trade in Services to establish disciplines for domestic regulation, in order to guarantee that national regulations in the area of “licensing and qualification requirements and technical standards” do not constitute an unnecessary obstacle to trade in services¹⁵. The next disposition of Article VI sets forth a transitory rule, to be applied until the entry into force of the disciplines: and it is in the context of this transitory norm that the reference to international standards can be found. According to Article VI, paragraph 5(a), until the disciplines enter into force, Member States must not apply national measures in the area of licenses and other technical norms in such a way as to violate the GATS criteria for the application of the necessity test (and they must be specified within the disciplines)¹⁶; next, paragraph 5(b) specifies that, in this analysis, “account shall be taken of international standards of relevant international organizations applied by that Member.” To determine whether a State is respecting its GATS obligations, account must be taken of that State’s application of international standards.

The second reference to international standards can be found in Article VII, which concerns primarily mutual recognition agreements. Article VII, paragraph 5 specifies that the Member States “shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.” While Article VI, paragraph 5(b) sets forth the scope and the limits upon the use of standards in the context of the GATS,

¹⁴ About domestic regulation in the GATS, see also L. ABUGATTAS MAJLUF, *Domestic Regulation and the GATS: Challenges for Developing Countries*, draft paper, available at www.ictsd.org; A. MATTOO AND P. SAUVÉ (eds.), *Domestic Regulation and Service Trade Liberalization*, Washington, World Bank and Oxford University Press (2003).

¹⁵ Art. VI.4: «With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service». Therefore, the GATS takes into account the possibility that restrictions to trade might be related to non discriminatory measures: in this case, the WTO demands to future negotiations between the States the disciplines which must be applied, but, at the same time, it establishes the minimum requirements that these disciplines must ensure.

¹⁶ Art. VI.5 (a): « In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c)» (for these criteria, see footnote above).

Article VII addresses the cooperation with the global bodies in charge of the standard setting procedure.

The GATS norms about international standards seem thus to differ strongly from the more comprehensive framework of the harmonisation principle within the context of the SPS and TBT agreements. Taking into account this contrast, the paper seeks to examine which limits the principle of harmonisation encounters in the area of trade in services, compared to trade in goods, and to verify which reasons can explain this difference. To this end, the analysis will be divided into three parts.

First of all, we will try to determine what are the international standards in the services sector which may be used in the context of the GATS. This is necessary for a number of reasons. In particular, as we will see, there is a widespread belief that the narrower reference to standards within the GATS is the result and consequence of a lesser diffusion of global standards for services. But is this true? Secondly, knowing which kind of standards can be referred to in the context of GATS is necessary in order to understand the consequences coming from this reference. Third, the scope and object of the standards relevant for services can help in clarifying the differences existing between the reference to international standards within the GATS, on the one side, and the SPS and TBT, on the other side. Therefore, the first step of the analysis will aim at examining which standards are relevant for the services sector, and what are their main features.

The second part of this study aims instead to verify which can be the scope of the reference to standards in the context of the GATS: to this end, we will first look at the modalities and limits of the Article VI, paragraph 5(b) reference; then we will examine the possible options for applying the principle of harmonisation within the GATS, which result from the sectoral disciplines, for the accountancy sector and telecommunications, and the proposals presented in recent years by the Member States.

A third problem is closely related to this topic: the definition of the features a standard setting body must have in order to be considered relevant by the GATS. As standards first established by international organisations are increasingly implemented at the domestic level, fostering WTO Member States' participation in the standard setting process proves crucial. However, some countries, especially developing ones, are excluded from this: as a result, they are pushing for the GATS to recognise as standard setters only those organisations in which participation is open to all WTO members. In this perspective, the third part of the analysis will look at the debate about the definition of international standard setting organisation, recognised by the GATS, and at the proposals aimed at amending it: in this way, we will see which kind of features the GATS requires in order to recognize a standard setter, and, therefore, it will be possible to check to what extent the WTO can promote greater transparency and openness of global regulators. Finally, we will also examine the forms of cooperation established thus far between the WTO bodies and the standard setters for services.

We would like to specify from the outset that, in the course of this examination, we will pay special attention to the negotiations carried out by three different subsidiary bodies of the WTO: the Council for Trade in Services (CTS), the Committee on Trade in Financial Services (CTFS) and the Working Party on Domestic Regulation (WPDR).

2.1. *Which standards are relevant for the services sector?*

There are frequent criticisms of the general lack, if not the genuine absence of international standards for services, in contrast to the marked diffusion of such standards for trade in goods. According to some opinions, this would explain the differences between the weak reference to standards in the GATS and the stronger one in the TBT and SPS agreements; moreover, it has been invoked in the course of negotiations on the future disciplines, in order to exclude a different formulation of the reference, more similar to the one of the sanitary and phytosanitary measures and the technical barriers sectors¹⁷. However, a closer examination of the service sectors paints a very different picture.

The sector in which there is the greatest diffusion of international standards seems to be financial services: in fact, the International Monetary Fund (IMF)¹⁸ and the OECD¹⁹ establish standards for fiscal and monetary transparency and corporate governance, while transnational regulatory networks, like the Basel Committee for Banking Supervision (BCBS)²⁰, the International Organization of Securities Commissioners (IOSCO)²¹, the International Association of Insurance Supervisors (IAIS)²², set forth rules in the areas of banking, securities and insurance. This helps us to understand why the issue of how the GATS should refer to global standards and foster their use by Member States was first raised within the Committee on Trade in Financial Services²³.

¹⁷ See Thailandia and Singapore's opinions in WORKING PARTY ON DOMESTIC REGULATION - *Report on the Meeting Held on 22 November 2004* - Note by the Secretariat, S/WPDR/M/28 (25 Jan. 2005), par.11 and 21; and, agreeing, Singapore, EU, Japan, India and Colombia, in WORKING PARTY ON DOMESTIC REGULATION - *Report on the Meeting Held on 7 and 18 February 2005* - Note by the Secretariat, S/WPDR/M/29, 11 July 2005, paragraph 14, 16, 22, 26 and 30.

¹⁸ About the IMF's standard setting activity see <http://www.imf.org/external/standards/index.htm>.

¹⁹ See <http://www.oecd.org>.

²⁰ See <http://www.bis.org/bcbs/index.htm>.

²¹ See <http://www.iosco.org>.

²² About Iais, see <http://www.iaisweb.org>.

²³ The debate on this point took place during the meetings of the Committee on Trade in Financial Services - CTFS of 6 October 2003, 25 June 2004, 28 September 2004 and 23 November 2004, S/FIN/M/42-45-46-47. Besides, the discussion within the CTFS seems to have deeply influenced the evolution of the debate within the WPDR. As a matter of fact, during the meetings of the CTFS was argued that the subject of standards needed to be discussed in the context of the disciplines negotiations, and therefore within the WPDR: it looks like the discussion, first started in the CTFS, later on moved in the *forum* which was more appropriate

Moreover, two communications to the GATS Council, from the European Union²⁴ and Switzerland²⁵, have argued for the use of rules set forth by such bodies within the WTO.

We see a similar situation in the accountancy sector (so far the only one for which disciplines have been developed): the International Accounting Standards Board (IASB)²⁶ and the International Federation of Accountants (IFAC)²⁷ set forth rules, recognised at the global level, for accountancy and auditing respectively. Both of these bodies were heard by the WPPS during the negotiations over the accountancy disciplines²⁸, though the disciplines do not expressly mention IAS and the ISA (which are the standards set forth by the IASB and the IFAC).

The International Bar Association (IBA)²⁹ plays a principal role in developing international standards for legal services, while the Accord on Recommended International Standards of Professionalism in Architectural

to the object of the negotiations: see Mexico's opinion in the meeting of the CTFS, 6 October 2003, S/FIN/M/42, paragraph 58: « the document [of Antigua and Barbuda et al.] dealt with two very important issues: the steps that a WTO Member had to take when drawing up a technical standard; and the requirements that a body had to fulfill in order to be considered an international body. [...] With regard to the first of the issues, Mexico believed that it was broader than what was contained in this proposal, and should therefore be part of the disciplines being developed under Article VI:4 of the GATS in the Working Party on Domestic Regulation». The first comprehensive proposal on the subject of technical standards and international standards has been put forth by Mexico, within the WPDR, in September 2004.

²⁴ See COUNCIL FOR TRADE IN SERVICES - SPECIAL SESSION - *Communication from the European Communities and their Member States - GATS 2000: Financial Services*, S/CSS/W/39, 22 December 2000, p. 5.; according to the EU, «It is our view that one prerequisite for a successful and orderly opening of financial markets is the existence of an appropriate regulatory structure, as well as the ability of local supervisory authorities to monitor a more complex market. The EC emphasise its support for regulation that is transparent, proportionate and necessary. WTO work on regulatory issues will be useful in supporting domestic regulatory reform efforts, and should reflect upon the consideration of international standards as developed by the competent international organisations (IOSCO, IAIS, the Basle Committee, IMF, World Bank, etc.). The WTO shall in no way seek to replace or take up the role of these competent international organisations; rather, the work of the WTO and of these other international organisations should be mutually supportive».

²⁵ See COUNCIL FOR TRADE IN SERVICES - SPECIAL SESSION - *Communication from Switzerland - GATS 2000: Financial Services*, S/CSS/W/71, 4 May 2001, p. 3, paragraph 18-19, arguing that «From a strictly commercial point of view, we recommend the increased use of the standards developed in the relevant international forums (the Basel Committee, the International Association of Insurance Supervisors, the International Organization of Securities Commissions and the Joint Forum on Financial Conglomerates). We encourage the CTFS to keep abreast of the work of these organizations to the extent that it affects trade in financial services».

²⁶ See <http://www.iasc.org.uk/>.

²⁷ See <http://www.ifac.org>.

²⁸ This fact is mentioned in the document *The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services*, Note by the Secretariat, S/WPPS/W/9, paragraph II (iii).

²⁹ See <http://www.ibanet.org/>

Practice of the *Union Internationale des Architectes* (UIA)³⁰ is important for the architectural profession. Both of these standard setters took part in a 2004 workshop on domestic regulation, organised by the WPDR³¹; moreover, there have been some proposals aimed at promoting the inclusion of rules produced by such bodies within the disciplines³².

With regard to network services, the International Telecommunication Union (ITU)³³ sets forth standards for telecommunications and the Universal Postal Union (UPU)³⁴ establishes principles and guidelines for postal services, while air and maritime transport are addressed by the significant activity of the International Civil Aviation Organization (ICAO)³⁵ and the International Maritime Organization (IMO)³⁶ respectively. While the ITU is expressly mentioned as a cooperating international organisation by the GATS Annex on Telecommunications, there is currently a debate over the approval of a Memorandum of Understanding for the cooperation between the WTO and UPU³⁷. Moreover, there are some initiatives aimed at promoting cooperation with the ICAO and the IMO³⁸.

³⁰ See <http://www.uia-architectes.org/>.

³¹ See CTFS, COMMITTEE ON TRADE IN FINANCIAL SERVICES, *Report of the meeting held on 11 October 2001*, Note by the Secretariat, S/FIN/M/32, 9 November 2001, and WORKING PARTY ON DOMESTIC REGULATION - *Report on the Meeting Held on 31 March 2004*, Note by the Secretariat, S/WPDR/M/25, 18 May 2004.

³² About IBA and its involvement in the development of the disciplines see, L. S. TERRY, *Lawyers, GATS, and the WTO "Accountancy Disciplines": the History of the WTO's Consultation, the "IBA GATS Forum" and the September 2003 IBA Resolutions*, 22 Penn State International Law Review 4 (2004) 695 et seq. The relevance of UIA's activity for the disciplines has been first mentioned by the Secretariat: see COUNCIL FOR TRADE IN SERVICES, *International Regulatory Initiatives in Services*, Background Note by the Secretariat, S/C/W/97, 1 March 1999, p. 11. Moreover, some proposals presented during the WPDR meetings in 2000 further argued the opportunity of using UIA standards within the disciplines: see WORKING PARTY ON DOMESTIC REGULATION, *Communication from Japan - Report of the Results of Research on Professional Services*, S/WPDR/W/6 (19 May, 2000), paragraph 71, WORKING PARTY ON DOMESTIC REGULATION, *Communication from the Republic of Korea - Disciplines on Domestic Regulation for Professional Services - Results of Consultation with Professional Sectors*, S/WPDR/W/10 (2 October, 2000), paragraph 7 and WORKING PARTY ON DOMESTIC REGULATION, *Communication from Canada - Disciplines on Domestic Regulation for Professional Services - Results of Consultations with Professional Sectors*, S/WPDR/W/13 (16 March, 2001), paragraph 5. See also a proposal set forth by Australia (Job No. 3262, 25 May 2000): this document, non accessible to the public, is cross referred (underlining the point concerning the use of UIA's standards) in WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 3 July 2001* - Note by the Secretariat, S/WPDR/M/12 (16 August, 2001), paragraph 69.

³³ About ITU, see <http://www.itu.int/net/home/index.aspx>.

³⁴ See <http://www.upu.int/>.

³⁵ See <http://www.icao.int/>.

³⁶ About Imo, see <http://www.imo.org/HOME.html>.

³⁷ CTS, *Proposal for Memorandum of Understanding on cooperation between the Wto and the Universal Postal Union*, S/C/W/180, 23 November 2000.

³⁸ One of the documents prepared by the Secretariat at the beginning of the WPDR negotiations explicitly links the regulatory activity of these organizations with the technical

There are many standards for the tourism sector, set forth by: the World Tourism Organization³⁹, the ICAO, the International Air Transport Association, the Commission on Sustainable Development, the Convention on Biological Diversity and the World Travel and Tourism Council⁴⁰. Some Latin American countries submitted a proposal in this area, which seeks to promote recognition of the international standards for sustainable tourism set forth by these organisations, and to strengthen their cooperation with the WTO⁴¹.

For advertising services, a Secretariat document mentions the Code of Standards for Advertising Practice, set forth by the International Chamber of Commerce (ICC)⁴² in 1938, and some recommendations of the World Health

standards which had to be established within the disciplines: see *Background Note by the Secretariat, International Regulatory Initiatives in Services*, 1 March 1999, paragraph 17 – 19. Moreover, Norway proposed to foster the use of standards for the accountancy and maritime and air transport: see COUNCIL FOR TRADE IN SERVICES - SPECIAL SESSION, *Communication from Norway, The Negotiations on Trade in Services*, paragraph 19 («WTO work on regulatory issues should, insofar as possible, be based on international standards which are well developed for specific service sectors, for instance, the ISA - International Standards on Auditing and the IAS - International Accounting Standards»), paragraph 34 («A proper WTO solution for maritime transport would contribute to reinforcing efforts being made by many countries, including Norway, to stimulate a shift of transport from road to sea for environmental reasons. [...] At the same time, Norway remains firmly committed to dealing with environmental challenges in the fields of maritime transportation itself, and will co-operate actively with other nations in the IMO and other relevant *fora* in order to improve international safety and environmental regulations») and paragraph 44 and 46 («Norway emphasizes that any agreement for this sector needs to be in full conformity with international standards and regulatory measures, as established by the ICAO – International Civil Aviation Organization and/or the ECAC – European Civil Aviation Conference» and «Norway proposes that the 1st and 2nd freedoms of traffic rights of the ICAO Air Transit Agreement (1944) also be included as horizontal commitments of Members»).

³⁹ *Background Note by the Secretariat, International Regulatory Initiatives in Services*, cit., p. 14.

⁴⁰ See COUNCIL FOR TRADE IN SERVICES - SPECIAL SESSION, *Communication by Bolivia, Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Peru and Venezuela, Draft Annex on Tourism*, cit.

⁴¹ COUNCIL FOR TRADE IN SERVICES - SPECIAL SESSION, *Communication by Bolivia, Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Peru and Venezuela, Draft Annex on Tourism*, S/CSS/W/107, 26 September 2001, p. 4: «Members recognize the importance of international standards for the sustainable development of tourism and undertake to promote the adoption and continued upgrading of such standards through the work of relevant international bodies and non-governmental organizations, including the World Tourism Organization, the International Civil Aviation Organization, the International Air Transport Association, the International Organization for Standardization, the Commission on Sustainable Development, the Convention on Biological Diversity and the World Travel and Tourism Council. Members recognize the role of international organizations and non-governmental organizations in ensuring the safe and efficient operation of all activities in the tourism sector, in particular the International Civil Aviation Organization, the World Tourism Organization, the World Health Organization and the International Air Transport Association. Members shall consult, where necessary, with such organizations on matters arising from the implementation of this Annex».

⁴² See <http://www.iccwbo.org/>.

Organization (WHO)⁴³ and the FAO⁴⁴ on the control of advertising of products affecting health and food security⁴⁵. More controversial is the area of health services: some countries argue that the activity of the WHO could be taken into consideration; however, neither the documents of the WTO subsidiary bodies nor the formal proposals of Member States make any reference to it⁴⁶.

Finally, it is worth mentioning how the ISO, in recent years, has set forth rules applicable to services, addressed to specific sectors (for example, there are many dedicated to tourism) as well as general rules applicable universally: this is true of the 9000 and 14000 series of ISO standards relative to quality management and environmental management, respectively⁴⁷. These ISO standards are not addressed to the characteristics of products, but rather the quality and environmental sustainability of business activities, which may also operate in the services sector. The determination of standards for services by the ISO is destined to become more frequent: in fact, the ISO's strategic plan for the 2005-2010 period expressly mentions the services sector as one of its objectives⁴⁸.

From this brief overview, we can see that there are international standards for services, but they are distributed unevenly from one sector to another. Moreover, we can remark that the number of standards for services has increased significantly in recent years, and presume that this tendency will continue in the future⁴⁹. For the purposes of our study, the observation of the number and the characteristics of the existing international standards in the

⁴³ See <http://www.who.int/en/>.

⁴⁴ See <http://www.fao.org/>.

⁴⁵ *Background Note by the Secretariat, International Regulatory Initiatives in Services*, cit., p. 13.

⁴⁶ During WPDR negotiations, South Africa argued that «some sectors, e.g. health, had important international standards»: see WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 7 and 18 February 2005 - Note by the Secretariat, S/WPDR/M/29*, paragraph 25; however, this view has never been transposed in a formal proposal, and can therefore be regarded as an isolated position.

⁴⁷ See K.T. HALLSTRÖM, *Organizing international standardization. ISO and the IASC in quest of authority*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing (2004) 4 -7. According to N. BRUNSSON, B. JACOBSSON, *The Contemporary Expansion of Standardization*, in Id. (ed.), *A world of Standards*, cit., 2, ISO 9000 set «standards for administrative processes».

⁴⁸ ISO general secretary Alan Bryder's hearing, took place during WPDR thirtieth meeting: see WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 22 June 2005 - Note by the Secretariat, S/WPDR/M/30* (6 September 2005), paragraph 168.

⁴⁹ As ISO's representative commented during his hearing, there are several reasons for this phenomenon: see WPDR, S/WPDR/M/30, paragraph 164 et seq.; and in particular paragraph 166: «Elements that had generated a growing need for international standards for services included: (i) the deregulation and privatization of public services in areas such as energy, transportation, telecoms, postal services, water; (ii) the delocalization of the supply of some services such as health services, IT assistance and call centres; (iii) the pressure by consumers and citizens on quality, environment and safety, with a corresponding increase in consumer protection legislation covering services; (iv) the expansion of web-based services such as tourism, financial services, webstores and on-line purchasing».

services sector, and of the kinds of bodies that create them, is important for many reasons.

First of all, the relative immaturity of international standards in the services sector, compared to trade in goods, seems to be able to explain why the reference to international standards in the GATS is less detailed than parallel references contained in other agreements like the SPS and TBT. Still, as we have seen, we are now witnessing a growing production of this kind of rules in the services sector as well: as a result, the delay in the production of standards does not exclude their use in the future, within the disciplines, through a possible reinforcement of the reference to them, on the model of the agreements on technical barriers and health measures.

We believe that this kind of initiatives must take the existing standards for the services sector into account. We also believe that the different degree of diffusion of international standards in different sectors favours the elaboration of the disciplines on a sectoral basis⁵⁰.

Another element influencing the development of the disciplines, and their reference to international standards, is the number and type of global regulators. While the SPS agreement refers to the activity of three international organisations (the Codex, the IOE and the IPPC) and the TBT agreement refers to two (ISO and the IEC), we have seen that there are more than twenty standard setters in the services sector. This is not without consequences for the feasible mechanisms of cooperation between the WTO and the standard setter, making this more complex for services than for goods⁵¹.

2.2. *Reference to standards in the GATS: current conditions and options for the future*

⁵⁰ For example, during WPDR negotiations it has been proposed to improve the reference to international standards within the disciplines starting from the financial services sector, in order to check the opportunity of applying the same criteria also in other sectors: see Antigua and Barbuda's intervention in WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 7 and 18 February 2005* - Note by the Secretariat, S/WPDR/M/29, paragraph 21, «the delegation suggested financial services might be used as a “laboratory” to test the application of disciplines». The same countries presented a similar proposal within CTFS negotiations.

⁵¹ It is well known that SPS and TBT application had a significant impact over the standard setters' decision making and on States' behavior during the standard setting process. For example, it has been shown that in the *Codex Alimentarius Commission* there are now oppositions between the same States that are conflicting during WTO agriculture negotiations. This happens because States are concerned that decision taken within the Codex may have a far reaching effect because of the SPS mechanism of reference to Codex standards: see F. VEGGELAND, S.O. BORGES, *Negotiating International Food Standards: the World Trade Organization's Impact on the Codex Alimentarius Commission*, 18 *Governance* 4 (2005) 675 et seq., at 695. Concerns over international trade have thus significantly affected a standard setting process that should aim primarily at securing food safety. However, a similar effort from WTO Member States – aimed at putting pressure on international standard setter so as to guarantee that they take into account free trade issue – may face some obstacles because of the high number of standard setters within the services sector.

As we have seen, Article VI, paragraph 5(b) of the GATS sets forth a typology of reference to international standards which is very different from that contained in the SPS and TBT agreements⁵². The GATS reference is limited to providing that the use of standards by the Member States must be taken into account in evaluating whether national measures respect the criteria of transparency and proportionality required by the agreement, and do not restrict trade more than is necessary. In its current formulation, the GATS seems to affect States' right to regulate in a less incisive way than the TBT or SPS do.

However, the effective impact of this norm does not depend merely upon its text. We do not yet have decisions by the WTO Appellate Body that address these provisions: the only decision concerning the GATS application, in the Gambling case⁵³, merely specifies the difference between market access and domestic regulation, but it does not involve the issue of international standards⁵⁴. At the same time, in the past years the AB interpreted the international standards provisions in the TBT and SPS agreements in an expansive way⁵⁵. Through the jurisprudential activity of the AB, therefore, the GATS reference to international standards could gain a further reaching effect, than the one its literal text seems to envisage.

Moreover, the very uncertainty regarding the precise scope and effect of the obligation imposed over States because of the GATS reference to standards could lead the Member States to adopt these standards anyway, pending the exact definition of this burden. For example, it has been shown that compliance

⁵² Remarking this opposition, see M. KRAJEWSKI, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, The Hague – London - New York, Kluwer Law International (2003); S. CHARNOVITZ, *International Standards and the WTO, The George Washington Law School Public Law and Legal Theory Working Paper No. 133*, available at <http://ssrn.com/abstract=694346>.

⁵³ See APPELLATE BODY REPORT, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Service*, WT/DS285/AB/R, 7 April 2005.

⁵⁴ About the Gambling decision, see J. P. TRACHTMAN, *Survey on United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, available at www.ejil.org/journal/curdevs/sr47.html; J. PAUWELYN, *WTO Condemnation of U.S. Ban on Internet Gambling Pits Free Trade against Moral Values*, *ASIL Insight*, available at www.asil.org/insights/2004/11/insight041117.html; J. PAUWELYN, *WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation*, *ASIL Insight*, available at www.asil.org/insights/2005/04/insight050412.html; J. PAUWELYN, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4:2 *World Trade Review* (2005) 131 et seq.

⁵⁵ See APPELLATE BODY REPORT, *European Communities-Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002; about this decision, see R. HOWSE, *A new device for creating international legal normativity: the WTO technical barriers to trade agreement and international standards*, mimeo.

with Codex standards began to increase even before 1994, during the negotiations prior to the definitive formulation of the SPS agreement⁵⁶.

The question of the effect of the current GATS reference to standards thus remains open. Moreover, during recent WTO negotiations the issue of including in the disciplines a stronger reference to international standards has been frequently discussed.

The Decision on Professional Services, adopted by the Council for Trade in Services on 4 April 1995, seems to point international standards as a core element of the future disciplines⁵⁷. This decision established the Working Party on Professional Services (WPPS), which was given the job of drafting the disciplines provided by Article VI, paragraph 4, starting from the accountancy sector. In addition to the necessity test and the determination of guidelines for the recognition of professional qualifications, this subsidiary organ of the WTO must also concentrate on “the use of international standards,” specifying that “in doing so, it shall encourage the cooperation with the relevant international organizations as defined under paragraph 5(b) of Article VI, so as to give full effect to paragraph 5 of Article VII.”⁵⁸

Following this, in a document presented at the opening of the work of the WPDR⁵⁹, the Secretariat (in so doing, showing to agree with some legal scholars’ opinion⁶⁰) expressed its support for the inclusion of a rebuttable presumption of conformity with WTO obligation for national measures in

⁵⁶ F. VEGGELAND, S.O. BORGES, *Negotiating International Food Standards: the World Trade Organization’s Impact on the Codex Alimentarius Commission*, 699.

⁵⁷ W/S/L/3, *Decision on Professional Services*, adopted by the Council on 1 March 1995.

⁵⁸ In so doing, the Council for trade in services achieves two objectives: on the one hand, international standards are considered as a core element of the disciplines (therefore solving the doubts coming from the fact that the reference to standards is in a disposition - art. VI.5 – which has provisional nature); on the other hand, the two norms relating to standards, i.e. articles VI.5 (b) and VII.5, result strongly linked. About the second objective, see G. NIELSON, *Short cut or long road? Equivalence, international standards and the GATS*, WTO Workshop on Domestic Regulation, Geneva 29 March 2004, available at www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess2_nielson_oecd1_e.ppt

⁵⁹ *Article VI:4 of the GATS: Disciplines of Domestic Regulation Applicable to all Services*, Note by the Secretariat, S/C/W/96, paragraph 35 – 42: « This provision (l’art. VI.5) falls short of creating a presumption of “necessity” in favour of requirements based on international standards. A presumption in favour of international standards could facilitate the application of the necessity test and would also constitute a strong incentive for the use of international standards» and che « The presumption in favour of domestic regulatory measures based on international standards which exists in the TBT and SPS Agreements creates an important benchmark for the necessity test by pointing at the least trade-restrictive measures which are adequate to secure the policy objective in view. In this respect, the TBT and SPS rules appear to be more focused than the existing reference to international standards in Article VI:5(b)».

⁶⁰ Seem to agree on this point most of the essays in A. MATTOO AND P. SAUVÉ (eds.), *Domestic Regulation and Service Trade Liberalization*, cit.: see, in particular, J. TRACHTMAN, *Lessons for the GATS from Existing Wto Rules on Domestic Regulation*, 57 et seq., at 78; R. JANDA, *GATS regulatory disciplines meet global public goods: the case of transportation services*, 109 et seq., at 119 (about ICAO’s and IMO’s standards); A. MATTOO, P. SAUVÉ, *Domestic Regulation and Trade in Services: Looking Ahead*, 221 et seq., at 222 and 228.

accordance with international standards for services, which is analogous to the presumption operating in the SPS and TBT agreements.

The possible solutions considered up until now for the formulation of the reference to international standards within both the sectoral regulations and the WPDR proposals can be grouped along three lines: the first group reiterates the reference in the same terms as the GATS text; the second group of proposals, instead, seeks to shape a more comprehensive framework for the principle of harmonisation within the agreement; finally, the most recent initiatives seem to oscillate between these different alternatives.

The documents following the CTS Decision on Professional Services do not seem to go a step ahead from the GATS, but simply reiterate its already ambiguous formulation. This is true of the Disciplines for the accountancy sector⁶¹. This orientation can also be seen in recent proposals before the WPDR, confirming the difficulty of Member States to reach a new agreement on this point. For example, Australia put forward a proposal for the legal and engineering professions that was limited to repeating that the disciplines ought to take international standards into consideration⁶².

In the telecommunications sector, the reference is framed in such a way as to bind the Member States even less than the GATS does. The Annex on Telecommunications does not mention the necessity of taking international

⁶¹ *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (17 Dec. 1998), paragraph 26: «In determining whether a measure is in conformity with the obligations under paragraph 2 (i.e., in determining whether domestic regulations do not affect trade more than what is necessary in order to pursue a legitimate objective), account shall be taken of internationally recognized standards of relevant international organizations applied by that Member». The choice of not changing the reference formulation is a clear signal. As a matter of fact, during WPPS negotiations it has been proposed to write in the accountancy disciplines a reference to international standards built on the example of the TBT one: but this norm disappears in the definitive draft, because of the opposition of national regulators: see C. TROLLIET, J. HEGARTY, *Regulatory Reform and Trade Liberalization in Accountancy Services*, Domestic Regulation and Service Trade Liberalization, ed. by A. Mattoo - P.Sauve, 147 et seq., for this point 150. See also the Secretariat's intervention in WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 22 November 2004 - Note by the Secretariat*, S/WPDR/M/28 (25 Jan. 2005), paragraph 25: «The treatment of technical standards proved quite difficult in the creation of the *Accountancy Disciplines*, and members could agree only on two paragraphs. The main difficulty was that, although much international effort had been made to create international standards for accountancy, sensitivity to any perceived threat to regulatory sovereignty was still an important element».

⁶² WORKING PARTY ON DOMESTIC REGULATION, *Communication from Australia. Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S/WPDR/W/34, 6 September 2005, paragraph 29 and 30. The only point which is diverging concerns the scope of technical standards, including also ethical rules and rules of professional conduct: in this way, the proposal from Australia takes into account the opinion the international organizations for professional services formulated during WTO negotiations and during the Workshop on Domestic Regulation of March 2004.

standards into account in evaluating the conformity of national regulation, but limits itself to “recognising [their] importance.”⁶³

The proposals that aim most vigorously at elaborating a general principle of harmonisation within the GATS are instead two communications, one by Mexico, which first called for the Member States’ consideration over this issue, and the other by Switzerland, which presented a general discipline for technical standards.

Mexico’s communication, while not proposing a text of the provisions on standards to include in the disciplines, introduced into the debate the possibility of including in the disciplines a presumption of conformity to WTO obligations for national regulations in line with the standards⁶⁴.

Very different from Mexico’s proposal is the one from Switzerland⁶⁵, which contains a first draft of the provisions for technical standards to be included in the disciplines⁶⁶. It seeks to introduce a comprehensive framework for the harmonization principle, like the one in the SPS and TBT agreements, and is made up of three elements. First of all, it would require the Member States to

⁶³ «Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services».

⁶⁴ WORKING PARTY ON DOMESTIC REGULATION, *Communication from Mexico. Mexico's Experience of Disciplines on Technical Standards and Regulations in Services*, S/WPDR/W/30 (24 Sept. 2004), paragraph 15 (e): « In developing disciplines to apply to technical standards and regulations on services, it will be particularly important to discuss the way in which harmonization with international standards should be linked to fulfilment of the objectives set forth in Article VI.4 of the GATS and hence to the presumption that a technical standard or regulation that is in line with an international standard does not create an unnecessary barrier to trade».

⁶⁵ WORKING PARTY ON DOMESTIC REGULATION, *Communication from Switzerland. Proposal for Disciplines on Technical Standards in Services*, S/WPDR/W/32 (1 Feb. 2005).

⁶⁶ Switzerland’s proposal is made up of seven parts: general provisions; equivalency; international standards and the relation to international organizations and agreements; transparency; fees (for acquiring the texts of technical standards); special and differential treatment for developing countries; technical assistance. As explicitly stated in a footnote, Switzerland’s text is based on existing WTO texts, adapted to the services sector: in particular, Article VI and the Annex on Telecommunications of the GATS, the Disciplines on Domestic Regulation in the Accountancy Sector and the Agreement on Technical Barriers to Trade (hereafter TBT) have been used. About the cooperation with international standard setters, the Swiss text is analogous to GATS and the Annex on Telecommunications: see *Communication from Switzerland. Proposal for Disciplines on Technical Standards in Services*, cit., parr. 21 and 22: « Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards for the practice of relevant services trades and professions, and undertake to promote such standards through the work of relevant international organizations. [GATS VII:5; AT 7(a)]» and « Members recognize the role played by relevant international bodies (intergovernmental and non-governmental organizations) in establishing and promoting international best practices to ensure the efficient trade in services. [GATS AT 7(b) adapted]». Also the definition of “relevant international organizations” is the same as the one in the footnote to art.VI.5(b) GATS.

use international standards as a basis for national regulations⁶⁷, except when these are inappropriate for the pursuit of specific legitimate objectives of public interest⁶⁸. There is also the presumption of conformity to WTO obligations for the domestic regulations in accordance with international standards⁶⁹. Finally, an exception may be made for developing countries, when the implementation of the global rules would have high compliance costs⁷⁰.

The most recent initiatives⁷¹ seem to oscillate between the two positions illustrated above: between the disciplines on accountancy and some sectoral proposals, which just reiterate the ambiguous formulation of the GATS, on the one hand, and the transversal proposals of Mexico and Australia, on the other, which apply a general principle of harmonisation, on the model of the TBT, to the services sector as well.

⁶⁷ *Communication from Switzerland. Proposal for Disciplines on Technical Standards in Services*, paragraph 20: «Where technical standards are required and relevant international standards exist or the completion is imminent, Members shall use them or the relevant parts of them, as a basis for their technical standards, except when such international standards or relevant part would be an ineffective or inappropriate means for the fulfilment of the legitimate national policy objective pursued, for instance because of infant institutional development or fundamental technological problems. [TBT 2.4 adapted]».

⁶⁸ Anyway, in Switzerland's proposal the legitimate objectives differ slightly from the TBT text: while both texts mention the «fundamental technological problems», the draft text includes also the “infant institutional development”, instead of “fundamental climatic or geographical factors”: see art. 2.4 TBT: «Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems».

⁶⁹ «Whenever a technical standard is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 3, and is in accordance with relevant international standards of relevant international organizations' it shall be rebuttably presumed not to create an unnecessary obstacle to international trade. [TBT 2.5]»: *Communication from Switzerland. Proposal for Disciplines on Technical Standards in Services*, paragraph 23.

⁷⁰ «Developing countries may request special and differential treatment in cases where international standards entail high compliance costs and result in policies and institutions that are ill suited to a Member's legal and institutional development level. Members therefore recognize that in this case developing country Members should not be expected to use international standards as a basis for their technical standards, which are not appropriate to their development, financial and trade needs. [second sentence: TBT 12.4]»: *Communication from Switzerland. Proposal for Disciplines on Technical Standards in Services*, paragraph 29.

⁷¹ With the purpose of answering to the objections raised during WPDR negotiations, Switzerland and Mexico presented a joint proposal about technical standards: see WORKING PARTY ON DOMESTIC REGULATION, *Communication from Switzerland and Mexico. Proposal for Disciplines on Technical Standards in Services. Revision, S/WPDR/W/32/Rev.1* (28 October 2005). The joint proposed Disciplines on Technical Standards are organized in a structure diverging from the first Swiss text, but the point of our interest – the reference to international standards – does not differ significantly from the first draft: in particular, the three core elements mentioned above (standards as a basis for domestic regulation, presumption of conformity, special and differential treatment for developing countries) have not been changed: see paragraph 10-13 and 19.

The new WPDR Chairman has submitted an Illustrative List of Possible Elements for Article VI:4 Disciplines⁷², which seems to agree with the proposal of taking into account the two elements characterising the model set forth by the TBT agreement (the use of international standards as a basis of domestic regulations and the presumption of conformity with WTO obligations for national laws which are based on the standards)⁷³.

The next available document, the Consolidated Working Paper relative to the Disciplines on Domestic Regulation Pursuant to GATS Article VI.4, presented by the Chairman in July 2006⁷⁴, seems however to point in a different direction than the Illustrative List mentioned above. On the one hand, this paper argues that the States ought to “draw on international standards as a basis” (rather than “use international standards as a basis”⁷⁵); on the other hand, it makes no reference to a presumption of WTO compliance for domestic regulations which conform to international standards. The consolidated text thus seems to take an intermediate position compared to the two options put forward earlier, either the mere reiteration of the GATS formula or a general discipline for the principle of harmonisation.

The most recent working draft on domestic regulation, of February 2007, seems to reflect an even more cautious orientation⁷⁶. It provides that the States “should take international standards into account” in determining their own

⁷² WORKING PARTY ON DOMESTIC REGULATION, *Domestic Regulation: Preparation for the Sixth Ministerial Conference*. Note by the Chairman, JOB(05)/260, 25 October 2005, and the two annexes *Draft Ministerial Declaration – Chairman’s Proposed Text on Domestic Regulation*, and *Illustrative List of Possible Elements for Article VI:4 Disciplines*. In the Hong Kong Ministerial Declaration a strong support for the Illustrative List has been expressed, and the List is the starting point for the ongoing negotiations: «Members shall develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of negotiations. We call upon Members to develop text for adoption. In so doing, Members shall consider proposals and the illustrative list of possible elements for Article VI:4 disciplines»: Ministerial Conference, Sixth Session, Hong Kong, 13 - 18 December 2005, Ministerial Declaration, adopted on 18 December 2005, WT/MIN(05)/DEC (22 December 2005), Annex C, paragraph 5.

⁷³ The «use of relevant international standards and deviation from such international standards» and the «presumption of consistency with the disciplines if in compliance with international standards» have been explicitly mentioned between the elements to be included in the disciplines: see *Illustrative List of Possible Elements for Article VI:4 Disciplines*, cit., p. 5.

⁷⁴ *Disciplines On Domestic Regulation Pursuant To Gats Article Vi:4, Consolidated Working Paper, Note by the Chairman – July 2006*, JOB(06)/225, available at <http://www.tradeobservatory.org/library.cfm?refID=88479>.

⁷⁵ «Where technical standards are required and relevant international standards exist or their completion is imminent, Members shall draw on them or the relevant parts of them as a basis for their technical standards, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate national policy objective pursued»: *Disciplines On Domestic Regulation Pursuant To Gats Article Vi:4, Consolidated Working Paper*5, paragraph J.5, p. 10.

⁷⁶ CHAIR OF WORKING PARTY ON DOMESTIC REGULATION, *Chairs Work in Progress Document - Domestic Regulation GATS*, February 21, 2007, available at <http://www.tradeobservatory.org/library.cfm?refID=97441>.

domestic regulations⁷⁷ (by using the conditional verb “should take into account,” instead of “shall take into account,” this formula seems even more cautious than the one currently contained in the GATS)⁷⁸.

The debate within the WPDR has yet to yield stable, shared positions. Still, there seems to be a trend towards a less demanding reference to standards, which reflects the resistance of some States jealous of their right to regulate.

Beyond the objections that call for the different context in which measures originally developed for the goods sector would have to operate⁷⁹, the most frequent objections stress how difficult it would be for less developed countries, which are lacking the necessary economic resources and expertise, to effectively participate in the standard setting process⁸⁰. However, not only less developed countries have been strongly rejecting the Swiss text, but also United States and countries close to it, like Australia⁸¹. During recent negotiations, therefore, there doesn't seem to be an homogenous group of countries calling for a stronger use of international standards: this is opposite to what happened at the moment of the SPS agreement negotiations, when United States, EU and the Cairns Group all together were in favour, and there was no opposition by less developed countries⁸².

⁷⁷ «Where technical standards are required and relevant international standards exist or their completion is imminent, Members should take them or the relevant parts of them into account in formulating their technical standards, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate national policy objective pursued»: WPDR, *Chair's Working Draft on Domestic Regulation, Technical Standards*, paragraph 4.

⁷⁸ Anyway, some commentators argue that the provision for which technical standards must be based upon objectives criteria may give a way to draw a new link between domestic regulations and global standards, as «one definition of “objective” in WTO documents is consistency with international standards»: HARRISON INSTITUTE FOR PUBLIC LAW, GEORGETOWN UNIVERSITY, *Memo on new Domestic Regulation working paper*, available at <http://www.tradeobservatory.org/library.cfm?refID=97672>, p. 8.

⁷⁹ See WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 7 and 18 February 2005*.- Note by the Secretariat, S/WPDR/M/29, cit., paragraph 17 and 37.

⁸⁰ See the opinions of Egypt in WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 24 September 2004*. Note by the Secretariat, S/WPDR/M/27 (15 Nov. 2004), paragraph 75, of Colombia in WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 7 and 18 February 2005*.- Note by the Secretariat, S/WPDR/M/29, cit., paragraph 30 and of Malaysia in WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 22 June 2005* - Note by the Secretariat, S/WPDR/M/30 (6 September 2005), paragraph 127.

⁸¹ See, in particular, WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 22 June 2005* - Note by the Secretariat, S/WPDR/M/30 (6 September 2005), paragraph 120, 123, 124, 125 and 129.

⁸² See S. ZARILLI, *WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries*, Trade Related Agenda, Development and Equity Working Paper (1999), available at <http://www.acp-eu-trade.org/library/files/Zarrilli%20July%201999%20WTO%20Sanitary%20and%20Phytosanitary%20Agreement%20Issues%20for%20Developing%20Countries.pdf>.

The objection of some WTO Member States to a greater use of standards could perhaps be overcome if such a change was matched by a broader discipline of the international standard setters recognised by GATS, aimed at increasing their transparency. It is thus worth focusing, in the next part of this study, on the problems of participation in the standard setting bodies and of their cooperation with the WTO.

2.3. The definition of international standard setting organisations in the GATS and the cooperation between the WTO and the standard setters

The GATS does not specify which are the international organisations establishing standards relevant for the services sector. This contrasts to other agreements: as mentioned above, the SPS explicitly identifies the *Codex Alimentarius Commission*, the IOE and the IPPC, while the Annex on Telecommunications names the ITU and the ISO as standard setters with which to cooperate⁸³. In the lack of a clear recognition of the relevant standard setters, it gets critical to interpret the provisions of the agreement defining the notion of international organisations.

According to a footnote to Article VI, paragraph 5(b), the “relevant international organizations” whose standards shall be taken into account are the “international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.” Article VII, paragraph 5 then encourages Member States’ cooperation with “intergovernmental and non-governmental” organisations. So, a quick reading of the agreement reveals the following features of the international organisations establishing standards that may be relevant for the GATS: they must be “open to the relevant bodies of at least all Members of the WTO”; and they can also be non-governmental.

Also the current negotiations on the disciplines can help in detecting the exact meaning of the notion of international organisations, according to the footnote to Article VI, paragraph 5⁸⁴.

The debates within the WPDR and the CTFS seem to signal a restrictive interpretation of the above definition, so that the international organisations that set standards relevant for the application of the GATS can only be those having a universal character. For example, during the negotiations regarding the disciplines for professional services, the WPDR sent a communication to the international organisations operating in the sector. On this occasion, it had been proposed to consult regional organisations as well, but after extensive

⁸³ *Annex on Telecommunications*, paragraph 7, lett. a.

⁸⁴ A less questioned issue concerns the recognition of private global regulator as relevant standard setters according to GATS. The agreement explicitly mentions also non-governmental organizations; and the *Annex on Telecommunications* points in a similar direction (art. 7, lett. b: «Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services»). It is therefore feasible that the GATS may refer also to standards coming from private global regulators, such as IFAC and IASB.

negotiations, these were excluded⁸⁵. And yet, on this occasion, the scope of the initiative was merely to gather information useful to the normative activity of the WPDR, and not to identify the global regulators whose standards could be referred to⁸⁶. Most of the WTO Member States thus seem to exclude cooperation with regional standard setters even in view of mere consultations, and not only for the purposes of the reference contained in the GATS.

Some States' concern about being excluded from the international standard setting activity explains some of the proposals to the CTFS. They argue that even when an international organisation is formally open to the participation of all States, some countries (especially developing ones) do not have the necessary resources and expertise to concretely participate. In order to remedy this exclusion, they propose to recognise as standard setters only those organisations that effectively guarantee participation, such as by establishing programs of technical assistance to developing countries⁸⁷.

Finally, among the prerequisites that could be required for recognising an international organisation according to GATS, some have suggested including the respect for certain procedural principles, based on the model of the Principles for the Development of International Standards, Guides and Recommendations, formulated by the Committee on Technical Barriers to Trade in 2000⁸⁸. These apply the principles of participation and transparency, and require standard setters to use a procedure of notice and comment.

⁸⁵ The relevant documents about this point are the minutes of some WPDR meetings (from the forth to the eight): WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 24 February 2000* - Note by the Secretariat, S/WPDR/M/4 (6 April, 2000), WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 13 April 2000* - Note by the Secretariat, S/WPDR/M/5 (18 May, 2000), WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 25 May 2000* - Note by the Secretariat, S/WPDR/M/6 (29 June, 2000), WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 12 July 2000* - Note by the Secretariat, S/WPDR/M/7 (19 September, 2000) and WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 2 October, 2000* - Note by the Secretariat, S/WPDR/M/8 (17 November, 2000).

⁸⁶ As Thailandia pointed out during the fifth WPDR meeting «[in this case] the goal of consultations was to consider the potential horizontal applicability of the accountancy disciplines, not to harmonize standards across nations. Therefore, the definition of international organizations contained in the footnote to GATS article VI.5 (b) was probably not applicable to the Working Party in that case» (S/WPDR/M/7, par. 17); anyway, later on it was decided not to consult regional organizations.

⁸⁷ COMMITTEE ON TRADE IN FINANCIAL SERVICES, *Communication from Antigua and Barbuda, Belize, Fiji Islands, Guyana, Papua New Guinea, the Maldives, Solomon Islands and St Kitts and Nevis*, S/FIN/W/29/Rev.1, 17 September 2003, p. 4, proposing to modify the text of the footnote to art. VI.5 (b), in order to recognize as international organizations open to participation by all the members of WTO only those organizations for which: «(a) the terms of accession to that body are not dependent in fact or law on the level of development of the applicant and, (b) the international body provides a programme of technical assistance to assure the full participation of all affected developing countries in the standard setting body».

⁸⁸ *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2.5 and Annex 3 of the Agreement*, Annex 4, taken during the COMMITTEE ON TECHNICAL BARRIERS TO TRADE, *Second Triennial*

As we have seen, according to GATS Article VII, paragraph 5, WTO Member States shall cooperate with the organisations – governmental and non – that establish standards for the services sector. What are the forms of this cooperation? And what is the purpose of the cooperation that has already taken place between the WTO and global regulators operating in the services sector?

According to some legal scholars, there is a risk: the WTO, whose primary aim is to achieve free trade, may be referring to the standard setting activity of international organizations pursuing objectives which are different from its own, and which can therefore be in conflict with it⁸⁹. For example, global regulators for the financial sector aim to guarantee global financial stability, and this objective can contrast with the full opening of some services to the competition. These types of conflicts can be seen, for example, also with respect to air and maritime transport safety. From this perspective, the intent is to establish mechanisms through which the WTO can control and influence the activity of the global regulators whose rules it utilises, in order to ensure that they do not conflict with the goal of liberalisation.

Some developing countries argue that the WTO, being an international organisation of a universal character, might be an instrument to check the activity of global regulators that have a limited membership by the States that are excluded from it. Some of the proposals mentioned above, and the one aimed at limiting the international organisations considered relevant for the purposes of the GATS to those that effectively guarantee the participation of the less developed countries, through such mechanisms as providing for assistance and training, share the same perspective: to promote the inclusion of all States in the activity of standard setting currently taking place in a number of international organisations⁹⁰.

Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9, 13 November 2000.

⁸⁹ See J.P. TRACHTMAN, *Addressing Regulatory Divergence through International Standards: Financial Services*, in *Domestic Regulation and Service Trade Liberalization*, ed. by A. MATTOO - P. SAUVÈ, 27 et seq., on this point p. 30-31: «So the Wto has, to varying degrees and with varying degrees of formality, “delegated” to specific functional organizations the task of establishing standards to facilitate the free movement of accountancy services. This particular delegation is not inconsistent with prior practice in other particular areas, such as food safety standards [...]. The further question, however, is how will the WTO ensure that these organizations reflect appropriately the trade perspectives that concern the WTO? This is an agency problem: to the extent that these functional organizations are acting as agents of the WTO, how can the WTO ensure that they are faithful and diligent agents whose incentives are congruent with those of the WTO? The WTO, or more correctly its member States, must review the structures and goals of these organizations before determining the scope of the delegation. Perhaps the best way to think of these problems is o recognize that the member States are the ultimate principals: these are multiple-principal – multiple agent problems» (italics added).

⁹⁰ In presenting to the Committee on Trade in Financial Services the already mentioned *Communication from Antigua and Barbuda, Belize, Fiji Islands, Guyana, Papua New Guinea, the Maldives, Solomon Islands and St Kitts and Nevis, S/FIN/W/29/Rev.1*, the representative of Antigua and Barbuda stated clearly this point of view: « Over the past few years, the financial community had seen an unprecedented growth in the number of codes, standards and guidelines

At first glance, we can argue that the cooperation between the WTO and standard setters is more difficult in the services sector than it is for trade in goods, because the Member States' resistance to greater cooperation is even more pronounced in this area, for many different reasons.

Raw data can be drawn from the number of organisations that have obtained observer status in the subsidiary bodies of the WTO, competent in the area of services⁹¹: in the WTO subsidiary bodies that implement the TBT and SPS agreements, the standards setters referred to in the agreement (the Codex Commission, the FAO, the IEC, the OIE and the ISO) have observer status, but only two of the regulators (the ITU and the ICAO) which develop rules for the services sector have gained such status⁹².

There have instead been some informal contacts between the WTO and the standard setters operating in the services sector⁹³. Still, the debates preceding

that were fashioned entirely by these plurilateral groups and with which they expected conformity from others. These included financial standards relating to money laundering, capital adequacy requirements, cross-border taxation and exchange of information. The proposal's objective was to limit the impact of these plurilateral standards on WTO Members, and to promote the greater inclusiveness of small states in the process of formulating these standards by placing them under the umbrella of the WTO instead of in the bosom of plurilateral organisations with limited membership», italics added (COMMITTEE ON TRADE IN FINANCIAL SERVICES, *Report of the meeting held on 6 October 2003*, Note by the Secretariat, S/FIN/M/42, 12 November 2003, paragraph 52).

⁹¹ Have observer status within the Council for Trade in Services the IMF, the World Bank, UN, UNCTAD, the International Trade Centre – ITC, ITU, ICAO, WHO and the World Tourism Organization (the last three have *ad hoc* observer status, which means that their participation to CTS meetings is approved on a time to time basis, according to the issue which is going to be discussed); within the Committee on Trade in Financial Services and the Working Party on Domestic Regulation, are observers, besides the IMF, the World Bank, UN, UNCTAD, also the OECD and the African, Caribbean and Pacific Group of States – ACP.

⁹² See, for the examination of the International Association for Insurance Supervision (IAIS)'s request to gain the observer status within the WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 24 February 2000* - Note by the Secretariat, S/WPDR/M/4 (6 April, 2000) and WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting Held on 2 October, 2000* - Note by the Secretariat, S/WPDR/M/8 (17 November, 2000); within the CTFS, COMMITTEE ON TRADE IN FINANCIAL SERVICES, *Report of the meeting held on 13 April 2000*, Note by the Secretariat, S/FIN/M/25, 8 May 2000, and COMMITTEE ON TRADE IN FINANCIAL SERVICES, *Report of the meeting held on 9 October 2000*, Note by the Secretariat, S/FIN/M/28, 20 November 2000.

⁹³ During the negotiations for the adoption of the accountancy disciplines, IASB and IFAC held a hearing within the WPPS: see *The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services*, Note by the Secretariat, S/WPPS/W/9, paragraph II (iii). In 2001, the Basel Committee, IOSCO and IAIS were invited during the negotiations in front of the Council on Trade in Financial Services, while in 2004 the WPDR organized a workshop where also representatives from international organizations for the professional services sector intervened (in particular, IBA, which, has already mentioned, is drafting guidelines for the legal services, and UIA, setting standards for architects, were invited): see CTFS, COMMITTEE ON TRADE IN FINANCIAL SERVICES, *Report of the meeting held on 11 October 2001*, Note by the Secretariat, S/FIN/M/32, 9 November 2001 (the briefing took place on 10 October 2001), and WORKING PARTY ON DOMESTIC REGULATION, *Report on the Meeting*

these informal meetings were aimed at limiting the number of participating organisations and, most importantly, the scope of the meetings. Thus, the hearing of the global regulators for financial services, initially proposed as a first step towards a more stable cooperation, was approved only after it was clarified that it would have a merely informational purpose⁹⁴. The Member States were particularly concerned that the introduction of forms of cooperation with such organisations would make these organisations' standards effectively binding on the States through their recognition of the WTO⁹⁵; in other words, that the outcomes of this cooperation would ultimately "impinge on the right of national governments to take prudential measures independently."⁹⁶ The limited willingness to introduce stable forms of cooperation with the international organisations establishing standards for services seems therefore to reflect the fear of some WTO Member States that this would lead to an erosion of their national regulatory autonomy.

At first glance, this looks like an opposite view to that put forward by Antigua and Barbuda, mentioned above (*supra*, footnote 87), that aims to use the WTO as an instrument to check international bodies whose membership is restricted and that, establishing standards for services, interfere with States' right to regulate. In this case, however, as we have seen (*supra*, para. 2.3.1.), a change to the GATS definition of international organisation was introduced: global regulators, in order to be recognised by the WTO, would have to assure the effective and not merely formal participation of all States, through assistance programs for example. Because the cooperation between the WTO and the standard setter can help strengthen the participation of developing countries in global regulatory bodies, an express amendment to the GATS text would be necessary. In the absence of such amendment, given the actual brevity of the norm, the Member States remain concerned about the possibility that a closer cooperation with international bodies competent for services would lead to a further erosion of national regulatory autonomy.

3. *Recognition and the agreements*

In the context of the liberalisation of trade in services promoted by the WTO, the presence of many different systems of national regulation constitutes the main obstacle to trade, limiting and discouraging the provision of services outside the national territory by businesses and individuals. The problem is rendered even more complex by a series of factors, including the expansion of

Held on 31 March 2004 - Note by the Secretariat, S/WPDR/M/25, 18 May 2004 (the workshop took place on 29-30 March 2004). Within the WPDR also a representative from ISO, as mentioned above, intervened.

⁹⁴ The debate over this point can be followed reading the minutes of the CTFS meetings which took place between July 2000 and November 2001 (S/FIN/M/27-28-29-30-31 and 32).

⁹⁵ See Korea's intervention, S/FIN/M/29, paragraph 21.

⁹⁶ Malaysia representative's statement, in S/FIN/M/29, paragraph 22.

economic globalisation, lower costs of transportation and communications and migratory flows.

In this context, the mutual recognition of professional training, certification and qualifications is one of the most effective ways to regulate the differences.⁹⁷

This section aims to respond to three questions. The first: how do the GATS norms govern mutual recognition? The second: how is recognition formulated in the agreements? The third: what limitations do the GATS norms and the agreements imply for the States?

To answer these questions, we will analyse the GATS norms that refer to recognition; we will then examine the mutual recognition agreements made on the basis of Article VII GATS; finally, we will address the problem of the limitation of sovereignty deriving from the agreements, from both the normative and the administrative perspectives.

3.1 *Recognition in the GATS norms*

In the WTO system, the principle of mutual recognition is established in three agreements: the SPS, the TBT and the GATS.

The GATS contains various references to recognition. In fact, article VII, specifically dedicated to and entitled “Recognition,” can be linked with Article VI, which concerns “Domestic Regulation,” and with Article V on “Economic Integration.”

The first paragraph of Article VII suggests three features, having to do with the nature of the recognition (obligatory/optional), its object and how it is to take place, respectively.

Recognition is an option open to the States. Each Member “may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country.” GATS recognises the utility of recognition but, in contrast to what happens in the European context (where there is a presumption of the equivalence of national laws)⁹⁸, there is no automatic duty of recognition falling upon the host State. Participation in GATS and in the WTO system does not automatically require recognition. This optional character of recognition is significant: the goal of the free movement of services is pursued through the creation of a loose system that interferes with the legislative power and administrative system of individual States only pursuant to their specific and repeated (for every single agreement and for every unilateral recognition agreement) consent.

⁹⁷ See J. NIELSON, *Trade Agreements and Recognition*, in *Quality and Recognition in Higher Education*, published by the OECD, 2004, p.155-202, also available at <http://www.oecd.org/dataoecd/39/7/33729996.pdf>.

⁹⁸ See L. TORCHIA, *Il governo delle differenze*, Bologna, Il Mulino, p.21 et seq. e p.91 et seq.

The recognition may be addressed to the “education or experience obtained,” the “requirements met” or the “licences or certifications granted in a particular country.” There are two ways in which recognition may operate. It may be reciprocal and based on an agreement between two or more States, or it might be given unilaterally. The final paragraph of Article VII adds, however, that “[w]herever appropriate, recognition should be based on multilaterally agreed criteria.” Moreover, States parties to recognition agreements are obliged to guarantee an adequate opportunity of accession to other Members as well. These agreements, though bilateral, must remain “open.” And when accession is not possible, the States parties to bilateral agreements must try to negotiate analogous agreements with other States. These provisions express a preference not only for the form of the agreement, but also for a certain type of agreement, specifically multilateral rather than bilateral.⁹⁹ This is confirmed by the fact that, in cases where the recognition is unilateral, it cannot be exclusive and must leave open the possibility of recognition by other Member States.¹⁰⁰ There are at least two reasons for this preference. First of all, as Beviglia Zampetti argues, recognition, both in the context of goods as well as services, requires an intense technical activity of evaluation and comparison between the domestic and the foreign rules. This activity is best carried out through the cooperation between the interested States, rather than unilaterally. Secondly, Article VII in itself constitutes a derogation to the most favourite nation principle (see *infra*). In this view, multilateral agreements limit the scope of the derogation by increasing the number of parties involved and thus “most favoured.”

The recognition provision represents a derogation from the most favoured nation principle of the GATS. Article II of the agreement establishes that no State can accord a less favourable treatment to services and service suppliers than it accords to like services and service suppliers of any other country. The derogation can be explained by considering that, given the wide variety of regulatory requirements in the national legal systems of the Member States in the area of services, it is more realistic and efficient to allow bilateral or multilateral agreements (with a preference for the latter) than to require the automatic extension of recognition to all of the other Member States, once recognition is expressed only towards one of them.¹⁰¹

Still, the derogation is limited in its scope. Recognition cannot be used as an instrument of discrimination.¹⁰² The State must follow the procedure set forth

⁹⁹ *Ibid.* p.298-299.

¹⁰⁰ On the lack of transparency induced by notifications under art.V, instead of art.VII, see *infra*.

¹⁰¹ See J. NIELSON, *cit.*, p.158-160. The consequences of the principle of the most favoured nation in the GATS are also discussed in A. MATOO, *MFN and the GATS*, paper presented at the World Trade Forum Conference on the ‘*Most Favoured Nation (MFN): Past and Present*’, Neuchatel, 28-29 August, 1999.

¹⁰² For an analysis on the relationship between recognition and the principle of non discrimination see K. NICOLAIDIS, *Non-Discrimination, Mutual Recognition: An Oxymoron in the New WTO Lexicon?* in T. COTTIER, P.C. MAVROIDIS (eds.), *Regulatory Barriers and the*

in paragraph 4 of Article VII. This guarantees the necessary transparency and publicity to enable the possible participation of another State. Each State shall inform the Council for Trade in Services of its existing recognition measures, the opening of negotiations and the modification of existing agreements. This gives every Member of the WTO the opportunity to express its own interest in participating. The notifications of the agreements should be drafted in such a way as to indicate the Member State that is notifying; the article upon which the notification is based; the date in which the agreement entered into force and the duration of the agreement; the agency or body responsible; a description of the regulatory content of the agreement; modifications to the existing regulatory measures; the ways in which the agreement's text may be consulted. In effect, every notification presents peculiarities that take account of these guidelines only in part. Specifically, with regard to the description of the content of the agreement, the interpretations range from general indications like "mutual recognition agreement in the area of the legal profession" to more detailed descriptions. Moreover, where one agreement gives rise to multiple notifications, the differences are even more evident: the content of the agreement or the level of information provided are often heterogeneous.

Furthermore, the procedures set forth in Article VII have in fact been widely ignored by the Member States. GATS Article V, on Economic Integration, admits (out of respect for the principle of non-discrimination) the possibility that the Member States might be party to or enter into an agreement liberalizing trade in services. This is addressed not to Mutual Recognition Agreements but rather to Regional Trade Agreements (RTA). This possibility has led many States to notify agreements that are substantially mutual recognition agreements in the context of Article V rather than Article VII. As the Working Party of Trade Committee has underscored, this practice falsifies the general framework of the existing mutual recognition agreements, neutralising the Article VII, paragraph 4 duties of transparency and publicity aimed at ensuring the possibility of accession to the agreements to countries not involved in their negotiation.

States prefer a notification based on Article V rather than Article VII for reasons that are related to the possibility of avoiding the non-discrimination requirement, to which Article V is an exception. Respect for the prohibition on discriminatory treatment and the duty to keep agreements "open" implies the possible accession of countries with very different traditions and regulations from those of the original parties to the agreement. In this case, the cessation of the right to regulate to another State implies a more significant renunciation of state sovereignty than where the State merely receives into its own legal order rules more or less similar to its own. Thus, recourse to Article V seems to indicate a certain resistance to the erosion of state sovereignty implied by participation in mutual recognition agreements.

Principle of Non-Discrimination in World Trade Law, Ann Arbor, University of Michigan Press, 2000, p. 267-300.

In alternative to Article VII, there is Article VI of the GATS which establishes: [w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines.» This suggests that though the disciplines may include areas that are subject to mutual recognition agreements, they are not covered by them. In application of Article VI, in December 1998, the Working Party on Professional Services adopted the Disciplines on Domestic Regulation in the Accountancy Sector.¹⁰³ This document constitutes a first step in the development of the disciplines for the domestic regulation of services. Specifically, these apply to all the Member States that have assumed obligations in the accountancy sector and regard the development of procedures for granting licenses and certifications, as well the determination of technical standards.

The GATS rules thus offer two paths towards the elimination of barriers to trade in services. The first is represented by the establishment of common disciplines by WTO bodies.¹⁰⁴ The second is represented by individual Member States' adoption of mutual recognition agreements, which can be based on a reference to international standards. In the first case, Member States' domestic norms are fully substituted by the WTO rules. In the second case, national lawmakers retain a measure of autonomy in recognising norms established by another State or by a standard setter and admitting them into the national legal system.

The GATS norms were supplemented in 1997 by the Guidelines on Mutual Recognition Agreements or Arrangements in the Accountancy Sector put forward by the Council of the Working Party on Professional Services.¹⁰⁵ These provide a practical guide to governments and anyone else concluding mutual recognition agreements in the area of accountancy services. They give

¹⁰³ WTO, PRESS RELEASE, *WTO adopts disciplines on Domestic Regulation for the Accountancy Sector*, at http://www.wto.org/english/news_e/pres98_e/pr118_e.htm

¹⁰⁴ Furthermore, art.VI can be deemed relevant for recognition under another profile. As stated in art.VI, paragraph4, “[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*: (a) based on objective and transparent criteria [...]; (b) not more burdensome than necessary [...]; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service”. Therefore, the necessity test becomes applicable also to MRAs, as long as they regard the recognition of qualification requirements and procedures, technical standards and licensing requirements. On this point see K. NICOLAIDIS, J. TRACHTMAN, *Liberalization, Regulation and Recognition for Services Trade*, in S.M. STEPHENSON (ed.), *Services Trade in the Western Hemisphere: Liberalization, Integration and Reform*, Washington DC, Brookings Institute Press, 2000, p.43-71.

¹⁰⁵ WTO, WPPS, *Guidelines on Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, S/L/38, 18 May 1997.

procedural and substantive direction, suggesting the possible content of these agreements and the duties of notification and checking that could fall upon the parties to them.

The following conclusions may be drawn from the normative content of the GATS and related instruments. First, the GATS offers two paths to the elimination of barriers to trade in services, one internal to the organisation and the other left to the determination of individual States. The internal path consists in the establishment of general rules by WTO organs, the second, external path consists in the conclusion of mutual recognition agreements (though we have also seen that the recognition may be unilateral) by individual States. In both cases, the GATS rules permit the reference to standards determined by external organisations.

Second, the specific norms on recognition can be characterised by their flexibility. Article VII leaves open the possibility of concluding mutual recognition agreements or not, without requiring their adoption. In line with this flexibility, the Guidelines for Recognition of Qualifications in the Accountancy Sector are non-binding examples rather than exhaustive obligations. These norms moreover do not affect the substance of the agreements nor do they oblige States to negotiate and conclude them in a particular way. The only limitations upon these agreements are the principle of non-discrimination and the guarantee of the possibility of accession by third party countries.

3.2 *Mutual recognition agreements in the GATS: appearance and reality*

There are 148 mutual recognition agreements in the strict sense, that is in the sense of those notified on the basis of Article VII and subject to the rules governing recognition; the relative notifications are only 43, and the latest of these, by Armenia, goes back to October 2004. They are mainly agreements between States concerning higher education that were concluded prior to the birth of the WTO.¹⁰⁶ The more recent notified agreements however reveal a different tendency, both in terms of the parties to these agreements and their objects. The new agreements are mainly concluded by private organisations, either with or without a delegation of authority by the government, and are sectoral rather than transversal, in that they refer to specific professional areas.

In truth, the situation of the GATS notifications does not adequately reflect the importance of the mutual recognition agreements for services in the global legal space. There is therefore a disconnect between the “apparent” situation resulting from the notifications, and the real one. As highlighted by the Working Party of the Trade Committee, neither the number of notified agreements, nor the number of notifications presented in application of Article

¹⁰⁶ For an accurate listing and brief description of the agreements see J. NIELSON, OECD, *Service Providers on the Move: A Closer Look at Labour Mobility and the GATS*, TD/TC/WP (2001)/26/FINAL.

VII give a clear picture of the agreements actually in force between the countries belonging to the WTO. From a wide-ranging analysis, it seems that most of the new mutual recognition agreements in the area of services have not been notified and therefore, at least formally, do not fall under the GATS umbrella.

There are many reasons for the absence of notification. First: there is a tendency to conclude economic (or regional) integration agreements, such as NAFTA, ASEAN, APEC, which themselves include recognition provisions and upon which the recognition agreements between their Member States are then anchored (such is the case for the mutual recognition agreement between Australia and Japan within the APEC).¹⁰⁷ Regional agreements are governed by Article V and therefore avoid the Article VII transparency rules requiring notification.

Second: most of the sectoral agreements are negotiated and stipulated by private, in the sense of non-governmental, professional organisations. Many States have held that, even in the presence of government delegations of authority to these associations, their activities are not attributable to the State and therefore, they do not trigger a duty to notify.

Third: each of these notifications may cover more than one agreement.¹⁰⁸

Fourth: some States have held that the notification of the other State party to the agreement exempts them from notifying the WTO. However, the GATS does not exempt them explicitly nor implicitly from the necessity to notify an agreement. Confirmation of this can be seen in the cases of duplication of the notifications that have been made in different agreements.¹⁰⁹

Fifth: the Working Party of the Trade Committee has interpreted the phenomenon as a «lack of awareness of the obligation to notify by, or the limited administrative capacity of, the competent authorities.»

In practice, when the problem was raised before the Council for Trade in Services by India,¹¹⁰ most of the developing countries held that the reason for

¹⁰⁷ See *infra* par. 4 on 'Standards in mutual recognition agreements'.

¹⁰⁸ Among the most evident cases, Colombia has a notification for 25 agreements (WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Colombia, S/C/N/21*, 9 September 1996). Brazil: a notification for 19 agreements (WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Brazil, S/C/N/18*, 27 June 1996); Costa Rica: a notification for 11 agreements (WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Costa Rica, S/C/N/122*, 22 June 2000). In general, Latin-American countries, in which the tradition of mutual recognition is consolidated and widespread, have used one or few notifications for a whole group of agreements concluded before the entry into force of the GATS.

¹⁰⁹ See, for example, the agreement between Brazil and Colombia or the UNESCO Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education between Latin-American countries and countries of the Caribbean.

¹¹⁰ WTO, CTS, *Communication from India, Implementation of Article VII of GATS, JOB(03)120*, 24 June 2003. In the last decade India has gone through radical changes in the service sector and is among the countries that most of all suffered from the absence of recognition. On the specific matter see A. MATOO, D. MISHRA, A. SHINGAL, *Sustaining India's Services Revolution: Access to Foreign Markets, Domestic Reform and International*

the absence of notifications was the party States' reluctance to hold open accession to third countries. While States are interested in entering into the agreements, they are not interested in giving notification of them.¹¹¹ This would also explain the phenomenon of regional agreements containing recognition provisions.¹¹²

3.3. *The material scope of the agreements and the type of recognition*

The material scope of the agreements varies according to the period in which those were adopted. The earlier agreements are characterised by a transversal approach. These are mostly agreements for the general recognition of primary school, secondary school and university diplomas, based on a judgment of substantive equivalence between the programs of study and the institutions offering them. Most of the agreements between the Latin American countries goes in this direction. A similar recognition is sometimes addressed to the general pursuit of specialised studies, in other cases it is specifically provided for further professional qualifications or for the exercise of a profession.

The recent agreements, by contrast, refer to specific sectors. The more exportable professions (architecture, engineering, accountancy), those less tied to national peculiarities, find a source of regulation in the agreements.

Negotiations, Washington D.C., The World Bank Publications, 2004. On the problems that the GATS poses to developing countries see A. GABRIELE, *International Trade in services and the Evolving Position of Developing Countries*, in *Journal of Economic Integration*, 19, 2004, 780 et seq.; A. MATOO, A. SUBRAMANIAN, *What Would a Development-Friendly WTO Architecture Really Look Like?*, IMF Working Paper, WP/03/153, Washington D.C., August 2003 and by the same authors, *The WTO and the Poorest Countries: The Stark Reality*, IMF Working Paper, WP/04/81, Washington D.C., May 2004.

¹¹¹ “[I]t would seem that adequate opportunities have not been provided to other Members to indicate their interest in participating in these negotiations and negotiating their accession to such agreements or negotiating comparable ones with Member(s) concerned, as required under Article VII.2”, WTO, CTS, *Communication from India*, cit., p.2.

¹¹² On the other hand, countries such as Japan, the United States and the European Community argue that the major difficulties do not derive from lack of awareness on the existence of on-going negotiations, but rather because mutual recognition agreements are *per se* difficult to be reached. The United States delegation stated that “MRAs posed a practical challenge to reconciling wide variations in qualification requirements and required a shared commitment to reconcile such differences”, in WTO, CTS, *Report on meeting held on 23 September 2004, Note by the Secretariat, S/C/M/74*, 10 November 2004, paragraph 18. The problem of the scarce presence of notifications and of the absence of certain countries as part of the agreements does not hide political strategy finalized to exclude some States and include others, but simply reflects the intrinsic impracticability of recognition. This is the main reason why States would prefer to leave out of any commitments vast areas of activity: “[the] lack of MRAs [...] was probably linked to insufficiency of market access commitments in relevant areas”. See the opinion expressed by the European Community, *ibid.*, paragraph 9. The Japanese delegation follows on the same point: “the reason why few notifications had been made under article VII might be lack of MRAs, rather than lack of awareness”, *ibid.*, paragraph 27.

Agreements for the professions of lawyer, insurer and paramedic are instead less frequent.¹¹³

The recognition mechanism is automatic or semiautomatic in a few recent cases. For example, the agreement between Estonia, Latvia and Lithuania establishes that «[t]he Contracting Parties agree to recognize each other's higher education qualifications and qualifications giving access to higher education *unless there is evidence of substantial differences.*»¹¹⁴

Most of the agreements however provide for forms of recognition filtered by state intervention. Sometimes, they require prerequisites or summary procedures, or they incorporate mechanisms for facilitating the access to the professions. In the case of the agreements concluded by Macau, a lawyer admitted to the bar in another State does not need a law degree or training period in order to practice in Macau (as its own citizens would need to practice law), but must take an "adaptation course," whose duration may be reduced if the applicant already has a law degree in a country with a similar legal system to Macau. For other countries, the recognition is limited to general forms of cooperation or dialogue. The thrust of many Latin American agreements is in this direction.¹¹⁵

The consideration of the heterogeneity of the recognition formulas holds for the initiatives adopted by professional organisations as well. There are cases in which the applicant automatically acquires membership in the professional organisation attached to a host State that has concluded the agreement. In the agreement between Australia and New Zealand, it is established that «[a]rchitects registered in New Zealand will be registered in any Jurisdiction in Australia, following confirmation from the New Zealand authority that the applicant has a current practising certificate»¹¹⁶ and an analogous provision in the agreement between the United States and Canada for the accreditation of

¹¹³ Regarding the legal professions, there were only two notifications, one by Norway (WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Norway*, S/C/N/14, February 28, 1996.) and the other by Macau (WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Macau*, S/C/N/15, 1 March 1996). In both cases the recognition was unilateral.

¹¹⁴ Emphasis added. WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Latvia*, S/C/N/185, 22 January 2002. For the content of the agreement see *Agreement between the Government of the Republic of Latvia, the Government of the Republic of Estonia, and the Government of the Republic of Lithuania on the Academic Recognition of Educational Qualifications in the Baltic Educational Space*, 18 February 2000, available at http://www.aic.lv/rec/Eng/leg_en/LV_lik/balt_en.doc.

¹¹⁵ While some agreements use titles and denominations which give a precise idea of their content (for instance: 'Agreement on the Recognition of Professional Qualifications'), in many cases elements of recognition are included in more general agreements on 'cultural exchange and cooperation' which do not give any useful insight into the type of recognition and on how this is carried out. On this point see J. NIELSON, *cit.*, p.20.

¹¹⁶ WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Australia*, S/C/N/101, 2 January 1999.

engineers.¹¹⁷ In other cases, the recognition consists in the professional organisation's acceptance of the equivalence of the examinations and accreditation procedures administered by analogous organisations in other States party to the agreement.¹¹⁸

Finally, the forms of recognition also vary in the context of more far-reaching regional agreements. Some of these, like the EU/EEA or the Trans-Tasman Mutual Recognition Arrangement between Australia and New Zealand,¹¹⁹ have given semi-automatic recognition to the professional licenses obtained in the other country. Most regional accords however are limited to encouraging the conclusion of mutual recognition agreements, establishing a rather wide regulatory framework without translating this into concrete initiatives for the negotiation of such agreements.

3.4 *Limitations upon state sovereignty*

The analysis of the GATS norms and the notified general recognition agreements gives us the raw normative and empirical material with which to respond to the central question of this study: what limitations do the norms and the agreements impose upon the normative and administrative power of States? In the two sections that follow, we will consider the effects on State regulatory autonomy and then move on to administrative autonomy.

3.5 *States and private actors in the exercise of regulatory powers*

The problem of the cessation of the right to regulate will be approached from two perspectives: the first, the determination of the actors towards whom regulatory powers are transferred, second, the modalities of this transfer.

Article VII makes reference to the "Members" whose governments may carry out the recognition, that is the States party to the WTO who have also joined the GATS. However, an examination of the agreements notified under this Article reveals the existence of a double channel: some agreements (the older ones) are stipulated by the States, while most of the more recent agreements (though notified by the individual States to the Council for Trade in Services) are drafted and negotiated by professional organisations working in the same sector, with or without delegated authority.

Setting aside for now the differences in terms of the type of recognition (automatic or not), the mechanism of the traditional agreements operates along a merely horizontal plane, between formally equal, public actors: the States. So,

¹¹⁷ WTO, CTS, *Notification pursuant to Article VII of the General Agreement of Trade in Services, Engineering (Washington Accord)*, United States, S/C/N/53, 10 February 1997.

¹¹⁸ "Under the Washington Accord, institutions which are members agree to recognise the substantial equivalence or comparability of accreditation processes used by other institutions in relation to engineering qualifications", *ibid.*

¹¹⁹ Of which the agreements notified by Australia represent specific examples.

for example, the agreements for the recognition of educational titles, widespread in the Latin American area and beyond, are defined, stipulated and administered by States. The norms that are indirectly “recognised” by means of the agreement are those that the public law-makers have enacted to govern the education of their own citizens. So, the foreign country, recognising for example the validity of a university diploma, creates spaces in its own legal system for the authority of foreign norms.

The new agreements unfold instead along a vertical axis as well as the traditional horizontal one. These agreements are concluded by actors that may belong to different levels, ultimately anchored in the private sphere as well as in the public one.

The subjective dimension (the public or private nature of the parties to mutual recognition agreements) is relevant as a criteria for the distinction between traditional agreements and the more recent ones, and for creating further classifications in the context of the more recent ones. Furthermore, the determination of multiple types of agreements is useful for understanding the terms in which the problem of the cessation of regulatory power is posited.

The subjective criteria suggests three main categories: fully public agreements between different States, mixed agreements between States and professional organisations, and fully “private” agreements, between different international organisations.

In the area of the mixed agreements, we can distinguish the cases in which the professional organisations have a global or a regional dimension from those which merely represent the national sphere; among the national organisations, there are those that operate on the basis of a governmental delegation of authority and those that perform their activities without such a delegation.

In the agreements between different professional organisations, we can distinguish the agreements in which both organisations have a national dimension from those in which one of the two organisations has a global/regional relevance. We can also distinguish between the cases in which both organisations have a governmental delegation of authority, both operate without one and finally the cases in which there are organisations both with a delegation and without one.

The resulting picture is much more complicated compared to the traditional vision, which is dominated exclusively by public actors. The figure that follows illustrates these classifications and the distinctions proposed above. See Figure 1.

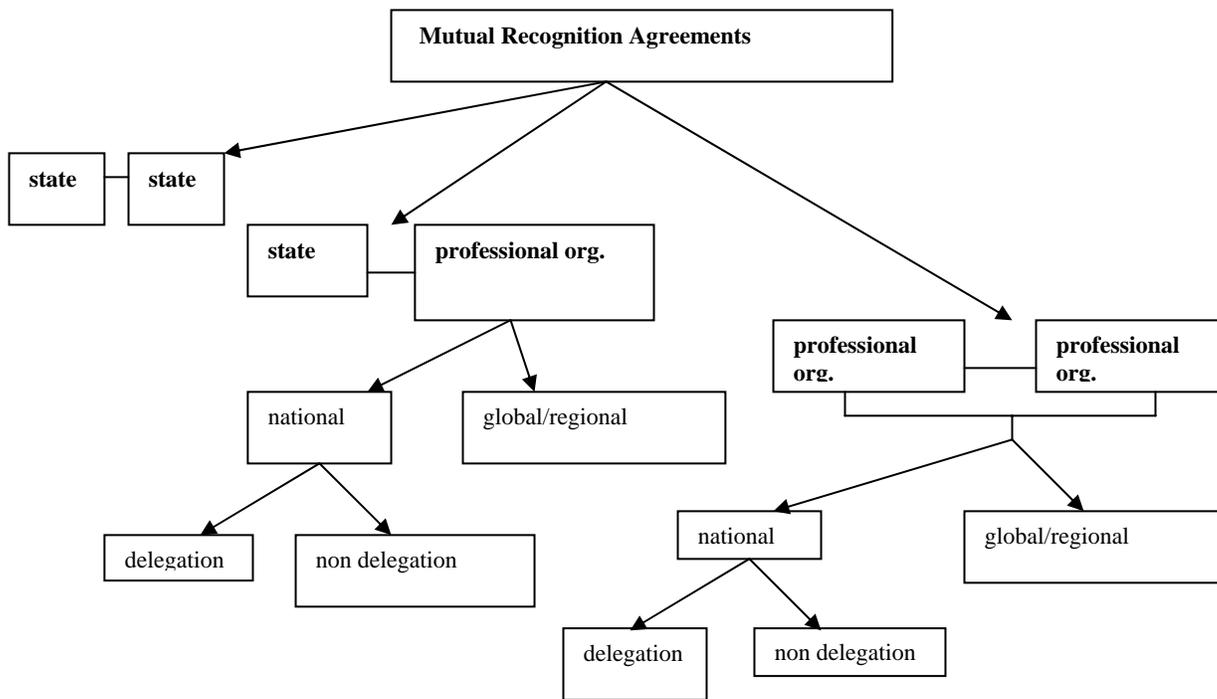


Figure 1: Old and new types of agreements

The introduction of non-state actors into the activity of recognition leads us to consider the State's cessation of regulatory power in new terms. There are at least three observations that can be made in this respect.

First, with reference to the external dimension, the mixed agreements, between States and professional organisations, and those between different international organisations, imply a transfer of the right to regulate to actors that are not only geographically beyond the range of the recognising State, but are characterised by their non-state nature. Concretely, private professional organisations, be they national, regional or global, regulate specific professional sectors operating within state legal frameworks: they fix standards for the provision of services, draft codes of conduct, guarantee the necessary certifications, fix the conditions of recognition and hear possible appeals. The State's renunciation of this regulatory power opens the national legal system up to rules formulated by private foreign bodies.

Secondly, relative to the internal dimension of this phenomenon, States delegate or attribute their own regulatory power to private national organisations. These may operate with or without an express governmental delegation of authority – as we will see, the delegation is relevant for the purposes of respect of the GATS duties of transparency – and even where a delegated authority has not been explicitly conferred, States do in fact admit of the legitimacy of the exercise of public functions by private professional

organisations: often, though the professional organisations define the content of recognition, the state administrations work on their implementation. This feature was evidenced by the United States delegation in a communication to the Working Party on Domestic Regulation,¹²⁰ affirming that «MRAs were negotiated by representatives of the professions in cooperation with representatives of the competent authorities, while the ultimate authority for implementation rested with the State bodies that did not directly participate in negotiations.»¹²¹ For example, the agreement between Australia and Japan, concluded by States and professional organisations and relative to the exercise of the engineering profession, does not specify the state organs responsible for implementation, but does speak generically of “country” as distinct from “signatories,” the term indicating the professional organisations. In one of the communications to the Council for Trade in Services, Australia clarifies the nature and role of the private organisation, Engineers Australia: «Engineers Australia is the primary professional association for the engineering profession and is constituted by Royal Charter. Engineers Australia does not act under delegated authority from the Australian Government but administers the National Professional Engineers Register (NPER) [...] has a national, regulated role in relation to assessment of engineers.»¹²² The relationship between private organisations and States is, moreover, explained in intervention by the United States clarifying the mechanisms of the Washington Agreement. The certification of private accrediting organisations enables the state authorities of the host country to grant licenses for the exercise of the profession of engineer. Engineers from countries that have signed the agreement automatically fulfil the training requirements necessary for obtaining the license.

Thirdly, the legitimate exercise of public functions by private organisations raises doubts about their accountability and their real pursuit of the public interest. In some cases, the internal statutes that regulate the formation and activity of these organisations introduce procedures aimed at insuring a certain degree of accountability, at least in relation to the organisation’s own members, and provide for *ex post* controls by the States. Still, these instruments do not seem sufficient to counterbalance the autonomy of these private bodies.

The fourth aspect, related to the previous one, regards the interpretation of the GATS norms. We have seen that the Article VII rules impose a duty of transparency to publicise the negotiation procedures by means of a notification. But, we can question the substantive scope of these norms and the way in which

¹²⁰ WTO, WPDR, *Communication from United States, Professional Services, Mutual Recognition Agreements (MRAs)*, S/WPDR/W/23, 10 March 2003.

¹²¹ The content of the communication is reported to the *Council for Trade in Services* in WTO, CTS, *Report on meeting held on 23 September 2004*, cit., paragraph 18.

¹²² WTO, CTS, *Communication from Australia*, JOB (04)/85, 24 June 2004, paragraph 5. As we will see more in deep *infra*, the NPER is a national registration system which has a public as well as a private component. Indeed, it “includes State and Territory Government nominees, representatives of community and professional associations and Engineers Australia”, *ibid.*, paragraph 8.

they affect the “privatisation” of the agreements. The Article VII rules seem *prima facie* limited to the state sphere. However, these norms must be read together with Article I, paragraph 3 of GATS, which explains that: «[f]or the purposes of this Agreement: (a) "measures by Members" means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.»¹²³ The function of professional organisations, where there is a delegation of governmental authority, is thus imputable to the responsible State. The Article goes on to specify that: «[i]n fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.»¹²⁴ Moreover, Article I, paragraph 3 of the GATS establishes that each State is obliged to guarantee the respect for the GATS norms by non-governmental bodies operating on its territory.

The question has however been discussed within the Council for Trade in Services, with results that can hardly be said to be unequivocal. India raised the problem of the participation of professional organisations and of the verification of their effective delegated authority. It argued that the low number of notifications was related to the circumstance that the new agreements had been concluded by professional organisations. The more or less culpable failure to notify could be explained by the circumstance that, being professional organisations rather than state organs, the interested country did not feel obliged to fulfil its Article VII duties. The following passage clarifies the reasoning behind this: «[h]e¹²⁵ said that there could be the view that some of these agreements had not been notified because they were considered to be between private professional bodies, and that they were subsequently not measures under the GATS. However, he thought that this might require further examination as to whether such professional bodies had been delegated powers by federal or state governments to conduct the process of recognition of professional qualifications. In the case of such delegated powers, his delegation felt that they would fall under government measures and would need to be notified under Article VII of the GATS.»¹²⁶ A different choice could basically conceal a different objective: to avoid the participation of third States in the negotiations and circumvent the GATS norms. On the contrary, it is opportune that «even in cases where the bodies involved had no explicit delegated authority, there still might be a bearing on the actual recognition, as regulatory authorities did make use of mutual recognition arrangements that had been made.»¹²⁷ The relationship between the agreements concluded between non-

¹²³ Art. I, paragraph 3 GATS. Emphasis added.

¹²⁴ Ibid.

¹²⁵ The representative of the Indian delegation.

¹²⁶ WTO, CTS, *Communication from Australia*, cit., paragraph 19.

¹²⁷ WTO, CTS, *Report on meeting held on 23 September 2004*, cit., paragraph 32.

governmental organisations and their effects on governments is so close as to imply a duty of notification upon the States themselves in these cases. Whether or not these professional organisations have delegated authority is evidently a question that must be examined on a case by case basis.

At this meeting, the United States responded to the Indian delegation's arguments, confirming that most of the mutual recognition agreements regarding American citizens had been concluded by private entities and that for this reason had not been regarded as triggering the duty to notify: «[h]er delegation took note of India's point that many MRAs were concluded by private entities, and stated that this was often the case for United States, which explained why no notifications of those agreements had been made in accordance with Article VII, as the later spoke of arrangements between Members.»¹²⁸ For example, even though the United States had notified the Washington Agreement, neither it nor the other party States had a duty to notify, as this was ultimately an agreement between private bodies.

To summarise, the tendency of recent agreements has been in the direction of privatisation. More professional organisations have promoted recognition initiatives, establishing criteria and procedures. Though recognition is often regarded as implying the horizontal erosion of sovereignty between states, in as much as the State cedes its right to regulate to another equal foreign actor, it also implies a vertical cession of sovereignty internal to each State -the State steps back in the initial phase of the agreement, leaving space to its own national organisations which exercise the power to regulate a particular area- and an additional kind of horizontal cession of sovereignty when within a mixed mutual recognition agreement, the State cedes its own regulatory power to a professional organisation, global, regional or belonging to another State. The risk lies in the limited accountability of these organisations and in a possible "escape" from the GATS norms requiring transparency and non-discrimination.

3.6. Recognition: automatic and subject to the right to scrutinise

Mutual recognition might be automatic or subject to a right to scrutinise. The "horizontal" cession of sovereignty is thus realised by means of two mechanisms. It can be integral: after a procedure for the evaluation of compatibility, a State recognises the equivalence between its own standards (and thus between its own laws and regulations) and those of the State in which the service provider originates. It can, by contrast, be mediated: each state maintains its own standards, and recognises no others (and thus recognises only its own laws and regulations) and thus allows foreign services providers to exercise their activity on its territory, but subjects this to procedures of certification and ascertainment as agreed with the other party State. In the first

¹²⁸ Ibid., paragraph 36.

case, one has an immediate and relatively inexpensive solution. In the second case, mediated recognition is more costly, in so far as the host State must ascertain the equivalence with its own standards. But in the first case of integral recognition, the renunciation of sovereignty is more consistent, while in the second, the transfer of sovereignty is more limited and the costs are transferred to the host State. This first category is exemplified by the agreements recognising unconditionally the documents and decisions (diplomas, certificates) of the service provider's State of origin, without further controls. The second category comprehends all of the cases in which the service provider's activity remains subject to the ascertainment and oversight of the competent authorities of the host State.

The European Commission recently commented on this distinction, expressing its preference for integral and immediate mutual recognition agreements, in contrast to the other type of "traditional" ones.¹²⁹ The Court of Justice, deciding cases concerning professional services providers, has intensified the duty to take the equivalence of professional qualifications into account and narrowing the space for ascertaining their equivalence.¹³⁰

In the context of mutual recognition agreements notified in the sense of the GATS norms, we can distinguish between two different, but mutually related types. The first has to do with the different tendencies followed in the choice between traditional agreements and the new, enhanced ones; the second has to do with the reasons for which a particular choice has been made. On the one hand, it is true that GATS agreements often follow the more traditional forms, which imply greater administrative costs but more deference to the integrity of national legislation, while more recent agreements do include various forms of automatic mutual recognition. On the other hand, the temporal factor is not always decisive. Where there is greater cultural and ethnic homogeneity and a greater degree of natural harmonisation between the norms, agreements of the second type have been chosen from the beginning, for example in the agreements between the Latin American countries for the recognition of titles.

The mechanism for automatic recognition can be understood through an examination of some of the agreements notified on the basis of Article VII.

¹²⁹ According to the definition given by Nicolaidis and Shaffer these are 'enhanced agreements'. The distinction between 'enhanced' e 'traditional agreements' is described as follows: "[a]s a result of its experience with conformity assessment under a number of MRAs -- in particular, the 1997 U.S.-E.U. MRA -- the European Commission published a paper in August 2004 that assessed lessons it had drawn. The Commission made a distinction between "traditional" MRAs, which focus on the mutual recognition of conformity assessment certifications without aligning relevant standards and "enhanced" agreements, which are based on standards deemed to be equivalent to each other or, even better, on common standards. The Commission concluded that the "traditional" form of MRA has proven unattainable", in K. NICOLAIDIS, G. SHAFFER, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 2005, at <http://www.law.duke.edu/journals/lcp/articles/lcp68dsummerautumn2005p263.htm>.

¹³⁰ See L. TORCHIA, *Il governo delle differenze*, cit., p.111.

The agreement concluded in February 2000 between the governments of Estonia, Latvia and Lithuania can be an example. This fits within the wider framework of the 1997 Lisbon Convention on the recognition of higher education qualifications. Its purpose is to «strengthen the Baltic common educational space and to stimulate the academic recognition as well as the mobility of students and teaching staff» between the party States.¹³¹ Each State agrees that: «a higher education qualification or a qualification providing access to higher education shall give its holder the same rights in the other Parties as it gives in the State in which it has been awarded.» In contrast to the more traditional agreements, there is no further procedure for the ascertainment or certification of professional skills. Still, this holds «unless there is evidence of substantial differences.»

The traditional procedure is thus stood on its head: there is no presumption of non-conformity implied by equivalence checks, but rather a presumption of equivalence with a possible check of non-conformity, which can be invoked only on the basis of evidence of substantial differences. Each State recognises the validity of the educational systems of the other party States *tout court*, as well as indirectly recognising the norms regulating the procedures for earning such titles.

Moreover, even these more penetrating agreements, zones of state sovereignty remain. Where a first-level university degree is obtained after a three-year program of study in which a thesis is not required, the university of the host State can require the fulfilment of other conditions before admitting the student to the next level of education.

3.7. *The role of national administrations in the agreements*

In the context of the duties that each State must fulfil in the negotiation and management of recognition, we need to distinguish between the general duties imposed by the GATS and those deriving from the individual mutual recognition agreements.

As we have seen, Article VII of the GATS requires national administrations to guarantee transparency and publicity of the negotiation procedures. The States must notify the agreements, making the relevant documents available to other national delegations. This is supposed to limit the derogation from the most favoured nation principle and create the possibility for new accessions.

Moreover, there is a duty of non-discrimination upon the States in their negotiations: the agreements must remain “open” to all States that consider themselves interested in the recognition.

¹³¹ For an analysis of the conditions in which the agreement has been shaped see WORKING GROUP OF THE NORDIC ADVISORY COMMITTEE ON HIGHER EDUCATION, *Report on the Potential for Creating a Nordic-Baltic Space for Higher Education and Training*, 1999, at <http://www.aic.lv/rp/eng/norbarep.doc>.

The GATS provides a minimal legal framework, while leaving the substantive details and future obligations to individual agreements. A systematic and comparative analysis of the agreements enables us to determine the limits upon the exercise of administrative activity by national authorities.

The first limit is implied by the very essence of recognition. For example, if diplomas, certificates and attestations conferred by a foreign administration are recognised, then the agreements contain an implicit prohibition on duplicating these administrative acts in the host State. A similar duty can be derived from the content of almost all of the agreements examined and is much more evident in the agreements providing for an automatic or semi-automatic recognition.

The agreements also imply an important development in the tools of cooperation and a multiplication of the forums in which this cooperation might take place. This creates duties of cooperation with other national administrations, which are served by duties to provide information, between these different national organisations and in relation to the service providers. For instance, the above-mentioned agreement between Estonia, Latvia and Lithuania established a National Academic Recognition Information Center, as part of a wider network of ENIC/NARIC national information centres created by the Lisbon Convention. Each centre has the duty of information in relation to its own institutions and citizens as well as in relation to the centres of other party States to the agreement. It must provide the institutes of higher education and universities present on its own territory with all of the relevant information about the educational and qualifications systems of the other States, while it shall send all of the information about its own system to the centres of the other countries.

But the function of the centres goes beyond the purely informative. On the basis of the data gathered, they are also charged with evaluating the qualifications conferred in the other countries. In the cases in which the private organisations implement the agreement, the same duties fall upon them. In the agreement between Australia and Japan on engineers, the activity of informational exchange is carried out between the organisations. Changes in the criteria, procedures and programmes must be notified, and every year a list of all the applicants requesting registration in the host country must be prepared. The consultation and constant cooperation between the associations is supposed to be, moreover, the essential tool for ensuring a unitary application and interpretation of the recognition measures.

Finally, national administrations bear obligations relating to the implementation of the agreements: duties to check and, where necessary, duties and powers to discipline. The powers of control still generally attach to the administration of the destination State, while disciplinary powers are attributed to the State of origin as well as the State in which the service is provided. The agreement between Lithuania, Estonia and Latvia establishes a Baltic Higher Education Co-ordination Committee charged with oversight. This body is currently composed of five members for each country, representing the ENIC/NARIC centres and the national conferences of rectors. It oversees and

coordinates the centres' activities, and implements the decisions and recommendations of the intergovernmental commission established by the Lisbon Convention. An example of the exercise of disciplinary powers is instead seen in the Australia-Japan agreement. Each country may exercise disciplinary powers where the recognised engineer violates the standards of the host country which are also the standards of the country of origin: «[e]ach country will take appropriate disciplinary action if an engineer violates the standards of that country.»¹³² The sanctions must be communicated to all of the APEC party States in which the engineer is registered. Each country must then take the most opportune measures in relation to the disciplinary action communicated to it.

Also with respect to the administrative activity explicated, it is possible to trace a path of evolution between the old and the new agreements. In particular, there are at least two differences between them. First, in the new agreements, the administrative activity is performed by *ad hoc* bodies which have tight, mutual relations or are composed in a mixed way. By contrast, in the traditional agreements, even if cooperation were necessary, it would almost never find a permanent forum in which to take place. Secondly, the new forms of agreement have done away with the case-by-case verification and certification that consumed much of the resources of the national administrations and that shifted the costs of the administrative activity to the host State.

4. *Standards in mutual recognition agreements*

The GATS goal of eliminating trade barriers is pursued by means of two instruments: general WTO rules and individual mutual recognition agreements between States. Reference to standards is made in both of these cases, as set forth in Articles VI and VII, respectively.

We have seen how the debate within the various bodies of the WTO has been addressed above all to the first case and how it has been generally inconclusive, so that we do not have an effective and efficient reference after all.

The reference to standards in the mutual recognition agreements, by contrast, though having received little attention within the WTO, can be seen in several of the agreements notified on the basis of Article VII.

There are specific mutual recognition agreements concluded in the context of global or regional alliances (ASEAN, APEC, EMFA), notified to the GATS as well, and which are addressed to the equivalence of professional practices.¹³³

¹³² Mext (Japan), Ipej (Japan), Engineers Australia, National Engineering Registration Board (Australia), *A Bilateral Framework to Facilitate Mobility for Mutual Recognition of Registered/Licensed Engineers*, October 2003, art.8.5, at http://www.mext.go.jp/b_menu/houdou//15/10/03100103/001.pdf

¹³³ See, for instance, the six international mutual recognition agreements for engineering. Three of these regard the recognition of qualifications: the Washington Accord (1989), the Sydney Accord (2001) and the Dublin Accord (2002). These agreements recognize the substantial equivalence of the accreditation systems for professional qualifications. Differently,

The basic concept underlying these agreements is that a professional, who is regarded as having attained a certain international standard of competence in the country of origin, can be registered without further verifications and thus exercise her professional activity in a host country which is party to the agreement. The APEC Engineering Agreement (1999), the Engineers Mobility Forum Agreement (2001) and the Engineering Technologist Mobility Forum Agreement (2003) are agreements of this type.

The mechanism for recognition functions on two levels: the global/regional level and the state one. The global or regional organisation defines the standards. Thus, individual member States of the organisation conclude mutual recognition agreements with each other, or with a non-member State which has accepted and applied the same standards.

An analysis of the APEC Engineering Agreement procedures enables us to better understand the functioning of the references to standards. The Asian-Pacific Economic Cooperation (APEC) was born in 1989, in Canberra, Australia. Originally made up of twelve countries,¹³⁴ this organisation has a regional character and seeks to promote the creation of a free trade area between its members. It has three objectives: “trade and investment liberalisation,” “business facilitation” and “economic and technical cooperation”.

In order to guarantee the free movement of engineers, an APEC Engineer Coordinating Committee was established to define and update the standards upon which one could be considered an engineer.¹³⁵ According to the Committee, professional engineers are those who have “completed an accredited or recognised engineering program; ¹³⁶ been assessed within their own economy as eligible for independent practice; gained a minimum of seven years practical experience since graduation; spent at least two years in responsible charge of significant engineering work; and maintained their continuing professional development at a satisfactory level.” Individuals meeting these criteria can be registered by APEC as recognised engineers.

The APEC Human Resources Development Working Group Steering Committee has actually created an APEC Engineer Register in order to “recognise the equivalencies in the qualifications and experience of practising professional engineers in the participating economies and to facilitate trade in engineering services between those participating economies”.¹³⁷

In each member country, a public or private body designated by the APEC manages the national section of the register and, on the basis of regional criteria and standards, registers individuals. The registration in one of the national

the other agreements regard the recognition of equivalence of the professional practice. As pointed out by the APEC, in these latter cases: “it is individual people, not qualifications that are seen to meet benchmark standards”.

¹³⁴ Among these: United States, China, Australia, Japan, Russia.

¹³⁵ WTO, CTS, *Communication from Australia*, cit., p. 4.

¹³⁶ It is the Apec who has the duty to list the “accredited and recognized programs”.

¹³⁷ Ibid., p.3.

sections of the general APEC register is supposed to enable an engineer to exercise his professional activity in any other country of the Asian-Pacific area. Thanks to the common standards, this leads to a presumption of equivalence, tending to ensure the mutual exemption from any further verification of the prerequisites for exercising the profession of engineer in all of the APEC countries: «[e]ach side shares the recognition that all requirements for registration/licensing as a professional engineer in its country are met by engineers whose names appear on the APEC Engineers Register of the other country».¹³⁸ Each State «has a high level confidence in the assessment procedures followed by the other in the registering of individuals».

The APEC Engineers Agreement fixes guidelines for the equivalence mechanism. The specific mutual recognition agreements between APEC member States can be located within this framework. These concretely specify the national bodies that manage the registers, the mechanisms defined by APEC itself, and further procedures, when held to be opportune. For example, a bilateral agreement between Australia and Japan was concluded in 2003, and notified in the sense of GATS Article VII. The signatories of the agreement were three bodies private professional organisations of engineers (Engineers Australia (EA), the National Engineering Registration Board Australia (NERB), the Institution of Professional Engineers Japan (IPEJ) and the Japanese ministry of science and technology (MEXT). In Australia, the EA, a private organisation established in 1919 actually manages the National Professional Engineers Register (NPER), but most importantly for our study, manages the Australian section of the APEC register. In Japan, the MEXT administers the registration of engineers on the basis of national law (the Professional Engineer Law). This designates the IPEJ to administer the habilitation exams for engineering and the registration in the national APEC register for engineers. The agreement provides for a «bilateral framework to facilitate mobility for mutual recognition of registered/licensed engineers,» concretely implementing the mechanisms provided in the context of APEC: registration in the national section of the APEC registry following a verification of the prerequisites defined at the supranational level. The following figure clarifies the functioning of the agreement. Figure 2.

¹³⁸ *A Bilateral Framework to Facilitate Mobility for Mutual Recognition of Registered/Licensed Engineers*, cit., art. 3.2.

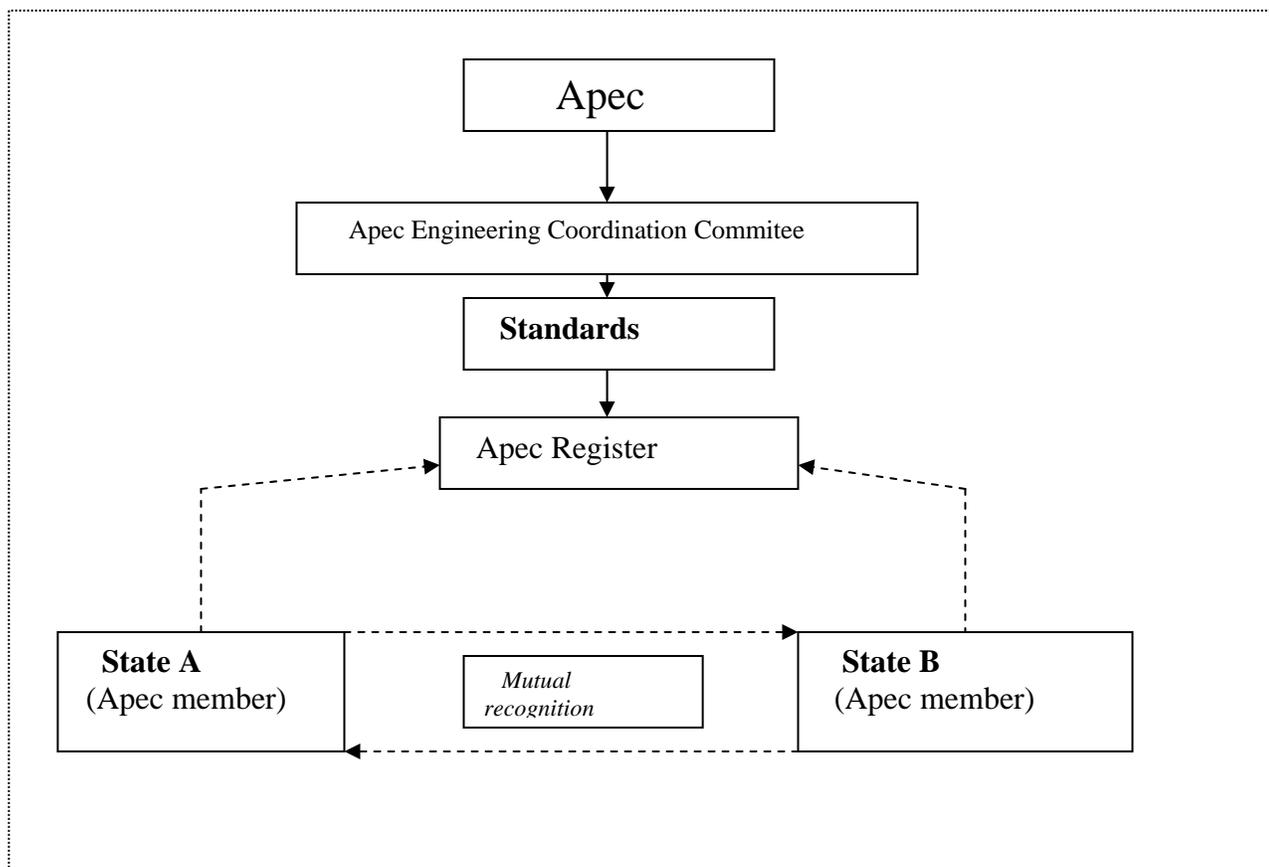


Figure 2: Standards and mutual recognition agreements in APEC

Other agreements follow a similar logic. In these types of agreements, the vertical dimension joins with the horizontal one, and the first is essential to the second. The State, lets a standard, that it has contributed in part to create, into its own legal system. Then, by virtue of another party State's adherence to the same standard, recognition happens.

In the case of reference to standards within mutual recognition agreements, different questions arise compared to the debate surrounding the other type of reference, discussed in the first part of this paper. The need for the standards setter to have a universal character is overcome both in principle, in so far as the agreement is by its very nature limited to the parties that conclude it, and in fact, since some agreements have a very wide regional or even a global membership.

5. *Summing up*

The WTO agreement for trade in services seems to draw on the principle of harmonisation less than the TBT and SPS agreements. As we have seen, the TBT and the SPS require the Member States to use the standards as a basis for national measures, they presume the conformity with WTO obligations of domestic regulations in accordance with such standards, and they foster the

participation of States in the standard setting activity of the international organisations. In the GATS, by contrast, there are only two provisions concerning international standards: Article VI, paragraph 5(a), provides that, in evaluating whether domestic measures may constitute an unnecessary barrier to trade, the States' use of international standards shall be taken into consideration, while Article VII, paragraph 5 promotes the cooperation with the international standard setting organisations.

The debate within various subsidiary organs of the WTO has been focused on the possibility of widening the scope of these rules in various ways. In particular, it has been proposed to specify more precisely the characteristics that the standards setters ought to have to be recognised by the GATS agreement; to introduce different modes of cooperation with the international standard setting organisations; to require the States to use standards as a basis of domestic regulations, and to require that national measures in accordance to standards be presumed not to constitute an unnecessary obstacle to trade.

The difficulty of reaching an agreement to amend and strengthen the principle of harmonisation reflects the States' fear of seeing their right to regulate replaced by rules made by others. Still, some mechanisms could be introduced which would guarantee an effective participation of the States in the standard setting activity carried out at the global level. This is the thrust of some proposals that an international organisation be recognised in the sense of the GATS agreement only if it internally respects a one-country one-vote rule, as well as offers assistance and training programmes to less developed states, to give them the expertise necessary to an effective participation in the organisation's activity. It has moreover been suggested that the Principles for the Development of International Standards, Guides and Recommendations, formulated to dictate the rules for the standard setting process carried out within the organisations recognised by the TBT, be adapted for the services sector in order to guarantee respect for the principle of participation.

By introducing these requirements, the WTO could become a tool for changing the structure and functioning of global standard setters who, in order to take advantage of WTO recognition according to the mechanism of *borrowing regimes*, would be induced to adapt their procedures for the elaboration of the standards, favouring an effective extension of the participation of their member States.

Regarding the principle of equivalence, the analysis of the GATS norms and the general recognition of the notified agreements have provided the normative and empirical data for evaluating the extent of the limitations upon state normative and administrative power deriving from the WTO system. The transfer of the right to regulate was analysed from two perspectives, the relevant actors and function. With respect to the first, we have distinguished between traditional agreements, in which there is a State-to-State transfer of regulatory power, and the new generation agreements, in which the transfer of power is made by States to private actors. Professional organisations, acting with or without delegated authority, determine the norms that regulate

individual professions – standards, codes of conduct, recognition prerequisites – in addition to materially concluding the agreements. From the functional perspective, a greater or lesser limitation of sovereignty corresponds to different modalities through which recognition operates. In the case of automatic recognition, the cessation of sovereignty is integral, while recognition with scrutiny preserves a space for state intervention. The tendency of more recent agreements is in the first direction and yet, quantitatively, they are still a minority.

The type of recognition also influences the limitations on the national administrations. Integral recognition imposes less costs upon national administrations than other types of recognition. In general, these costs are realised in respecting specific duties and prohibitions. Most salient are the duties deriving from GATS norms, concerning the transparency of the negotiations. These duties are thus implicit in the very nature of recognition: the prohibition on the duplication of the acts, documents and decisions (certificates, diplomas, etc.) whose recognition is sought. There are also duties arising out of individual agreements: cooperation with other administrations, mutual information, control and oversight of implementation, exercise of disciplinary powers.

But what is the relationship between the principles of harmonisation and recognition within GATS? Do they mutually reinforce each other, or are they in competition?

The text of the agreement suggests a interrelation between these two principles. We have mentioned that the removal of barriers to trade in services is guaranteed by the GATS both through common rules adopted by WTO organs (Article VI), as well as by encouraging mutual recognition agreements between member States (Article VII). In both of these cases, there is a reference to standards.

Still, in the first case, the analysis of negotiations carried out in the WPDR demonstrates interpretative uncertainties and the ineffectiveness of the rules. The empirical analysis of the agreements notified within GATS in the sense of Article VII sheds light on the possibility that harmonisation and mutual recognition are closely related. In this case, the agreements are recent ones, concluded in the context of regional or global understandings. Here, a body within the regional or global organisation fixes the unitary standards, which are then the basis of any future recognition. The member States of the organisation conclude agreements by referring to a common, harmonised platform.

HARMONISATION AND EQUIVALENCE IN THE EUROPEAN SERVICES REGULATION

ALESSANDRO TONETTI

SUMMARY: 1. Introduction. 2. The law governing professions. 2.1. Harmonisation. 2.2. Equivalence. 3. The law contained in the “Services Directive”. 3. Harmonisation. 3.2. Equivalence. 4. The relationship between the two principles and administrative cooperation. 5. Limits to the Member States’ right to regulate. 6. Towards a convergence of national laws?

1. Introduction

In recent decades, we have seen the institution of many supranational bodies (of a regional or global character), whose activity, aimed at integrating national economies and markets¹ produces strong interdependencies between legal systems existing at different levels of government and ends up tangibly affecting individual Member States’ right to regulate².

The European Union represents the most important and mature expression of this phenomenon. The EC Treaty, in pursuing the single market (which to this day is a pillar of the Union),³ expressly posits as one of the objectives of Community action “the approximation of the laws of the Member States”⁴.

The approximation of the laws is realised by means of two principles:⁵ harmonisation,⁶ which implies the definition of common norms, standards and

¹ For a summary of the main international economic organisations, see M.P. CHITI, *Diritto amministrativo europeo*, ed. II, Milan, 2004, p. 12 et. seq.

² In a global prospective, S. CASSESE, *Gamberetti, tartarughe e procedure. Standards globali per i diritti amministrativi nazionali*, in *Riv. trim. dir. pubbl.*, 2004, p. 657 et. seq. (*Shrimps, Turtles and Procedure: Global Standards for National Administrations*, available at <http://ssrn.com/abstract=692761>); S. BATTINI, *La globalizzazione del diritto pubblico*, in *Riv. trim. dir. pubbl.*, 2006, p. 325 et. seq.; M. DE BELLIS and E. MORLINO, *Armonizzazione e mutuo riconoscimento nel General Agreement of Trade in Services*, in this volume.

³ In these terms, S. CASSESE, *La nuova costituzione economica*, in *Riv. dir. pubbl. comunit.*, 2001, p. 905.

⁴ Article 3, paragraph 1, letter h). The relationship between the single market and European regulation is highlighted by G. DELLA CANANEA, *L’amministrazione europea*, in *Trattato di diritto amministrativo. Diritto amministrativo generale*, S. Cassese (ed.), Milan, 2003, p. 1823 et. seq.

⁵ In this regard, see S. CASSESE, *La nuova costituzione economica*, cit., p. 907 et. seq. The author illuminates two instrumental relationships. The first is the relationship between the harmonisation of national legislation and the four freedoms of movement. The second is the relationship between these freedoms and the unity of the market. Cassese views mutual recognition as another factor in the development of the European economic constitution (pp. 913, 920).

⁶ For further analysis, see F. CARUSO, *Unificazione del diritto, diritto uniforme e ravvicinamento delle legislazioni nella Cee*, in *N.ss. D.I.*, app. vol. VII, Turin, 1987, p. 972 et. seq.; M. DOUGAN, *Minimal harmonisation and the internal market*, in *Common Market Law*

administrative practices and equivalence (especially in the forms of mutual recognition and control of the country of origin)⁷, which allows goods and services legitimate in one Member State to circulate freely (though not necessarily unconditionally) in the markets of every other Member State. These principles thus affect domestic regulation in different ways: harmonisation replaces (or reduces) domestic regulation, in as much as it tends to homogenise national legal systems; equivalence, by contrast, preserves the differences between national laws, but restricts in some measure their scope of application.

In the course of the integration process, these two principles have been used in different ways. At times, radical solutions have been privileged only to be later revealed as inadequate to govern a reality as complex as the European one. In the first phase of constructing the common market, total harmonisation was the path of choice, but this was soon abandoned for a variety of reasons (for example, the complexity of decision-making procedures and the breadth of areas to regulate).⁸ Recently, however, the Commission has tried to pursue the opposite solution, proposing the rule of the exclusive control of the country of origin in the area of services.⁹ The legislator, however, in order to avoid social

Review, 2000, p. 853 et. seq.; M. GNES, *Ravvicinamento delle legislazioni (diritto comunitario), ad vocem*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, Milan, 2006; M.R. SAULLE, *Ravvicinamento delle legislazioni (diritto comunitario)*, in *Enc. dir.*, agg. IV, Milan, 1998, p. 899 et. seq.; P.J. SLOT, *Harmonisation*, in *European Law Review*, 1996, p. 378 et. seq. For a global perspective, see J. WEINER, *Globalization and the harmonization of law*, London-New York, Pinter, 1999.

⁷ There is a vast literature on this subject. Some noteworthy recent works are L. TORCHIA, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo*, Bologna, 2006 (according to the author, mutual recognition does not exhaust the principle of equivalence, but does however represent its main operative instrument (p. 68, note 31, and p. 91-92)); M. GNES, *Mutuo riconoscimento (diritto comunitario), ad vocem*, in *Dizionario diritto pubblico*, cit.; S. NICOLIN, *Il mutuo riconoscimento tra mercato interno e sussidiarietà*, Padova, 2005; G. ROSSOLILLO, *Mutuo riconoscimento e tecniche conflittuali*, Padua, Cedam, 2002; J.H.H. WEILER, *La costituzione del mercato comune*, in J.H.H. WEILER, *La Costituzione dell'Europa*, Bologna, 2003, p. 307 et. seq.; V. HATZOPOULOS, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Athens – Brussels, 1999; A. BERNEL, *Le principe d'équivalence ou de "reconnaissance mutuelle" en droit communautaire*, Zurich, 1995.

⁸ Since the mid-1970's, the Court of Justice has made a fundamental contribution in this direction by introducing the technique of mutual recognition into Community law. The key decisions in this area are the well-known judgments in *Dassonville* (11 July 1974, Case C-8/74) and *Cassis de Dijon* (20 February 1979, Case C-120/78), both in the area of goods. Less well-known, but equally relevant, if for no other reason than that it precedes the more famous *Cassis de Dijon*, is the judgment in *Van Wesemael* (18 January 1979, Case C-110/78), in the area of services. In this judgment, the Court affirmed for the first time the principle that a service provided on the basis of an authorisation granted in one Member State enjoys the freedom of movement, if meeting similar conditions as those required in the destination State and that possible restrictive measures ought therefore to be considered incompatible with Community law.

⁹ EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on services in the internal market*, 25 February 2004, COM(2004) 2 definitive/2, in particular Article 16, concerning the country of origin principle, establishes that "Member

dumping, preferred the more attenuated solution offered by the principle of equivalence, preserving the host State's power to impose national law norms, under certain conditions.¹⁰

The abandonment of the more radical solutions, however, shed light on one of the main problems facing the European Union (like any other supranational organisation with similar ends): the difficulty of balancing between the need to recognise national authorities' right to regulate autonomously throughout their national territory, on the one hand, and the need to limit their power of economic regulation, in order to enable the common market to function on the other. This motivated the search for a way to strike a balance between uniformity and differentiation, or in other words, between harmonisation and equivalence.

In truth, the White Paper from the Commission to the European Council of 1985¹¹ provided a new approach for the regulation of the market, based on a combination of different instruments and techniques, including minimal harmonisation and mutual recognition. The results were not altogether satisfactory, especially in the most important sector of the European economy – the service sector¹² – which is not free from important legal and administrative barriers.

For this reason, the Commission recently set out a new strategy for the market for services,¹³ which refined the application and composition of the two

States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.”

¹⁰ The Commission's original proposal had in fact fed the fear that, in an ever wider (and thus more heterogenous) context, this would create an extraordinary competitive advantage for the States with lower standards of protection, thus forcing the more advanced States to renounce their higher levels of protection. In these regard, see M. PALLINI, *Liberalizzazione dei servizi e rischi (veri e presunti) di dumping sociale nell'Unione europea*, in *Dir. pubbl. comp. eur.*, 2007, p. 379 et. seq.; R. CAFARI PANICO, *La liberalizzazione dei servizi tra regime vigente e la direttiva Bolkestein*, *ivi*, 2006, p. 1880 et. seq.; M. PEDRAZZI, *Potrà l'applicazione della "direttiva Bolkestein" ledere i diritti fondamentali?*, *ivi*, 2006, p. 1894 et. seq.

¹¹ EUROPEAN COMMISSION, *Completing the Internal Market: White Paper from the Commission to the European Council*, Milan, 28-29 June 1985, doc. COM (85) 310.

¹² EUROPEAN COMMISSION, *Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services*, p. 11, asserts that, in the modern economy, services account for 70% of GDP and employment. See also A. VANNINI, *La disciplina europea*, in AA.VV., *Professioni e concorrenza*, Rome, 2005, p. 19, which cites Eurostat data that only in fourteen Member States do the professional services rendered to businesses produce 8% of the income.

¹³ EUROPEAN COMMISSION, *An Internal Market Strategy*, which was followed by the *Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services*, 30 July 2002, COM(2002) 441 def., which shed light on the main problems facing the sector. In particular, it demonstrated that ten years after what was supposed to have been the completion of the common market, there were still important “legal barriers’ arising from national, regional and local regulation the behaviour or administrations” and “the unsatisfactory application of certain EU instruments” (pp. 6, 9).

principles. This approach found its initial concrete application in two important measures: Directive 2005/36/EC of 7 September 2005, in the area of professions, and Directive 2006/123/EC of 12 December 2006, with a broader scope, extending to the internal market for services in general.

This study, proceeding precisely from an analysis of these two Directives, seeks to identify the (new) balance that has been struck between harmonisation and equivalence on the services sector¹⁴, and its impact on national regulations and administrations. The questions posed by this analysis are the following. What concrete forms do these two principles take in the European legal system? What limits do they impose upon domestic regulations and administrations? What are their effects on the system as a whole? More specifically, is there a convergence of national laws? If so, what kind of convergence and with what outcomes? The analysis will therefore focus on the services sector, as it is not only the most important economically, it is also the most interesting legally.

I will first examine the principles of harmonisation and equivalence in relation to the two areas mentioned above; then, on the basis of this analysis, I will look at the effects of these principles on national laws and administrations; finally, I will try to make sense of the results – real and potential – of the convergence of the laws of the Member States.

I will argue that, in the context of the new services strategy, the balance between the two principles of harmonisation and equivalence is struck now more than ever by the application of administrative law doctrines and techniques. Not only do they enable national systems to coexist and converge towards more evolved models, they can be extended and generalised, becoming the basis of a normative body aimed at limiting States in order to serve the proper functioning of the market.

2. The law governing professions

Many professional activities in the Member States are governed by regulations which require the possession of specific qualifications in order to practice them.¹⁵ These particular legal schemes are aimed at ensuring the quality of the services provided on the national territory; these schemes however must not place legal obstacles in the way of the free movement of services. Thus, in order to facilitate the access to professional activities and their exercise within the Community, the Community legislator has acted on

¹⁴ Obviously, the questions at the heart of this examination will be addressed with specific reference to the two Directives. While they do not exhaust the provisions of European law in the area of services, they do however represent a relevant (given also the consistency of the sectors considered) and significant part of the new approach. The considerations that follow are thus drawn not from Community law as a whole, but from the new strategy for services.

¹⁵ For a general framework, see G. DELLA CANANEA, *L'ordinamento delle professioni*, in *Trattato di diritto amministrativo. Diritto amministrativo speciale*, S. CASSESE (ed.), Milan, 2003, p. 1139 et. seq. and C. MORVIDUCCI, *Professioni*, in *Trattato di diritto amministrativo europeo. Parte speciale*, II, M.P. CHITI and G. GRECO (eds.), Milan, 1997, p. 1001 et. seq.

numerous occasions to fix common rules for the recognition of professional qualifications acquired in a different Member State.

In the beginning, it enacted sectoral directives. These directives were addressed to individual professions, and subjected the recognition of diplomas and professional qualifications to a prior harmonisation of the national laws governing professional education and training. But then, given the extreme difficulty of guaranteeing a similar legal mechanism for regulating a decisively more complex and articulated reality, a second phase was launched in which directives were instead focused on general systems for the recognition of diplomas and qualifications.¹⁶

Most recently, this area has been addressed by Directive 2005/36/EC (hereafter, Professions Directive),¹⁷ which consolidates, updates and simplifies as many as fifteen directives adopted between 1977-1999, in order to make the legal regime more uniform, transparent and flexible. The Professions Directive also introduces some important innovations. I will briefly illustrate its contents, beginning with harmonisation measures, which may either be: a) substantive, that is addressed to the content of the laws; b) procedural, meaning concerned with the relationship between the service provider and the administration; c) organisational, more strictly connected with the conformity of the administrative structures. This distinction – as I will argue in what follows – is useful insofar as it allows us to understand the current propensity of Community legislation to pursue procedural and organisational rather than substantive harmonisation in order to facilitate the functioning of the market.

2.1. *Harmonisation*

Looking more closely at the Professions Directive, the substantive harmonisation measures address only a few professions: doctors of medicine, nurses, dentists, veterinarians, midwives, pharmacists and architects. These professions were already addressed by specific directives, and the Professions Directive basically brings them all together in a single instrument.

For each of these professions, the directive sets forth “minimum training conditions,” which have to do with the basic education necessary to access university training, the length of the course of study or the number of hours of theoretical and practical instruction, the basic knowledge and skills to be

¹⁶ For a deeper analysis, see C. MORVIDUCCI, *Professioni*, cit., p. 1013 et. seq. and H. SCHNEIDER, *The Recognition of Diplomas in the European Community*, University of Maastricht, available at <http://www.fdewb.unimaas.nl/eurecom/PDF/Paperschneider.PDF>. For a European and global perspective, see K. NICOLAIDIS, *Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services*, Harvard University, 1997, available at <http://users.ox.ac.uk/%7Essfc0041/managemr.htm>.

¹⁷ For early commentary, see A. MARI, *La nuova direttiva sul riconoscimento delle qualifiche professionali*, in *Giorn. dir. amm.*, 2006, p. 398 et. seq. and R. ROTIGLIANO, *Primo commento alla recente direttiva 2005/36/CE sul riconoscimento delle qualifiche professionali*, in *Serv. pubbl. app.*, 2005, p. 901 et. seq.

acquired, as well as the basic curriculum (except for doctors and architects). The minimum conditions fixed at the European level do not create homogenous solutions at the national level because the Member States can dictate additional and more severe conditions, as well as modulate the indications contained in the Directive in different ways.

Much more consistent and, in certain aspects, more innovative, are the procedural and organisational harmonisation measures (to be understood in the sense indicated above), which address the entire sphere of application of the Directive. On the procedural level, already in the preamble we read that “to ensure the effectiveness of the system for the recognition of professional qualifications, uniform formalities and rules of procedure should be defined for its implementation...”¹⁸ Thus, in case of the right of establishment, the Directive fixes the time limits of the procedure: the competent authority of the host Member State has one month to acknowledge receipt of the application and inform the applicant of any missing documentation and must make a final decision as soon as possible, in any case within three months after the date on which the applicant’s complete file was submitted.¹⁹ The documentation process is also regulated: the competent authority of the Member State can request specific documents and certificates from the applicant or the administration of the Member State of origin, which are required to produce them within two months; in the event of justified doubts, the host Member State may require from the competent authorities of a Member State confirmation of the authenticity of the attestations and evidence of formal qualifications, and in some cases shall be entitled to proceed to direct verification.²⁰ The Directive likewise makes indications for the final decision concluding the procedure: the procedure for examining an application must lead to a duly substantiated decision by the competent authority of the Member State, thus with an express and motivated decision. The Directive also guarantees judicial review: the decision, or failure to reach a decision within the deadline, shall be subject to appeal under national law.²¹ Somewhat similar requirements are made for the provision of services, whenever a prior check of the professional qualifications is necessary: in this case, the procedural time limits are shorter, the documents that can be requested are fewer and once the final deadline passes, an administration that has not yet made a decision is bound nevertheless by tacit consent.²² In substance, the procedure for the examination of the application to exercise a regulated profession has to respect definite time limits, has to follow predetermined criteria, conclude with an express and motivated decision

¹⁸ Whereas 30 and Articles 50 et. seq.

¹⁹ Article 51, paragraphs 1 and 2.

²⁰ Article 50

²¹ Article 51, paragraphs 2 and 3.

²² Article 7, paragraphs 2 and 4.

(except in the case of tacit consent), and be open to judicial challenge in all of the Member States²³.

No less important are the measures for organisational harmonisation, instrumental to the collaboration between different Member States, and between them and the Commission, in order to facilitate the implementation of the Directive and compliance with the obligations arising from it.²⁴ The Directive thus imposes three obligations upon the Member States. The first is to designate the authorities and bodies competent to award or receive evidence of formal qualifications and other documents or information, and those competent to receive applications and take the relevant decisions. The second obligation is to designate a national coordinator for the above-mentioned authorities with the job of promoting the uniform application of the Directive and collecting all of the information useful for its application, such as on the conditions for access to regulated professions in the Member States. The third obligation is to designate a contact point, responsible for providing the citizens and contact points of the other Member States with such information as is necessary concerning the recognition of professional qualifications, such as information on the national legislation governing the professions and to assist citizens in realising the rights conferred on them by the Directive, in cooperation, where appropriate, with the other contact points and the competent authorities in the host Member State. Under all three of these obligations, the Member States must immediately inform the other Member States and the Commission of the measures taken in their fulfilment²⁵ and the competent authorities are obliged to work in close collaboration and shall provide mutual assistance in order to facilitate application of the Directive.²⁶ In this way, a common and transparent organisational structure must take root in each Member State, which is then horizontally linked to the similar structures in other Member States, and vertically connected to the Commission, thus enabling institutions and individuals to easily identify the responsible administration and access the information necessary for pursuing the recognition of professional qualifications.

Considering therefore that, in the face of some 800 professions regulated in the Member States, only ten are addressed by substantive, minimal harmonisation norms and that even in this area margins of discretion are left to the States, it cannot be said that, in the professions sector, legal convergence is realised through this technique of substantive harmonisation. Of much wider scope are the results obtained by procedural and organisational harmonisation measures which, importing doctrines of administrative law, can be applied transversally to all of the professions addressed by the Professions Directive.

²³ See G. FONDERICO, *I principi comunitari di buona amministrazione dei servizi nazionali*, in this volume.

²⁴ Whereas 31.

²⁵ Articles 56, paragraphs 3-4, and 57.

²⁶ Articles 8, 56, paragraph 1.

2.2. Equivalence

Regarding equivalence, Directive 2005/36/EC, after establishing that the recognition of professional qualifications allows the beneficiary from one Member State to gain access to the same profession and to pursue it in the host Member State under the same conditions as its nationals,²⁷ goes on to address operative procedures, which differ according to whether the free provision of services or the right of establishment is at issue.²⁸

In the case of the free provision of services, mutual recognition is supposed, in principle, to be automatic, and in exceptional cases conditional upon prior verification. Regarding the automatic procedure, the Directive establishes that the Member States cannot restrict, for any reason relating to professional qualifications, the free provision of services in another Member State if the service provider is legally established in a Member State for the purpose of pursuing the same profession there.²⁹ In that case, the host Member State shall exempt service providers established in another Member State from the requirements which it places on professionals established in its territory relating to authorisation, registration or membership in a professional organisation.³⁰ Member States may however require an advance declaration from a service provider who first moves from one Member State to another and the annual renewal of such declaration, potentially accompanied by a certain number of documents.³¹ Once these requirements have been met, the professional is free to provide his service. The procedure for prior check of the provider's professional qualifications, by contrast, can be used only for those regulated professions having repercussions on public security or public health.³² Whenever the verification reveals a substantial difference between the professional qualifications of the service provider and the training required in the host Member State, to the extent that that difference is such as to be harmful

²⁷ Article 4.

²⁸ D. FISICHELLA, *Il principio di mutuo riconoscimento e la libera circolazione delle professioni*, in *Dir. UE*, 1999, p. 51 et. seq; L. LEZZI, *Principio di equivalenza, mutuo riconoscimento e libertà di circolazione delle professioni nell'Unione Europea*, in *Dir. comuni. scambi intern.*, 2003, p. 383 et. seq.

²⁹ Article 5.

³⁰ To facilitate the application of the disciplinary code in force in the host State, the automatic temporary registration with the relevant professional organisations may be required.

³¹ Article 7, paragraphs 1 and 2. The service shall be provided under the professional title of the Member State of establishment or, in the case of an unregulated profession, under the provider's academic title. (art. 7, co. 3). The formal weight of the title thus becomes the visible measure of the provider's different origins, in order to protect the service recipient. In cases where the qualifications have been verified, the service shall be provided under the same professional title as in the host Member State (Article 7, paragraph 4).

³² Article 7, paragraph 4. Such a prior check - the Directive specifies - shall be possible only where the purpose of the check is to avoid serious damage to the health or safety of the service recipient and where this does not go beyond what is necessary for that purpose.

to public health or safety, the host Member State shall give the service provider the opportunity to demonstrate his qualifications, in particular by means of an aptitude test. The host State thus has the duty to evaluate the equivalence of the provider's training with that required domestically and, when there are substantial differences, to offer the possibility of overcoming them following procedures defined by Community law.³³

The law relating to the right of establishment is more complex. In this case, in contrast to the free provision of services, recognition in principle requires a prior check, while the automatic mechanism applies only in limited cases³⁴. Therefore, the general regime is based on the principle of mutual recognition, without prejudice to the application of compensation measures, in case of substantial differences between the training acquired by the provider in the Member State of origin and that required by the host Member State. These compensation measures can consist in an adaptation period or an aptitude test. The choice generally falls to the service provider. There can be derogations from this right to choose, but they may not be freely introduced. The host State must give prior notice to the Commission, which has three months to ask the State not to adopt them because they would be inappropriate or inconsistent with Community law. In any case, the possibility of providing for compensation measures is subjected to the principle of proportionality, for which the host State, whenever it intends to require an adaptation period or an aptitude test, must always conduct a prior check on whether the knowledge acquired by the applicant in the course of his professional experience can make up for the substantial difference with respect to the training required to practice on its territory.³⁵

³³ Article 7, paragraph 4.

³⁴ More particularly, the Directive sets forth three mechanisms for recognition: a) recognition on the basis of the coordination of the minimum training conditions; b) recognition of professional experience; c) the general regime for the recognition of educational titles (hereafter, "general regime"). The first functions automatically and applies only to the professions for which "minimum training conditions" have been fixed (Article 21 et. seq.). The second, which also follows automatic procedures, regards a number of professions which have to do with industrial, commercial and artisan activities and is based on the experience obtained in the country of origin (Article 16 et. seq.) The third, finally, requires the completions of a prior check and functions as a default, in the sense that it applies to all the professions not covered by the other two mechanisms or applies to the covered professions when the applicant, for a specific and exceptional reason, does not satisfy the conditions provided for them. In any event, an individual application for recognition must be presented to the competent authority of the host Member State. Thus, even in the first two cases, there will be a procedure that is defined as automatic, for the simple reason that it implies an activity of mere recognition of the conditions fixed in the Directive rather than a genuine evaluation as is required by the general regime, where the conditions are not predefined.

³⁵ Article 14. This solution is in line with the principles affirmed in the case-law. In the abovementioned *Vlassopoulou* judgment (ECJ, Case C-340/89, cit.) regarding the legal profession, the Court held that "a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other

The system for the recognition of professional qualifications thus involves national administrations, and particularly those of the host State, in the observance of a number of obligations which correspond to just as many rights in the possession of the applicant. First of all, the administration of the host Member State is obliged to evaluate the correspondence of the applicant's actual professional qualifications with those required by national or Community law. Secondly, where there is an incomplete equivalence between the prerequisites actually fulfilled and those required, the administration cannot simply deny recognition, but must enable the applicant to overcome the gaps by means of one of the two indicated measures, the adaptation period or the aptitude test. Thirdly, the administration's ability to evaluate is limited and oriented by the secondary legislation: thus, for example, some derogation decisions can be assumed only with the Commission's authorisation. In substance, the conditions for exercising the right are checked by the administration in the destination country, but according to rules of European law aimed at preserving as much as possible the effects of country of origin's law.

3. *The law contained in the "Services Directive"*

The Services Directive represents the second, and most important, normative instrument created by Community law to realise the new strategy for the internal market for services. The legislative process was marked by heated political and social debate, which tangibly affected its outcome.³⁶

However altered with respect to the original proposal, Directive 2006/123/EC (hereafter, "Services Directive") did not lose its relevance. It was born from the need to overcome the many legal obstacles to the effective exercise of the free movement of services, which the Commission found to lie especially in excessively burdensome administrative procedures, the legal uncertainty of administrative norms and practices and in the lack of mutual trust

evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules" (p. 16).

³⁶ The Commission's initial proposal for the free provision of services established the principle of country of origin, which subjected service providers exclusively to the national rules of their Member State of origin. The debate that followed was fed by the fear that the widespread adoption of the proposal's country of origin principle would have favoured service providers from Member States with lower levels of social protection, and lead providers from other Member States to establish themselves there in order to enjoy greater competitiveness, creating a general lowering of standards of protection. The initial proposal was ultimately amended to enable the Member States to enforce their national laws, subject to certain conditions. This is described by A. HEIMLER, *La direttiva Bolkestein*, in *MCR*, 2006, p. 95 et. seq. and A. La Spina, *Competizione e conflitto tra norme nella prospettiva sociologo-giurista*, in A. Plaia (ed.), *La competizione tra ordinamenti giuridici. Mutuo riconoscimento e scelta della norma più favorevole nello spazio giuridico europeo*, Milan, 2007, p. 157 et. seq.

between the Member States.³⁷ For this reason, the Services Directive establishes a general legal framework applicable to all services,³⁸ with the exception of those expressly excluded³⁹ and leaves room for the specific measures contained in other Community instruments.⁴⁰ Notwithstanding these limitations, the Directive has a wide scope and presents many interesting features regarding the principles of harmonisation and equivalence, which have a strong impact on the administrations of the Member States.

3.1. *Harmonisation*

While the substantive harmonisation measures are minimal in the Professions Directive, merely confirming the provisions already made in prior directives with respect to specific professions, such measures are even more modest in the Services Directive. What measures there are basically have the scope of guaranteeing an equivalent protection of the general interest on essential issues, like consumer protection, particularly in regard to the provider's duties to furnish information,⁴¹ professional liability insurance,⁴² multidisciplinary activities,⁴³ the exchange of information on the quality of the services⁴⁴ and the settlement of disputes.⁴⁵ In truth, the Directive foreshadows later harmonisation initiatives by the Commission,⁴⁶ probably for the purpose of limiting them to what is strictly necessary for the functioning of the market, and a vast programme for the convergence of national laws, to be realised mainly through a mutual evaluation system involving both Member States and the Commission, which has a function of initiative and orientation.⁴⁷ It remains

³⁷ Services Directive, whereas 3.

³⁸ Article 1.

³⁹ Articles 2 and 17.

⁴⁰ Article 3. Including Directive 2005/36/EC.

⁴¹ Article 22.

⁴² Article 23.

⁴³ Article 25.

⁴⁴ Article 26.

⁴⁵ Article 27.

⁴⁶ Article 16, paragraph 4.

⁴⁷ The whole Chapter VII of the Directive is dedicated to the convergence programme, which sets forth three instruments: codes of conduct at the Community level, additional harmonisation in specific areas and mutual evaluation. Mutual evaluation is to be achieved in the following way: each Member State shall present a detailed report to the Commission on the requirements restricting access to or exercise of service provision, justifying their conformity with Community law; then the Commission transmits the reports to all of the Member States and consults the interested parties; then the Member States, within six months of receiving these reports present their observations on each report and the Commission transmits the reports and relative observations to the appropriate comitology committee, which can in turn make its own observations; finally, the Commission presents a summary report to the European Parliament and to the Council, accompanied where appropriate by proposals for additional initiatives. The Commission must moreover provide on an annual basis analyses and observations on the application of national provisions restricting access to or exercise of the provision of services.

the case however that effective implementation is remanded to future (possible) proposals by the Commission, and that the measures of substantial harmonisation are wholly marginal in the short term.⁴⁸

The limited scope of the substantive harmonisation measures stands in stark contrast – even more so than in the Professions Directive – to the wide scope of the procedural and organisational harmonisation measures. With respect to procedural harmonisation, the Directive first of all dictates general norms for administrative simplification: the Member States are obliged to simplify procedures, to adopt the forms harmonised by the Commission, to accept the documents issued by another Member State,⁴⁹ as well as to enable all of the formalities to be completed at a single contact point,⁵⁰ also by electronic means, according to the rules for implementation set forth by the Commission.⁵¹ With reference to the exercise of freedom of establishment, the Directive sets forth principles and procedures for authorisation: the procedures and formalities must be clear and made public in advance; applications must be treated in an objective and impartial manner, according to predetermined criteria and, in the case of numerical quotas, through a process of selection; the time limit for a response must be reasonable, pre-established and made public; failing a response within the time period set, authorisation shall be deemed to have been granted, unless a different regime is justified by overriding reasons relating to the public interest; decisions to deny authorisation must be duly motivated;⁵² finally, all applications for authorisation shall be acknowledged (a kind of recognition that the proceeding has been initiated), with a communication indicating the time period, means of redress and, where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted.⁵³ Compared to the Professions Directive, the Services Directive does not contain detailed provisions, like the time limit for the end of the procedure, which it leaves instead to the determination of the Member States. It is however certainly more complete, and it is not difficult to compare its contents to the most evolved national laws governing administrative procedures.⁵⁴

⁴⁸ This aspect is criticised by G. AMATO, *L'errore Bolkestein. Armonizzare stanca*, in *Sole24ore*, 19 February 2006, p. 1.

⁴⁹ Article 5.

⁵⁰ Article 6.

⁵¹ Article 8.

⁵² In truth, the Directive does not expressly provide for this duty to motivate, which can however be implied by the duty to motivate the decision to extend the time period for the conclusion of the procedure: if the *ratio* is to protect the citizen in the face of a prejudicial decision in the course of the proceeding, it is all the more important to motivate the final decision to refuse authorisation as well.

⁵³ Article 13.

⁵⁴ See A. SANDULLI, *Il procedimento amministrativo*, in S. CASSESE (ed.), *Trattato di diritto amministrativo. Diritto amministrativo generale*, Milan, 2003, p. 1048 et. seq. With reference to European law, see S. CASSESE and F. BIGNAMI (eds.), *Il procedimento amministrativo nel*

The measures for organisational harmonisation are quite incisive as well. The Directive requires the Member States to set up points of single contact to which service providers can turn to obtain all of the information needed for navigating the system of the host Member State and completing the procedures and formalities useful for accessing and exercising their activities.⁵⁵ These points of single contact are destined to play an important role in assisting service providers, functioning as both an authority directly competent to issue the documents necessary for accessing a service activity, and as an intermediary between the service provider and the directly competent authorities. The points of single contact thus represent a form of organisational simplification: while they do not affect the separation of functions and competences between authorities within national systems, they are extremely useful in ensuring services providers with a single office to which they may turn. Moreover, every Member State is obliged to designate liaison points which, cooperating with analogous bodies in other Member States, guarantee administrative assistance, especially in carrying out checks.⁵⁶ Member States shall communicate the contact details of the liaison points to the other Member States and the Commission, which shall publish and regularly update the list of them. This establishes a functionally connected network of national administrative authorities, which work to ensure the correct application of Community law.

The characteristics highlighted with reference to the Professions Directive are thus even more accentuated in the Services Directive. The substantive harmonisation measures are barely relevant, while measures for procedural and organisational harmonisation assume an important dimension, revealing a clear propensity to utilize doctrines and techniques drawn from administrative law.

3.2. *Equivalence*

The final version of the Services Directive does away with the country of origin principle found in the original proposal, which would have implied the service provider's subjection only to the laws of the Member State of origin. The final Directive, by contrast, establishes a number of principles and rules for national authorisation schemes, based on mutual recognition, and including some stringent limits upon the States.

With reference to the freedom to provide services, the Directive first establishes that the Member States shall not condition access to a service activity or its free exercise upon requirements which do not respect the principles of non-discrimination, proportionality and necessity, or do not pass the so-called test of proportionality.⁵⁷ The Directive moreover specifies that the

diritto europeo, Milan, 2004, in particular, the contribution of C. FRANCHINI, *I principi applicabili ai procedimenti amministrativi europei*, p. 281 et. seq.

⁵⁵ Articles 6 and 7.

⁵⁶ Article 28.

⁵⁷ On this, see S. MORETTINI, *Community principles affecting the exercise of discretionary power by national authorities in the service sector*, in this volume.

necessity of national requirements cannot be justified by just any imperative need of a general interest, but only by particular reasons of public policy, public security, public health or protection of the environment.⁵⁸ This system can be derogated from only under exceptional circumstances and on a case-by-case basis, in order to ensure the safety of the services.⁵⁹ In this case however, the State must follow a particular procedure, called mutual assistance, which requires the Member State to verify the readiness of the Member State of establishment to adopt an analogous measure and eventually submit the question to the Commission.⁶⁰ In substance, the national authority's decision is subjected to a procedure that involves another Member State on the one hand, and is subjected to second-degree check by the Commission on the other, in order to prevent and eventually punish abuse of the interested Member State.

Relating to the right of establishment, the Directive provides that the Member States may condition access to a service and its exercise upon an authorisation scheme only if it passes the test of proportionality.⁶¹ It then provides a series of precise dispositions that limit the exercise of administrative power in the face of such authorisation schemes. Thus, national administrations are required to predetermine the conditions for granting authorisation, ensuring that they do not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to those which the provider is already subject to in another Member State.⁶²

The Services Directive, moreover, in order to guarantee a high level of mutual trust between Member States (which Community law regards as indispensable for the realisation of the free movement of services), strengthens the administrative cooperation between national authorities, especially in the area of checks. First of all, it obliges Member States to give mutual assistance and to establish forms of efficient cooperation in order to ensure control over the providers and the services offered: to this end, national administrations must furnish information and carry out checks, inspections and investigations upon the request of the host Member State, as well as designate one or more liaison points for handling such requests.⁶³ Secondly, the Directive sets out a clear subdivision of oversight responsibilities: the Member State of establishment is responsible for checking a provider established on its territory and, upon the

⁵⁸ Article 16.

⁵⁹ Article 18.

⁶⁰ Article 35. Specifically, the interested Member State must ask the State of establishment to take measures appropriate to ensure a particular level of protection; thus, the State of establishment must act to communicate to the requesting State the measures taken or foreseen or the reasons why it has not taken any measures; then, after the interested State has notified the Commission and the Member State of establishment and the time limit of fifteen days has expired, it may adopt measures of its own, duly stating its reasons; finally, the Commission shall examine the compatibility of the measures taken with Community law and if necessary, ask the Member State to refrain from taking the proposed measures.

⁶¹ Article 9.

⁶² Article 10, paragraph 3

⁶³ Article 28.

request of the host State, must furnish information, carry out checks and adopt measures necessary in relation to the provider;⁶⁴ the host Member State is instead responsible for supervising the observance of the specific measures in force on its territory and, on request of the Member State of establishment or, in exceptional circumstances, on its own initiative, supply information, carry out checks and eventually adopt appropriate measures.⁶⁵ In this way, each Member State must guarantee the conformity of its own rules and give assistance to the other so that it may effectively exercise its own supervision, without useless duplications⁶⁶.

To conclude, the Services Directive does not exclude, but rather presupposes, that there are different legal regimes in the European legal order and that the free movement of services, and the right of establishment even more so, are thus subjected to administrative procedures aimed at ascertaining the equivalence between national legal requirements. It requires however that the initial checks and later controls not be duplicates of what the service provider is already subjected to in the State of establishment. This affects the division of competences between the Member States and the development of intense forms of administrative collaboration.

4. The relationship between the two principles and administrative cooperation

The examination of the two specific Directives in terms harmonisation and equivalence sheds light on the particular form that these two principles tend to assume in the new strategy for the internal market for services.

The first consideration that can be drawn from this is that the two principles operate in tandem, combining themselves in a relationship in which harmonisation operates in function of equivalence. The principle of equivalence is immanent in Community law. Based in Articles 43 and 49 of the EC Treaty, which prohibit state restrictions on citizens of other Member States exercising their rights of free establishment and the free provision of services. Community jurisprudence has long recognised their direct effect while extending their scope, so much so that the principle is now consolidated according to which the two freedoms imply “not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction [...] when it is liable to prohibit or otherwise impede the

⁶⁴ Article 29.

⁶⁵ Article 31.

⁶⁶ This is clearly a very different solution from the one initially proposed by the Commission: the proposal assigned all responsibility to the State of establishment; the Directive, by contrast, establishes a more complex mechanism which creates a relationship between the interested administrations, which carry out each others' functions in an integrated way.

activities of a provider of services established in another Member State where he lawfully provides similar services.”⁶⁷

Despite this, experience has shown that the elimination of numerous legal obstacles, necessary to the effective exercise of the above-mentioned freedoms, requires a “prior coordination of national legal schemes, including the setting up of administrative cooperation.”⁶⁸ Thus, the two Directives embody the principle of equivalence, bringing together and organising rules already emerging in other Community legislation and case-law and pursuing the principle of harmonisation through specific measures and the announcement of others that will follow according to an approach that is both dynamic and limited to what is strictly necessary. This demonstrates the secondary relationship that connects harmonisation to equivalence: the first operates within the limits in which it is necessary to enable the second to function better.

The second observation deriving from this analysis of the secondary legislation is that the combination between the two principles takes place mainly at the administrative level, according to doctrines and techniques drawn originally from administrative law. In the Directives under examination, the equivalence that is established between the norms of the Member State of origin and the host Member State is always presumed.⁶⁹ The host Member State must take account of the titles, authorisations and checks to which the provider is subject in the Member State of origin, and is eventually responsible for demonstrating that there are substantial differences such as to justify further measures. The principle of equivalence thus establishes a relationship between the provider, who has the right to certain protections under European law, and the administration, which must respect the conditions imposed by both national and European law.

Because equivalence implies an “administrative-like” action, and because harmonisation serves the function of equivalence, harmonisation measures are essentially procedural and organisational, rather than substantive in nature.⁷⁰ Procedural harmonisation measures (sometimes detailed, as in the case of the Professions Directive, and sometimes less comprehensive, as in the case of the Services Directive) govern precisely the relationship between the provider and the administration of the host Member State and, eventually, between this administration and the administration of the State of origin. These measures thus recall important administrative law doctrines of protection, like the prior definition of procedural time limits, the pre-determination of evaluation criteria,

⁶⁷ ECJ, 25 July 1991, Case C-76/90, *Sager*, paragraph 12, for the provision of services, and ECJ, 7 May 1991, Cause C-340/89, *Vlassopoulou*, for the right of establishment. See also ECJ, 18 January 1979, Case C-110/78, which manifests one of the first extensive interpretations of the EC Treaty dispositions.

⁶⁸ In this sense, whereas 6 of the Services Directive.

⁶⁹ According to the analysis of L. TORCHIA, *Il governo delle differenze*, cit., p. 21 et. seq. which distinguishes three types of equivalence: predetermined, presumed and prefigured.

⁷⁰ In this regard, see G. DELLA CANANEA, *L'Unione europea. Un ordinamento composito*, Bari, 2003, *passim*.

communication of receipt of the application, motivation of unfavourable final and intermediate decisions and the judicial review of the administrative decisions. They include simplification doctrines, like implied consent, applied in a general way in the case of the freedom to provide services.

The organisational harmonisation measures are also aimed at facilitating the exercise of free movement by regulating the relationship between the provider and the administration. Thus the law requires that the competent administration be determined. From the supranational perspective, this recalls the doctrine of the unity of the organisation responsible for the proceeding. It makes use of the points of single contact (where interested parties may go to acquire information and complete the necessary formalities), which is one of the most important institutions of organisational simplification; it calls for the creation of a network to connect national administrations with each other, in order to facilitate the circulation of information and the carrying out of checks.⁷¹

This last point sheds light on another interesting perspective, which is that of administrative cooperation. The check of national conditions and the judgment of equivalence between the laws of one or more Member States is strongly conditioned upon the mutual trust of the national administrations, and thus upon their ability to effectively perform the checking functions assigned to them. For this reason, these laws establish ever more intense forms of cooperation, which require the national administrations to work together, in order not to duplicate their respective activities⁷². It is in the application phase that most of the contacts between the different administrations are established. These practices generate a great flow of information, favouring the circulation of models and (thanks mainly to the role of the Commission in collecting all of this information) and the adoption of common ones.

In conclusion, in the context of the new strategy for the internal market for services, the principles of harmonisation and equivalence work together, by means of doctrines and institutions drawn from administrative law. The principle of harmonisation however operates in an instrumental way with respect to the principle of equivalence: thus it focuses on procedural and organisational elements, enabling the principle of equivalency to have greater effect.

⁷¹ As S. CASSESE points out in *L'influenza del diritto amministrativo comunitario sui diritti amministrativi nazionali*, in *Riv. it. dir. pubbl. comunit.*, 1993, p. 330, "European administrative law, however indifferent in principle to States' internal organisation, conditions it all the same. It produces in some cases a singular effect: some national administrative bodies, though established by national laws, are relevant from the point of view of Community law because it actually requires their institution or regulates their structure or conditions their existence or organisation in some other way"; by the same author, see also *La signoria comunitaria sul diritto amministrativo*, in *Riv. trim. dir. pubbl. comunit.*, 2002, p. 291 et seq. More specifically on the organisational perspective, see C. FRANCHINI, *Il diritto amministrativo italiano e l'influenza comunitaria: l'organizzazione*, in *Riv. it. dir. pubbl. comunit.*, 2004, p. 1179.

⁷² In this regard, see E. CHITI and C. FRANCHINI, *L'integrazione amministrativa europea*, Bologna, 2003, *passim*.

5. *Limits to the Member States' right to regulate*

The principles of harmonisation and equivalence, as embodied in the new strategy for services, place stringent limits on the Member States' right to regulate. To illustrate the scope of these limits, I will separately examine the limits place upon the legislative power and the limits upon the administrative power, which can be further broken down into external and internal limits, according to whether they affect the scope of the power or the modalities of its exercise.⁷³

Harmonisation functions as an external limit to the scope of national legislative power, in the sense that it pre-empts or reduces the field of domestic regulation: pre-emption is seen when the Community norm is sufficiently precise and directly applicable; reduction (which is much more frequent) is seen when the Community norm leaves some margin of discretion to the national legislator in implementing Community law. In both cases, the Member State – due to the well-known principles of supremacy and direct effect – is obliged to conform to the harmonisation norms in all of their aspects, substantive, procedural and organisational. Equivalence, in its part, functions as an external limit, in the sense that it redefines the scope of application of the national norms: mutual recognition and the control of the country of origin prohibit the host State from applying national rules to providers operating in a regime of free provision of services or the right of establishment,⁷⁴ and require them to consider the distinction between free provision of services and right of establishment, providing different and certainly less onerous conditions for the first case, which would not be possible in the second.⁷⁵ The Member States preserve the ability to introduce specific and even potentially derogatory norms, but their legitimacy depends on the existence of imperative needs of a general interest (which are often pre-determined by the harmonisation norms themselves), and their passing the proportionality test. The effect of external limits on the scope of the national legislative power is thus evident: in some cases its exercise is pre-empted or reduced; in others, its content is conditioned by a series of prohibitions and obligations, most important of which are the prohibition of discriminatory or restrictive measures and the duty to conform to Community prescriptions.

⁷³ According to the analytical scheme followed by L. TORCHIA, *Il governo delle differenze*, p. 96 et. seq. and p. 123 et. seq. As the author argues, the distinction “does not have a general formal value in the European legal system, which uses a system of sources only partially hierarchised and a very reduced administrative system, but it is relevant for national legal systems, and the Italian one in particular, where the power to make the rules and the power to implement them are strongly differentiated” (p. 93).

⁷⁴ ECJ, 8 June 2000, *Commission v. Italy*, Case C-264/99, paragraphs 12-13; 10 July 1991, *Commission v. France*, Case C-249/89, paragraph 26; 17 December 1981, *Webb*, Case 279/80, paragraph 16.

⁷⁵ ECJ, 15 March 2001, *Mazzoleni*, C-165/98, paragraph 23.

Turning now to internal limits, the national legislative power is subjected to a series of conditions aimed at ensuring its compatibility with Community law. This is seen where the legislative power is exercised to further imperative needs of a general interest. At the least, the principle of equivalence imposes a burden of proof upon the Member States, requiring it to demonstrate the necessity and proportionality of the law. Harmonisation thus enriches the contents of national laws while proceduralising their forms; generally, the Member State is obliged to state the reasons for its legislation, to give notice to the Commission and, possibly, to the other Member States as well, to take their observations into consideration and to respect the final decision of the Community body.⁷⁶ Moreover, we may observe that the Community secondary legislation obliges Member States to share information about their respective national laws and entrusts the Commission with a general power of policy orientation, which the States must then take into account. In this case, the norm aims not only to ensure the consistency of national law with Community law, but also to promote their coordination. The exercise of the national legislative power is thus conditioned upon many internal limitations, which can be reduced to three basic types: the burdens of proving necessity and proportionality, the duty to give notice and the duty to share information relative to national measures potentially creating barriers to the freedom of movement.

The limits upon domestic regulation are even more incisive at the strictly administrative level. Looking at external limits, the principle of equivalence prohibits first of all the duplication of procedures already required in the Member State of origin. Mutual recognition and the control on the country of origin require the administration of the host Member State to not repeat procedures that can be substantively (though certainly not formally, given that the national laws can be different) assimilated to those carried out by the administration of the Member State of origin. With the mechanism of the control of the country of origin, it is not only the normative measure that penetrates into the destination Member State, but also the administrative activity of the State from which the service provider comes, since the former cannot duplicate the work of the latter. This leads to the second external limit (implicit in equivalence, but developed and reinforced by harmonisation

⁷⁶ The Member States' choices are in any case subject to review by the Community court. The court, in fact, has affirmed its own competence in setting the points of reference and interpreting derogations. This means that the derogations established by national laws and customs must conform to the parameters set by Community law or judicial interpretation and, above all, by the European Commission. Thus, by effect of the principle of supremacy, the domestic conception of imperative reasons of a general interest must give way to the Community conception, which is determined by the Community bodies on the basis of the Community interest, discrimination, proportionality and necessity. The Member States and their administrations must, therefore, respect the orientations set forth at the Community level, even where they enjoy a greater room to manoeuvre. In this regard, see S. Nicolin, *Il mutuo riconoscimento*, cit., p. 152 et. seq.

measures), which is the duty of administrative cooperation.⁷⁷ The administrations, in addition to having to take the decisions and activities of other Member States' administrations into account, must also exchange information useful to fulfilling their respective responsibilities. In dealing with duly motivated requests, they are obliged to carry out checks, inspections and investigations and, in case of difficulty, to notify the requesting administration in order to find a shared solution. There are therefore basically two external limits upon administrations: the prohibition of duplication and the duty of administrative cooperation, which requires different national administrations to help each other in an integrated way.

Looking at internal limits we see the following substantive fact: administrations have the duty to provide equal treatment, which thus subjects every decision to the principles of proportionality and transparency. Even in this case, national measures potentially restrictive of the freedom of movement are subjected to a review procedure, which is carried out by notice to the Commission or by means of a more complex system which requires the national administration to enter into dialogue with the administration of the Member State of origin in search of the best solution or, in case of disagreement, to satisfy the scrutiny of Commission. Even more important is this procedural fact: administrations' conduct is coordinated by harmonisation norms either in the sense of enabling the automatic exercise of the service (as is supposed to happen for the free provision of services) or in the sense of following specific procedural requirements. Thus the administration is obliged to define its evaluation criteria in advance, consider the steps already taken by the applicant, respond within certain time periods, state reasons for its decisions (in order to enable judicial review). The organisational dimension is also relevant: European law – as we have seen – requires administrative conformity, setting forth structures and relations with other offices, in order to facilitate administrative cooperation. The functioning of the system is moreover the focus of an intense monitoring activity: the Member States are obliged to send the Commission periodic reports of their implementation measures;⁷⁸ the Commission may, in turn, at any moment ask the national points of single contact for reports on the outcomes in assisting citizens and must prepare a general report on the state of implementation of the Community law within a certain deadline. These provisions are of no small account because they represent one of the most advanced forms of administrative control, which is

⁷⁷ On this subject, see S. CASSESE, *Gli Stati nella rete internazionale dei poteri pubblici*, in *Riv. trim. dir. pubbl.*, 1999, p. 321 et. seq., now also in Id., *La crisi dello Stato*, cit. p. 54 et. seq. and S. CASSESE, *International Organizations and National Administrations*, Kluwer Law and Taxation Publishers, International Institute of Administrative Sciences, 1983, p. 163 et. seq.

⁷⁸ The report, beyond general comments, includes statistics on the decisions taken and a description of the main problems arising from the implementation of the Directive.

based on gathering, elaborating and circulating information,⁷⁹ making it possible to raise and overcome possible criticism and, in the final analysis, enabling the uniform application of the Community law.

In substance, harmonisation and equivalence place stringent limits on the Member States' right to regulate, both at the substantive rule-making level as well as at the strictly administrative (procedural, organisational) level. These limits obviously function in different ways, but there is a fact that seems common to all of them: the use of traditional administrative law doctrines and institutions. The limit requires national administrations and legislatures – in their relationship with citizens and the administrations of other Member States – to give an account for their action, motivating their decisions and submitting them to the judgment of an external body (mainly the Commission), which provides vigilant oversight and initiative for the correct functioning of the market.

6. *Towards a convergence of national laws?*

If the Community principles of harmonisation and equivalence (as defined and realised in the two Directives under examination) have such a strong impact on the Member States (and in particular on their administrations), it is clear that their functioning cannot help but create some homogenisation of national laws.⁸⁰ This phenomenon is in fact the result of the connections that the two principles forge between different national legal systems: harmonisation opens up national systems vertically, establishing relationships between bodies operating at different levels of government in drafting and implementing the norms; equivalence opens up national systems horizontally, establishing multilateral relationships between the norms and administrations of different Member States.⁸¹ Thus the real problem is not so much to ascertain whether there is some form of convergence, as to identify what kind it is, and what its consequences are.⁸²

⁷⁹ G. D'AURIA, *I controlli*, in *Trattato di diritto amministrativo. Diritto amministrativo generale*, cit., p. 1393, which specifically discusses control through awareness and control through information.

⁸⁰ See G. FALCON (ed.), *Il diritto amministrativo dei paesi europei tra omogeneità e diversità culturali*, Cedam, 2005, in particular the contributions by J.-B. AUBY, *I diritti amministrativi dell'Europa: un convergenza verso principi comuni?*, p. 363 et. seq.; M.P. CHITI, *Il diritto amministrativo dell'integrazione*, p. 375 et. seq.; E. FERRARI, *Per l'armonizzazione dei diritti amministrativi europei*, p. 383 et. seq. See also G. DELLA CANANEA, *I fattori sovranazionali e internazionali di convergenza e di integrazione*, in G. NAPOLITANO (ed.), *Diritto amministrativo comparato*, Milan, 2007, p. 325 et. seq.

⁸¹ S. CASSESE, *Le basi costituzionali*, in *Trattato di diritto amministrativo. Diritto amministrativo generale*, cit., p. 183 et. seq; Id., *Diritto amministrativo comunitario e diritti amministrativi nazionali*, in *Trattato di diritto amministrativo europeo*, cit., p. 9 et. seq.; Id., *L'influenza del diritto amministrativo comunitario*, cit., p. 329 et. seq.

⁸² As L. TORCHIA argues in *Il governo delle differenze*, cit., p. 129, "the principle of equivalence functions as a tool of integration, but not of homogenisation and it has a strong

From this perspective, a first form of convergence is that directly “imposed” by harmonisation measures, whose effect is to pre-empt or reduce the scope of domestic regulation in favour of Community regulation. These measures – as we have seen – are focused on the procedural and organisational aspects of national regulation, above all on these aspects in relation to the administrative sphere, in order to facilitate the functioning of equivalence; these measures addressed the substantive aspects of regulation only marginally, mainly repeating and capturing general principles, such as the fundamental principles of non-discrimination and restrictive measures.

A second form of convergence is “induced” by the principle of equivalence, which preserves the differences between national regulations, but conditions the scope of their application, enabling the law and administration of one Member State to penetrate the territory of another Member State. Also in this case, the convergence is basically realised at the level of procedure and organisation: equivalence in fact requires all administrations to evaluate the correspondence of national regulations, to respond to the applications of interested actors and cooperate with the administrations of other Member States, while, by definition, it does not affect the substantive law.

The combined force of the two principles, as embodied in the new strategy for services, thus creates a strong regulatory and administrative integration,⁸³ which facilitates the exercise of the free movement of services. Substantive regulation, by contrast, still remains very distant given that neither harmonisation nor equivalence affects Member States’ legal regimes.

The preservation of strong differences at the substantive level – especially in a Community system that by now includes as many as twenty-seven national legal systems – together with the functioning of the principle of equivalence, which – as we have seen – is immanent in the European legal system, highlights one of the most interesting and at the same time most problematic current issues: the competition between legal systems.⁸⁴ As Mr. Cassese has recently

influence on both national administrations and producers, creating convergence. The discussion naturally remains open as to the degree and quality of this convergence, it being clear that a legal regime based on the presumption of equivalence can present margins of uncertainty as to the rule effectively applicable in the concrete case”. In more general terms, see S. CASSESE, *Il problema della convergenza dei diritti amministrativi: verso un modello amministrativo europeo?*, in *Riv. trim. dir. e proc. civ.*, 1992, p. 472 et. seq.

⁸³ In this view, compare the different arguments put forward by L. TORCHIA, *Il governo delle differenze*, cit., p.171 et. seq., discussing “integration”, S. CASSESE, *La signoria comunitaria sul diritto amministrativo*, cit., 295 et. seq., which, while referring to integration introduces the idea of “signoria” (majesty), J. SCHWARZE, *The convergence of the administrative laws of the EU member states*, *European Public Law*, 1998, p. 191 et. seq., which employs the very concept of “convergence,” R. CARANTA, *La “comunitarizzazione” del diritto amministrativo: il caso della tutela dell’affidamento*, in *Riv. it. dir. pubbl. comunit.*, 1996, p. 439 et. seq., which uses the idea of “Communitisation.”

⁸⁴ On this feature, see S. CASSESE, *L’arena pubblica. Nuovi paradigmi per lo Stato*, in *Riv. trim. dir. pubbl.*, 2001, p. 601 et. seq., now also in S. CASSESE, *La crisi dello Stato*, cit. p. 74 et. seq.; M. GNES, *La scelta del diritto. Concorrenza tra ordinamenti, arbitraggi, diritto comune europeo*, Milan, 2004, *passim* and for a synthesis by the same author, *Scelta del diritto*

argued, “the absence of harmonisation measures, together with the disparity between national laws and the protection of the right of establishment, ultimately creates the phenomenon of the choice of the most convenient law by subject to whom the law applies,”⁸⁵ the law that is “less severe,” in the terminology of the Court of Justice.⁸⁶

The American scholars who first examined this phenomenon, in reference to the *Delaware* case, highlighted the possible effects to which this can lead.⁸⁷ Even if their conclusions are not unambiguous, many expressed the concern that the possibility of choosing the less severe law can provoke a generalised race to the bottom, and thus argued in favour of regulation at the federal level. This interpretation has been taken up in Europe since the European Commission’s presentation of the first proposal for the Services Directive which – as we have seen – was based on the principle of the exclusive control of the country of origin, provoking a lively debate which led the Commission to rewrite the Directive’s text.

The solution put forward in the Services Directive, like that in the Professions Directive, is very different from that emerging out of the American legal commentary. The point of the regulation is not substantive harmonisation (an ever more difficult operation given the complexity of the European composite legal system) but rather procedural and organisational harmonisation, which facilitates the functioning of equivalence (which, in so far as it is assumed, is based on the relationship between operators and national administrations). The European solution substantially rests upon regulatory and administrative integration, through the use of administrative law doctrines and institutions (the duty to evaluate equivalence, to state reasons, and ensure the judicial review of decisions, no matter whether the applicant is a private actor or the administration of another Member State), rather than a generalised push towards (clearly impossible) uniformity.

This form of integration is important for at least three reasons. First, because it facilitates the coexistence of different legal regimes. The clear and stable definition of tools to further equivalence provides much support in constructing a “legal regime in which the differences between national systems are not homogenised or cancelled, but governed by an order that determines their relevance and reciprocal relationships.”⁸⁸

This form of integration is also important for the second reason that it constitutes an effective protection against the danger of national regulations’ race to the bottom, while protecting the rights of service providers. The right of

(nell’ordinamento europeo), ad vocem, in *Dizionario di diritto pubblico*, cit.; also A. ZOPPINI (ed.), *La concorrenza tra ordinamenti giuridici*, Bari, 2004. With special reference to financial services, see G. HERTIG, *Regulatory competition for EU financial services*, in *Journal of international economic law*, 2000, p. 349 et. seq.

⁸⁵ S. CASSESE, *L’arena pubblica*, cit., p. 116.

⁸⁶ This refers to the famous *Centros* judgment, ECJ, 9 March 1999, Case C-212/97.

⁸⁷ Described in M. GNES, *La scelta del diritto*, cit., p. 33 et. seq.

⁸⁸ L. TORCHIA, *Il governo delle differenze*, cit., p. 128.

establishment and the free provision of services are not in fact unconditional, but rather are subjected to a judgment of equivalence, which implies an evaluation of the correspondence of national rules and the possibility of asserting the domestic rule where substantive deformities are registered. Even the domestic regulation is subjected to precise limits and forms of monitoring and control, which ensure its compatibility with European law. Thus, just as the State has the power to impose national regulation (and to preserve, thereby, its established levels of protection), service providers (but also the administrations) may assert their freedom of movement and ask for the withdrawal of decisions or norms which unjustifiably impede its full exercise.

The third reason for which this form of integration is so important is that it furthers normative convergence at the substantive level as well. Equivalence in fact implies operating costs inversely proportional to the degree of harmonisation: the less convergence of national legal regimes, the more intense will be the activity carried out by the administration of the host Member State and the probability that the service provider will be rejected or subjected to difficult and burdensome compensation measures. The national laws, in the absence of adequate harmonisation measures, present elements of diversity which require national administrations to conduct detailed checks of compatibility, motivate their decisions, communicate them and so on. In this framework, it is clear that the Member State that applies a more rigorous standard gains a competitive advantage over Member States with lower standards: service providers for the former State can fulfil the requirements of the host Member State with greater ease; conversely, service providers resident in States with lower standards will have greater difficulty in extending their activity beyond the national boundaries. The integration that is realised by means of administrative law doctrines and institutions thus creates the conditions so that, in the medium to long term, a gradual race to the top in terms of the substantive law may take place.⁸⁹

Moreover, the Community legislator has recognised that the functioning of the market requires a convergence of substantive law.⁹⁰ In particular, the Services Directive – as we have seen – expressly provides for a wide convergence programme, based not so much on harmonisation measures than on a system of mutual evaluation of national regulations⁹¹. In this way, the approach to regulation is more procedural, in so far as harmonisation is not

⁸⁹ S. BATTINI describes this phenomenon at the global level in *La globalizzazione del diritto pubblico*, cit., p. 345 et. seq. It thus seems all the more plausible that it might manifest itself at the European level, where the legal systems are integrated by much more penetrating legal obligations. The process, however, is not at all automatic, as is pointed out by S. CASSESE, *Mercatizzazione dello Stato o arena pubblica?*, in A. ZOPPINI (ed.), *La concorrenza tra ordinamenti*, cit., p. 220 et. seq.

⁹⁰ See V. HATZOPOULOS, *Le principe communautaire d'équivalence et de reconnaissance mutuelle*, cit., 225 et. seq., which argues that for the functioning of the very principle of equivalence it is necessary to provide for measures of minimal harmonisation.

⁹¹ See note 46.

pursued by means of a norm, but rather through the search for different types of regulatory processes to be shared between different decision-making bodies⁹²

In conclusion, with the new strategy for services, the European legal system is experiencing a convergence, in part imposed by harmonisation and in part induced by equivalence, both of which have a common denominator: the use of administrative law doctrines and institutions. The convergence certainly regards procedural and organisational features, but this creates the conditions for which there may also be important consequences at the level of substantive regulation as well. This strategy is original and effective, and could also be extended into supranational contexts even wider than the European one,⁹³ because it operates as an instrument of integration rather than homogenisation, and acts as a protection against regulatory races to the bottom and as force towards an improvement of levels of protection, by recognising the free movement of services and thus ensuring the functioning of the market.

⁹² C. BARNARD, *The substantive law of the EU. The four freedoms*, Oxford, 2004, p. 525 et. seq., which speaks of reflexive harmonisation. This system is extremely interesting for at least two reasons. The first and most obvious is that, in this way, national administrations are required to account for their choices and demonstrate their compatibility with Community law; this enables the Commission to have a complete overview of national laws, to focus on existing problems and act conscientiously to remove barriers to the free movement of services. The second reason – less obvious, but not less important – is that the circulation of information, the possibility of preparing and receiving observations, the availability of a synthetic framework are all useful conditions favouring an effective process of national laws' convergence.

⁹³ In this perspective, see K. NICOLAIDIS and G. SHAFFER, *Transnational mutual recognition regimes: governance without global government*, 68 *Law and Contemporary Problems* (2005), 263 et. seq. (also available on the internet at <http://law.durke.edu/journals/Icp>), according to which “enlargement has expanded the coverage of U.E. “regional administrative law” and made it a better laboratory than ever as to what may eventually happen in the realm of global administrative law” (p. 265).