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Presentation 5: Challenges in Building an EU Single Market for Services

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Foreword

Good morning. Today in the allotted fifteen minutes I can only give a very brief overview of our subject “Challenges in Building an EU Single Market for Services”. Bear in mind also that I am a generalist private sector independent trade consultant and not a lawyer – and anyhow this morning we do not have time to delve into the intricate interactions between the national laws of Member States and the extent of the legal powers of the European Union (EU).

To give you an idea of the challenges to building the service sectors in the EU Single Market I will describe the actions being taken by the European Commission to improve its functioning.

You should bear in mind that the EU consists of 27 Member States that are sovereign nations, with different histories, languages, social customs, laws and levels of economic development. They have a combined population of 501 million and GDP of over US \$ 16 trillion.¹ Three neighbouring countries, Iceland, Norway and Switzerland are acting in close concert with many aspects of the EU Single Market as well. So in effect we are looking at 30 countries and there also others which seek to join the EU and are beginning to align their institutions and laws.

Services account for over two-thirds of EU GDP and employment and are the driving force of the EU economy. Broadly speaking, 9 out of 10 new jobs are created in this sector. Approximately 75% of services trade concerns the supply of services to other businesses in most sectors of the European economy. More integrated and better functioning services markets should enhance the global competitiveness of the EU economy as a whole.

A few facts on the financial services sector gives, from one angle, an impression of the size of the EU economy:²

The EU is the world’s leading exporter of financial services, with extra-EU exports accounting for 26% of financial services exports worldwide, ahead of the US with the next largest share of 19%. Trade between EU member states is even larger, accounting for 31% of global financial services exports.

The asset management industry manages investments worth € 13,000 billion for EU investors, a quarter of all such global investments. The majority of this investment represents saving for old age through pensions and life insurance.

Banks in EU Member States hold 49% of global bank assets. Over half of cross border international bank lending, a total of over € 12 trillion, originates from banks in the EU.

The EU accounts for 40% of the global insurance market, whilst 8 of the top 10 global insurers are headquartered in EU member states.

1 The birth of the European Community

The first moves of European cooperation and the creation of its supra-nationalism date back to 1951 with the Treaty of Paris establishing the European Coal and Steel Community. As the French Foreign Minister Robert Schumann put it then the aim was to “make war not only unthinkable but materially impossible.”

¹ Here 16 trillion = 16,000,000,000,000.

² Source: Key facts about EU Financial and Professional Services, TheCityUK, May 2011.

It was the Treaty of Rome in 1957 that created the European Economic Community³ which was the cradle from which the EU Single Market eventually grew via the Single European Act of 1986⁴. It incorporated the legally binding four basic freedoms for the movement of goods, capital, services and people. It was progressively amended by the treaties of Brussels, Amsterdam and Nice.⁵ In effect the creation of a Single Market including for services – an area without internal frontiers in which the free movement of services is ensured – has been one of the cornerstones of the European project from its origin.

A major institutional step forward was The Treaty on European Union (TEU) which was signed in Maastricht in 1992 and entered into force on 1 November 1993. It created the EU and led to the creation of the single European currency. It set out the powers of the European Commission, the European Parliament and the European Court of Justice. It reduced harmonisation to a minimum and relied on the recognition of equivalence for the approximation of laws and standards, and prohibited restrictive practices and discriminatory practices. However the services elements took longer to deal with and led to the Directive on services in the Internal Market (see Section 3 below). The European Commission White Paper of 1985 identified 300 measures to be addressed in order to complete a single market launched on 1 January 1993.

It was as recently as 2004 that another significant step forward was proposed so as to establish a Constitution for Europe, and after a few key amendments, it was finally signed as the Treaty of Lisbon on 13 December 2007 and entered into force on 1 December 2009.⁶

This gave the EU a single legal personality, and provided for the EU to speak with a single voice in the world on foreign affairs and trade. It sets out the powers which belong to the EU (including exclusive charge over competition rules, monetary policy of the Euro area and the common commercial policy), and which powers remain with the Member States and which are shared.⁷ The EU can only exercise those powers that have been specifically conferred on it by the Member States. The Member States have primary responsibility in health, education and industry – the services part of industry being our focus today on how the EU Single Market is operating.

Even by late 2009 when the Lisbon Treaty entered into force there were still some services restrictions on the four basic freedoms set out over 50 years ago in 1957 !

The Schengen Agreements (1985-1997) created a borderless zone consisting of 25 European countries with a population of over 400 million.

The Euro currency began on 1 January 1999 for all the then Member States except Denmark and the UK. The bank notes and coins were introduced from 1 January 2002.⁸

³ It was signed by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. It also created the European Atomic Energy Community (Euratom).

⁴ Its aim was to create a "Single Market" by 1992 through closer cooperation on the legislative processes and it came into force on 1 July 1987.

⁵ Brussels, 1965, created the European Council and the Commission of the EC; Amsterdam, 1997, entered into force on 1 May 1999 and dealt with immigration and cooperation on police and criminal justice fields, and common foreign policy and security policy; and Nice signed in 2001 and entered into force on 1 February 2003. It set new Member States voting weights and prepared for further countries from Central and Eastern Europe to accede.

⁶ The English version of the Lisbon Treaty in consolidated form was published by the European Commission under the reference 6655/1/08 Rev.1, on 31 May 2010 (410 pages).

⁷ It also has a provision for the arrangements if a Member State wishes to withdraw from the EU.

⁸ The currency in effect was virtual for travellers cheques, electronic transfers, banking, bonds and other forms of government debt and were denominated in Euros from 1 January 1999. The national currencies ceased to exist independently and their exchange rates were locked at fixed rates against

The EU Women's Charter sets out key areas for action, including an equal labour market, equal pay and ending gender-based violence.

Thus it is important to note in the context of the EU Single Market that the EU and Member States share competence for the service sectors in the internal market.

The recently adopted Communication "Towards a Single Market Act" confirmed the importance of the Single Market for services and the need to develop it further, setting out an ambitious work programme to bring it closer to its ultimate aim (see Section 5 below).

2 The Europe 2020 Strategy

The EU Single Market for services has to be viewed against backdrop of the "Europe 2020 Strategy" of March 2011 which advocates a focus on structural reform measures.⁹ The structural reforms required to create a genuine Single Market for services are at the heart of the "Europe 2020" strategy, which states that "an open single market for services must be created on the basis of the Services Directive". The Strategy aims to turn the EU into a smart, sustainable and inclusive economy, delivering high levels of employment, productivity and social cohesion, with three main objectives:

- Smart growth: developing an economy based on knowledge and innovation
- Sustainable growth: promoting a low-carbon, resource-efficient and competitive economy
- Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion.

A stronger, deeper and extended Single Market is seen as one of the key instruments to achieve these triple objectives. The Strategy calls for a renewed political commitment to re-launch the Single Market with a focus that includes competitive public procurement markets for services, improved framework conditions for innovation while at the same time ensuring access to quality services for all consumers. It steps up the process of adapting the EU Single Market policies and legislation to the digital era, including creating a true EU Single Market for online content and services and empowering consumers to buy online.

Special attention will be given to improving the application of EU Single Market measures across policy areas and their enforcement in Member States. Equally important, the European Commission will press ahead with its smart regulation agenda, including market monitoring, ex-post evaluations of the effects of EU legislation, administrative simplification and enhanced cooperation between national administrations.

Having sketched out the setting within which the EU Single Market operates we can now turn to its main features. As recently mentioned by the Hungarian presidency the EU Single Market is a "never ending story" given the technological developments.

each other. The Euro was the successor to the European Currency Unit (ECU). The notes and coins for the former currencies continued to be used as legal tender until the Euros were introduced on 1 January 2002.

⁹ See "Europe 2020 – a strategy for smart, sustainable and inclusive growth", European Commission, Brussels, 3 March 2010 – COM(2010)2020 final.

3 Services in the internal market

3.1 The Services Directive - 2006/123/EC

The European Parliament and the Council adopted the Services Directive, in December 2006, a horizontal Single Market instrument that covers a large variety of service activities representing about 40% of EU GDP and employment.¹⁰ The Directive had to be fully implemented by the Member States by 28 December 2009.

The following are quotations from the introductory paragraphs to the Directive:

1 [under the Treaty] “the internal market comprises an area without internal frontiers in which the free movement of services is ensured [] the freedom of establishment is ensured [] and it establishes the right to provide services.”

4 “It is [] important to achieve an internal market for services, with the right balance between market opening and preserving public services and social and consumer rights.”

7 “This Directive establishes a general legal framework which benefits a wide variety of services while taking into account the distinctive features of each type of activity or profession and its system of regulation. The framework [] [launches] a process of evaluation, consultation and complementary harmonisation of specific issues, which will make possible the progressive and coordinated modernisation of national regulatory systems for services activities, which is vital to achieve a genuine internal market for services by 2010. [] [It] takes into account other general interest objectives, including the protection of the environment, public security and public health as well as the need to comply with labour law.”

14 “This Directive does not affect terms and conditions of employment [] nor the right to strike and to take industrial action [] nor does it apply to temporary work agencies. This Directive does not affect Member States’ social security legislation.”

21 “Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive.”

Note: It also excludes audiovisual services (24), gambling activities (25) and the “field of taxation” (29).

36 The concept of ‘provider’ should cover any natural person who is a national of a Member State or any legal person engaged in a service activity in a Member State [] the concept of a provider should not cover the case of branches in a Member State of companies from third countries [] The concept of ‘recipient’ should also cover third country nationals who already benefit from rights conferred on them by Community acts” including those “who are long-term residents.”

38 The concept of ‘legal persons’ [] leaves operators free to choose the legal forms which they deem suitable for carrying out their activity.”

Paragraphs 40 and 41 gives a long list of the actions taken by Member State governments on grounds of “public policy” that provide “overriding reasons relating to the public interest” to impose additional regulations on services providers that might in practice reduce their internal market freedoms, for example public security and health, protection of workers, animal health, fraud prevention, unfair competition, protection of creditors, road safety, cultural, religious and philosophical values, the promotion of the national language, the preservation of historical and artistic heritage and veterinary policy.

¹⁰ The list of services covered, and those not covered (principally financial services and transport) , is given in Annex 2.

The A key provision of the 2006 Directive, in its Chapter IV on the Free Movement of Services, Section 1 on the "Freedom to provide services and related derogations" is its Article 16, which is given in full:

Article 16 Freedom to provide services

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

- (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
- (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
- (c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

- (a) an obligation on the provider to have an establishment in their territory;
- (b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;
- (c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;
- (d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
- (e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
- (f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
- (g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

4. By 28 December 2011 the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.

Article 26 covers the quality of services provision and the certification of services by independent or accredited bodies, and quality charters. Article 27 covers the settlement of disputes and the recognition of the equivalence of financial guarantees. Article 39 instructs the European Commission to carry out an annual analysis of the application of the Directive,

and Article 41 instructs the European Commission to present a report to the European Parliament and the Council every three years.

The European Commission states that the Single Market for services is not yet delivering its full potential. Productivity growth has been slow in recent years in a number of services sectors, partly due to the low intensity of competition, which remains inhibited by unjustified barriers to the Single Market.

3.2 Review of the Services Directive: findings by the European Commission

In accordance with Article 16:4 the European Commission has completed its first review of the implementation of the Services Directive that is referred to as the mutual evaluation.¹¹

The adoption and subsequent implementation of the Services Directive has been a crucial milestone in improving the functioning of the Single Market for services. It has done so by removing unjustified barriers, simplifying the regulatory framework and helping modernise public administrations. Yet more remains to be done. This full potential of the Directive will only be realised when Member States have completed all the required legislative changes to implement it. This is particularly the case in those Member States that have adopted framework horizontal laws implementing the Directive but have not (or have hardly) changed existing sector specific legislation to remove unjustified barriers there.

Services are very diverse and often complex activities. So also are the rules that Member States impose on them and the barriers service providers and recipients may face when seeking to benefit from the Single Market. Barriers hit services harder than goods - because of the intangible nature of services, the importance of the know-how of the service provider, the use of equipment across borders, etc. They also hit SMEs, in particular micro-enterprises (95% of all services providers in the EU), harder than larger firms. Many of these barriers are of a cross-cutting nature, being common to a wide variety of services across all stages of the provider's activity. In addition, they have a number of common features, including the fact that they often arise from administrative burdens, the legal uncertainty associated with cross border activity and the lack of mutual trust between Member States.

Part of the problem seems to be that a number of EU rules adopted over the years to help the functioning of the Single Market for services are not being used to their full extent and are, at times, implemented inconsistently. Services are often subject to a number of different EU instruments. Some of them apply in a horizontal manner like the Services Directive or the E-commerce Directive. Others such as the Directive on the Recognition of Professional Qualifications regulate issues of central relevance to a certain number of service activities. There are other EU instruments which have a very significant impact on the services sector like those regulating business-to-consumer transactions or the protection of the environment. There is sometimes a lack of clarity as to how these instruments interact. Also, sometimes the national implementation and application of these instruments does not seem to take sufficient account of the actual functioning of the Single Market. In practice, this leads to uncertainty as to which rules apply, in particular in the context of cross-border service provision, to the detriment of the ability and willingness of SMEs to operate abroad.

Some remaining difficulties result from the wide use by Member States of the possibility to reserve certain service activities for certain operators. There are 800 examples of different activities in the EU that are considered to be regulated professions in one or more Member

¹¹ As from January 2011 stakeholder consultations are being held with those persons and organisations that have a legitimate interest in a given situation, action or enterprise and include consumer groups, trade unions, business representatives including SMEs, NGO representatives in social and environmental fields, and regional representatives.

States and are reserved for providers with specific qualifications. Whilst in certain cases there may be valid policy reasons to justify this practice (for instance because of the complexity of the activities to be performed or their implications for the security or safety of the consumer), this does not seem to be always the case. Many of these activities are regulated in only a few Member States and more than 25% of them are regulated in just one Member State.

In some sectors, construction for example, there are a high number of regulated "specialisations" whose relevance may be questioned because of the costly market fragmentation they result in and which may constitute a hindrance to the provision of high quality services.

There are still questions related to legal form requirements (for instance, restrictions as to the legal forms available to operators taking up certain activities such as a prohibition on providers of crafts services to take the form of limited liability companies) and capital ownership requirements (for instance, obligations to have specific qualifications in order to hold share capital in companies providing certain services such as the rule that an individual must be a qualified tax advisor to hold capital in a company offering tax advice services).

Limitations on the available legal forms are often the cause of difficulties for companies or professionals wanting to establish in another Member State as they restrict their choice of the most appropriate vehicle for purposes such as taxation or raising capital. The application of legal form or capital ownership requirements to cross-border provision of services may have particularly restrictive effects such as depriving certain providers of the possibility to offer their services cross-border merely because of the legal form in which they operate.

On the basis of this mutual evaluation process, it would seem that services in the construction sector, the tourism sector and the business services sector are likely to be good candidates for a "performance check" which should be completed within one year. The Commission will issue annual guidance on the application by Member States of the freedom to provide services clause and the evolution of cross-border service provision in the Single Market, the first of which should be issued by the end of 2011.

By the end of 2012, the Commission will report to the European Parliament and to the Council on the functioning of the system and the need for any targeted extension of its scope of application.

The Internal Market Information system

From early 2010 the EU Member States administrative cooperation on the Services Directive to facilitate the free movement of services has been developing through the use of the Internal Market Information (IMI) system. It is a secure online application that allows national, regional and local authorities to communicate quickly and easily with their counterparts abroad. For example it can be used to find the right authority to contact or verify a professional's qualifications or to check on the licence of someone planning to provide services. It makes use of pre-translated questions and replies in the language of the inquirer.

Points of Single Contact (PSCs)

The Services Directive requires all EU Member States to establish web portals so that anyone who provides a service will have a "Point of Single Contact" where it can be found out what legal requirements would need to be met to operate in the host country. Service providers can also use the web portals to apply for any licence or permit they would need.

3.3 Challenges as seen by business

Often the private sector entrepreneurs with the fabled 'animal spirits' get frustrated at how slow the governmental and inter-governmental institutions are taking account of the new problems caused by globalisation in many of the service sectors. There are increasingly rapid changes in commercial markets aided by powerful computing equipment and applications, faster telecommunications systems and how the internet can be an international market even for micro-enterprises.

At the launch of the Single Market Act in October 2010 criticisms were raised by businesses that the digital and services markets were still unfinished and Member States were blamed for poor implementation of single market rules and the European Commission was reproached for poor enforcement.

BusinessEurope, the European federation of employers, made a presentation at a workshop on the Services Directive in December 2010 on the subject of "Points of Single Contact" assessing whether it is now easier to set up a business in another Member State. They judged that there is not yet a real single market in services because there are still too many barriers created by:

- Divergent national, regional and local laws
- Administrative obstacles: quantitative restrictions, prior authorisations and so on
- A lack of confidence between Member States and their protectionist tendencies

They called for:

- A simplification of national requirements
- More transparency about national systems
- Fewer formalities and better information, through the Points of Single Contact with easier information and speedier procedures
- Administrative cooperation between the relevant authorities

Their assessment of how well the points of single contact (PSCs) were working noted that:

- Some Member States still do not have a functioning PSC in place
- The use of e-signatures, easy login and interoperability across borders is lacking in most cases
- Most Member States have 'first generation' electronic systems that need to be updated
- The interconnection between the websites of municipalities is often poor
- Budget constraints are holding back performance
- Some PSCs charge users
- Services are often available only in one additional language which is English
- The available information is adequate, but does not cover all aspects
- Linked websites are often not translated
- In most cases it is not yet possible to complete procedures online and the forms are available only in host country national languages

They therefore made the following recommendations:

- The PSCs should offer their services in more foreign neighbouring languages
- The information should be enhanced and cover all services sectors
- The services should be free of charge
- Increased availability of procedures for electronic completion should be provided
- Cross-border accessibility (eg inter-operable e-ID and e-signatures) should be

enhanced

Add links to the tax authorities, because PSCs do not provide information on tax

Governments should do more to promote the awareness of the PSCs, especially among SMEs that are ill informed about the advantages and opportunities, and this should be done in a wide range of media. Guidance booklets and brochures should be distributed. More expert meetings, conferences and seminars on the implications of the Services Directive should be held.

4 Financial services in the internal market

As noted, financial services are not covered by the Services Directive 2006, but because they are such a hot topic following the financial crisis that began in 2007 and which is not yet fully resolved, some of the actions affecting them are now outlined.¹²

From 1 January 2011 three new European Supervisory Authorities (ESAs) became operational: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). They have specific rule making, dispute settlement and information gathering powers. In cooperation with national supervisors the ESAs will ensure that rules are applied in a rigorous and consistent fashion throughout the EU, and to monitor developments within the financial system to detect potential risks to financial stability.

EIOPA has been given specific tasks such as ensuring harmonised technical approaches on the use of ratings in relation to the Solvency Capital Requirements and smooth transition to the amended Solvency II Directive.¹³ A central aim is to develop a single rule book to ensure strengthened stability, equal treatment, lower compliance costs and the prevention of regulatory arbitrage. The will also act to settle disputes between national supervisors.¹⁴

The Europe 2020 Strategy aims to reform the financial system to ensure a solid, stable and healthy financial sector supporting the real economy. Implementing supervisory reforms, filling regulatory gaps and strengthening prudential, accounting and consumer protection rules will all be important elements. Strengthening the governance of financial institutions and designing policies to prevent and better manage possible future financial crises also form part of the new strategy.

The European Commission is considering putting into place fundamental principles at the European level on access to electronic bank payment systems, especially useful for people working temporarily in another Member State where there are difficulties in opening a bank account and the use of payment cards for non residents.

The European Commission is also considering whether to establish, at the EU level, approved European Rating Agencies so as to have objective standards for ratings that include more 'European standards', rather than those from third countries that could be unfairly critical to European companies.

¹² The European Commission published a communication on "Regulating financial services for sustainable growth" on 2 June 2010 – COM(1020)301 final.

¹³ Solvency II is a fundamental review of the capital adequacy regime for the European insurance industry. It aims to establish a revised set of EU-wide capital requirements and risk management standards that will replace the current solvency requirements.

¹⁴ The International Association of Insurance Supervisors (IAIS) has set up a Multilateral Memorandum of Understanding (MMOU) framework for close cooperation between national insurance regulators and supervisors.

The Directive on Alternative Investment Fund Managers (AIFM) introduces a single market framework for the sector to increase transparency, reinforce investor protection and strengthen the internal market in a responsible and non-discriminatory manner.

The new Single Euro Payments Area (SEPA) is set to become operational during 2012. It will cover over 500 million citizens and more than 20 million businesses which can make and receive Euro payments under the same basic conditions, rights and obligations regardless of their location. Consumers will only need one bank account and their payments will be faster, cheaper and safer. Money transfers will reach the beneficiary at the least by the end of the next business day or faster and no deductions will be made to the amounts transferred, which for businesses should improve cash flow, reduce costs and facilitate access to new markets in the EU.

At the end of March 2011, the European Commission made a proposal that “seeks to create an efficient and competitive single market for consumers, creditors and credit intermediaries with a high level of consumer protection.” This will cover access to consumer credit histories, different disclosure requirements, information on advertising and marketing materials and explanations to the consumer on the credit product and associated risks and loan repayment conditions.

The Financial Stability Board proceedings

The EU will have to take account of the global setting for regulating financial services. The proceedings of the Financial Stability Board (FSB), set up by the G20 Ministers, are now entering a crucial period and whether the outcome will be the same for the EU and US is a significant issue. To make the global financial system safer, less volatile, more efficient and transparent, a shared vision must be forged and the focus on national comparative advantage must not be the primary aim.

The private sector is voicing a concern that there is no need for undue haste in identifying critical activities as sources of systemic risks and that the FSB should de-couple their recommendations on banking and derivatives which caused the crisis and that of the insurance sector which provided an element of stability during the financial crisis.

For banks the Basel III requirements will set new minimum capital ratios for high quality capital of 7% as adjusted for risk. For a few very large financial services institutions assessed as “Systematically Important Financial Institutions” (SIFIs) - which might include insurers – will have to hold 10% of risk weighted assets. Switzerland imposes even higher ratios on its major banks, given its small economy.

There are still varied views on the risk weighting of pension fund liabilities, as well as the risk weighting methodology itself needed to provide comparability and consistency across banks and countries for their common equity and contingent capital.

There are differences being expressed on how the trading of derivatives should be placed through clearing houses, how these clearers are classified and the amount of collateral to be posted.

Also being discussed are rules on executive bonuses, the proportion receivable up-front in cash, special tax rates and the effect on high fliers who might move out of the EU and US to Hong Kong for example.

The accounting valuation of assets at market prices is creating differences between the EU rules and US.¹⁵ So arbitrage on risk capital, derivatives trading, executive pay and accounting may be subject to a political quick fix in the Autumn.

5 Proposals for a Single Market Act

The recently adopted Commission Communication "Towards a Single Market Act"¹⁶ stressed the need to further deepen the Single Market for services and to build on the results of the "mutual evaluation" process provided for in Article 39 of the Services Directive.

When the Commissioner for the Internal Market and Services, Michel Barnier, introduced the proposed Single Market Act he said it is not only "designed to enhance economic cooperation, it also serves an over-arching political vision and mission for Europeans to live together in peace and democracy".

The European Commission is to make a proposal on the implementation of the Single Market Act so that by the end of 2012 there will be a comprehensive package of implementation measures that will help it to reach its full potential. The European Commission proposed 50 actions¹⁷ and from the services angle the following are probably the most relevant:

- 4 Internal market for services
- 5 Electronic commerce
- 9 Business-to business services
- 14 Accounting rules
- 17 Public procurement
- 18 Services concessions (for public procurement)
- 21 Interconnection of business registers
- 23 International trade
- 25 Services of general economic interest (SGEI) (public services)
- 26 Transport infrastructures
- 33 Recognition of professional qualifications
- 40 Access to basic banking services
- 41 Responsible lending and borrowing
- 45 Information exchange between public authorities (IMI)
- 47 National transposition of EU rules
- 49 One-stop-shop for information and assistance (PSCs)

All listed companies are required to use the "international financial reporting standards" (IFRS) for their consolidated accounts of each financial year starting from 1 January 2005.

The European Commission believes that auditing is in need of structural reform, with the need for a common global accounting language to provide comparable financial information for investors, particularly for companies operating cross-border under different jurisdictions and to reduce regulatory arbitrage.

The European Commission is considering how to deal with the Big Four accounting firms that form an oligopoly and the anti-competitive situation this creates as well as the risks to the financial services system should one of them implode, as Arthur Anderson did following the Enron scandal, which could severely disrupt nervous markets.

¹⁵ See Analysis "A shield asunder", Financial Times, 20 May 2011, page 11.

¹⁶ Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive - COM(2011)20 final.

¹⁷ See the full list in COM(2010) 608 final, 27 October 2010.

ANNEXES

1 Institutions of the EU as legislated for in the Lisbon Treaty

The Lisbon Treaty Has Two Main Parts: The Treaty on European Union (TEU) and The Treaty on the Functioning of The European Union (TFEU). The TEU in its Article 4:2 and Article 5:2-4 (copied below) provide that:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

2 The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

Article 2:5 of the TFEU includes the following paragraph, and it applies to economic policies and common foreign policy and thus trade with third parties:

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

The following are the EU institutions and bodies:

The main institutions

- The European Parliament
- The European Council
- The Council of the European Union (Council of Ministers)
- The European Commission
- The Court of Justice of the European Union
- The European Central Bank
- The Court of Auditors

In addition there are other bodies:

- The Committee of the Regions
- The European Economic and Social Committee
- The European Investment Bank

The European Parliament is the directly elected EU institution that represents the citizens of the Member States and shares the job of lawmaking with the Council of Ministers (referred to

as the 'ordinary legislative procedure') and for setting the EU budget. The Parliament elects the President of the European Commission.

The European Council is a new body comprised of the prime ministers and presidents with executive powers, it sets the political direction and priorities, and it elects the President of the European Union who chairs its meetings and represents the EU internationally at the highest levels. It usually proceeds by consensus but decisions are taken by a qualified majority except in certain cases.

The Council of Ministers coordinates the EU economic policies and plays a central role in foreign and security policy. It shares lawmaking and budgetary powers with the European Parliament.

The European Commission is accountable to the European Parliament and is the only EU institution with the general power to initiate proposals for legislation. It enforces the EU's policies, manages EU programmes and represents the EU in international negotiations and ensures that the EU treaties are applied properly.

2 The Services Directive 2006

2.1 The scope of the Services Directive¹⁸

The Services Directive applies to the provision of a wide range of services – to private individuals and businesses – barring a few specific exceptions. For example, it covers:

- **distributive trades** (including retail and wholesale of goods and services)
- the activities of most **regulated professions** (such as legal and tax advisers, architects, engineers, accountants, surveyors)
- **construction services and crafts**
- **business-related services** (such as office maintenance, management consultancy, event organisation, debt recovery, advertising and recruitment services)
- **tourism services** (e.g. travel agents)
- **leisure services** (e.g. sports centres and amusement parks)
- **installation and maintenance** of equipment
- **information society services** (e.g. publishing – print and web, news agencies, computer programming)
- **accommodation and food services** (hotels, restaurants and caterers)
- **training and education services**
- **rentals and leasing services** (including car rental)
- **real estate services**
- **household support services** (e.g. cleaning, gardening and private nannies).

The Services Directive does not apply to the following services, which are explicitly excluded:

- **financial services**
- **electronic communications services** with respect to matters covered by other community instruments
- **transport services** falling into Title V of the EC Treaty

¹⁸ The source for Section 2.1 is: http://ec.europa.eu/internal_market/services/services-dir/guides_en.htm

- **healthcare** services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession
- **temporary work** agencies' services
- **private security** services
- **audiovisual** services
- **gambling**
- certain **social services** provided by the State, by providers mandated by the State or by charities recognised as such by the State
- services provided by **notaries** and **bailiffs** (appointed by an official act of government).

In any event, national rules and regulations relating to these excluded services have to comply with other rules of Community law, in particular with the freedom of establishment and the freedom to provide services as guaranteed in the Treaty on the Functioning of the European Union.

How does the Services Directive help businesses set up?

The Services Directive facilitates the establishment of a business in a Member State. This concerns cases in which a legal or a natural person intends to establish in another country. But it also benefits to providers who want to establish in their own Member State, as they will take advantage of simplified rules and procedures. Under a general obligation for Member States to simplify procedures and formalities some very specific obligations are established by the Directive:

- it requires Member States to **set up "points of single contact"**, i.e. one-stop shops through which service providers can obtain all relevant information and complete all procedures relating to their activities.
- it requires Member States to ensure that all these procedures and formalities can be completed at a distance and by **electronic means**.
- it obliges Member States to **review** and **evaluate** all their **authorisation schemes** concerning access to a service activity or the exercise thereof and abolish them or replace them by less restrictive means (such as simple declarations), where they are unnecessary or otherwise disproportionate. Remaining schemes are to be rendered clearer and more transparent (e.g. conditions have to be made public in advance; criteria have to be clear and non-discriminatory). Furthermore, authorisations have in principle to be granted for an indefinite period and be valid throughout the national territory.
- it requires Member States to abolish **discriminatory requirements**, such as nationality or residence requirements, and **particularly restrictive requirements**, such as "economic needs" tests (requiring businesses to prove to the authorities that there is a demand for their services). It also requires the **review of other burdensome requirements** which may not always be justified (such as territorial restrictions or minimum number of employees).

How does the Services Directive facilitate the cross-border provision of services?

The Services Directive aims at improving the regulatory environment for service providers who want to supply their services across borders to other Member States, without setting up an establishment there. In this respect, the Services Directive lays down the "freedom to provide services" clause whereby Member States should, in principle, not impose their national requirements on incoming service providers. Member States are thus generally prohibited from imposing restrictions upon incoming service providers. However, certain requirements can still be imposed under very limited circumstances, i.e. when they are non-

discriminatory, justified for reasons of public policy, public security, public health or the protection of the environment and do not go beyond what is necessary in order to achieve their objective.

Furthermore, the "freedom to provide services" clause is also assorted with a number of general derogations. These include, among others, matters covered by the Directive 96/71/EC on the temporary posting of workers abroad.

For those requirements that Member States are still allowed to impose on incoming service providers, service providers will have to be able to obtain all relevant information and complete all procedures and formalities through the Points of Single Contact, at a distance and by electronic means.

How does the Services Directive enhance the rights of service recipients?

The concept of "recipient" does not only cover consumers but also businesses who want to use services in the course of their activities. To enhance the rights of recipients and strengthen their confidence in the internal market, the Services Directive requires Member States to:

- **remove obstacles** for recipients wanting to use services supplied by providers established in other Member States, such as obligations to obtain an authorisation.
- **abolish discriminatory requirements** based on the recipient's nationality or place of residence. This obligation of non-discrimination has to be complied with by the Member States' public administrations (i.e. the State or regional or local authorities) and by service providers in their general conditions of access to a service from another Member State.
- **make available** to recipients general **information and assistance** on the legal requirements, in particular consumer protection rules, and on redress procedures applicable in other Member States.

What kind of administrative cooperation does the Services Directive call for and why?

The Services Directive obliges Member States to cooperate with each other and give mutual assistance in the supervision of service providers. This will ensure effective supervision while at the same time providing that such supervision does not lead to additional and unjustified obstacles for service providers.

Competent authorities of different Member States have to exchange information with each other and carry out checks, inspections and investigations upon request. They also have to send an alert to other Member States in cases relating to a service activity that could cause serious damage to the health or safety of persons or to the environment. For this purpose the Commission in cooperation with Member States established an electronic system for the exchange of information (IMI – see Section 3.2 above).

2.2 Examples of current infringements of the Services Directive 2006

As a matter of priority, the Commission will continue and step up work with Member States on an individual basis so as to achieve a complete and correct transposition and implementation of the Services Directive in all Member States. In the first half of 2011, the Commission will carry out a series of bilateral meetings with those Member States where there are strong indications of incorrect or incomplete implementation of the Services Directive. When needed, formal enforcement measures will be taken.

In parallel, a first economic assessment of the actual implementation of the Directive and of its impact on the functioning of the services markets will be carried out by the Commission in 2011.

The idea would be to define a set of practical scenarios in specific sectors where businesses and citizens most often confront poor functioning of the Single Market and to prioritise sectors on the basis of employment and growth potential. This does not mean however that the results of the performance check will only be of relevance for those specific sectors. In view of the often cross-cutting nature of the barriers in the services sector and the legislative instruments applicable to it, the "performance check" will also be useful to identify issues of a horizontal nature.

The "performance check" should allow the formulation of sector-specific conclusions on the functioning of the Single Market for services and, where necessary, identify the need for other actions, including legislative intervention if required.

The European Commission monitors the number of EU directives related to the internal market that have not been transposed entirely or partly into the national laws of Member States, and takes infringement proceedings to ensure action.

Some cases where Member States still have barriers to intra-EU trade illegal under the provisions of the EU Single Market are:¹⁹

Belgium: a number of requirements are imposed on temporary employment agencies established in other Member States which limits their scope of activities and imposes a specific legal form which contravenes the right to provide the same service without restrictions, and limits competition in this field.

France: the legislation on the supply of geographical information prevents certain companies' access to public procurement contracts.

Germany: the city of Bonn concluded an agreement with a private company for waste disposal services without a competitive tendering procedure, in breach of EU public procurement rules.

Greece: the establishment and operation of post-secondary education centres have to be authorised prior to establishment in a way that is not free and is incompatible with EU law.

Italy: the State can intervene in ownership and management decisions in private companies, which provide for unjustified restrictions on the free movement of capital and the right of establishment in the EU.

Sweden: legislation requires all services suppliers to establish a branch, in effect limiting the freedom to choose the type of establishment, in breach of Treaty rules and the 2006 Services Directive.

Slovenia: foreign health insurers are required to appoint a representative to liaise with the authorities and together with other provisions this restricts the ability of health insurers to establish themselves being contradictory to the basic freedoms outline in the Treaties.

Spain: bus service providers from other Member States are denied the opportunity to bid for the provision of school bus services in the autonomous community of Castilla-La Mancha which is incompatible with EU public procurement rules.

The Netherlands: businesses must obtain work permits for certain staff members before they can be temporarily posted to the Netherlands to perform services, which is a requirement that breaches EU rules on the freedom to provide services.

¹⁹ "Single Market Newsletters", European Commission, Nos. 57, 59 and 60.