

Doomed to fail? Public procurement and services markets in  
the EU and the US, and the potential consequences for the  
transatlantic trade negotiations

Leif Hoffmann

Lewis-Clark-State College  
[lshoffmann@lcsc.edu](mailto:lshoffmann@lcsc.edu)

Paper prepared for Western Political Science Association Conference

Las Vegas, NV, April 2-4, 2015

*Please don't cite without permission of the author.*

## Abstract

Lurking beneath the prevailing images of the American and European single markets is a more complex reality, important elements of which are exactly the opposite of the prevailing images. Though one might expect most impediments to internal trade to arise in Europe—since the quasi-state of the EU is generally more decentralized than the US—in fact there are a great many areas where the US lacks central regulatory authority enjoyed by the EU institutions. The EU created coherent federal rules for exchange in services and ensures that these rules open up exchange to competition, while the US has not. The difference in outcomes is due to the unique role of the European Commission and the absence of a similar actor in the US and the fact that broader norms of legitimate governance favor centralized authority - including liberalizing central authority - more in the EU than in the US. The present Trade and Investment Partnership negotiations between the EU and the US are thus doomed to fail if the individual US states, retaining regulatory authority in services and public procurement, are not invited to sit at the table early on to ensure their buy-in into any future deal.

## Introduction<sup>1</sup>

In the background to the politics of the Transatlantic Trade and Investment Partnership (TTIP) negotiations is some common wisdom about single markets in the US and the EU. The loudest TTIP opponents are Europeans who worry about “Americanization,” by which they mean a homogenizing liberalism that erodes social standards and regulations. This fear presumes that American actually has such features, of course. That is, relative to Europe, the presumption is that US market rules are both more centralized (with greater federal authority) and more liberalized.

In 2006, for instance, opponents to the original EU services directive proposal by Internal Market Commissioner Frits Bolkestein took to the streets, brandishing flags that read ‘Bolkestein Go

---

<sup>1</sup> *Note to reader:* For right now the draft focuses on the services aspect of the respective internal markets. In the case of public procurement (15 – 20% GDP) the European Union has completely preempted the policy sector, establishing an EU-wide public procurement regime based on non-discrimination, transparency and economic efficiency, while in the US, states still freely discriminate against out-of-state bidders (for a detailed account on public procurement, cf. Hoffmann, 2011). For instance in 2009, 47 states had at least one statute on the books giving preferential treatment to in-state products or companies —the same number identified in a survey in 1940 (Melder, 1940, p. 58). Well beyond tie-bid preferences, many laws give preferences of up to 15% on cost to in-state bidders. Some are blanket preferences, like Wyoming’s statute W.S. 16-6-105, which requires all purchases by state agencies to grant an in-state preference of up to 5%. Some states even have outright bans on out-of-state suppliers for certain goods or services: Georgian authorities must buy Georgian mulch and compost, Pennsylvanian authorities must heat public buildings with Pennsylvanian coal, Oregon authorities must do their printing in Oregon (Oregon State Procurement Office 2009; North Carolina Department of Administration 2006; Zimmerman 2003, 6).

Home'. The flags also bore the American stars and stripes to signal opposition to the directive's American-style 'savage liberalism'. The perception that the United States has more of a single market than the European Union is widespread among scholars and pundits alike. Market liberalization is described as part of America's 'cultural DNA of the past 400 years' and its 'gospel of success' (Brooks, 2009), whereas Europe's level of market integration is likened to a disease, called the 'Europe Syndrome' (Murray, 2009). Harvard political economist Benjamin Friedman argues that America's economic success is due to '[t]he absence of many of the restrictive labor practices and laws found in many other advanced industrialized economies, [...] allow[ing] human resources to move to where they can be most productive' (Friedman 2008, p. 88). Even architects of the Single Market in Europe agree with this assessment. In 1989, Lord Cockfield, Internal Market and Services Commissioner during the Delors era, remarked that it would be a mistake to talk about the European Union 'in terms of a "United States of Europe"' given that 'essentially on the ground [...] the United States gives far more power to the federal authority than is likely to be necessary or acceptable in Europe' (Cockfield, 1994, p. 164).

This article contends that this is wrong, and to a surprising degree. The EU has adopted rules more like a single market than the US in major economic sectors, such as public procurement, services, and the regulated goods market, in two ways; centralization of the market (having a single set of coherent rules for exchange) and liberalization (adopting rules that open exchange to competition). The research presented here focuses specifically on the services sector, given that it alone represents over 70 per cent of the two polities' GDP. It will show that the service directive actually implemented (2006/123/EC) and the closely related Directive on the professional qualification (2005/36/EC) established *more* open and competitive internal market rules than exist in the US, especially regarding the delivery of temporary services. To illustrate empirically the differences in market liberalization in the two polities, this article exemplarily focuses on one

occupation: hairdressers. While perhaps not a cause célèbre like the Polish plumber, hairdressers are actually one of the most common examples cited in the discussions surrounding the EU services directive, with some commentators considering it even as the archetypical case (Badré et al., 2004-05; Broussolle, 2010; Chang et al., 2010; Hohn, 2006; House of Lords, 2005; Saint-Paul, 2007).

Because the EU and the US have been largely treated as unique cases, both the literature on American-state building and that on European market integration have missed how close comparison alters both our descriptive views and social-scientific explanations of each polity. Hence, this article will first characterize the outcomes, showing that the EU has already exceeded the level of market liberalization in services compared to the US, and then offer an institutional and ideational argument to explain these differences.

The key institutional argument is that there is no US parallel to the institution of the European Commission, which is mandated to continually push liberalization forward. Commission leadership has been critical to service liberalization. The ideational argument, though it runs strongly counter to the common wisdom, is that broader norms of legitimate governance favor centralized authority - including liberalizing central authority - more in the EU than in the US. The basic notion of federal governance of market integration is far more accepted across Europe at all levels than in the United States, challenging also important elements of the euroscepticism literature. As interviews and poll data reveal, many Americans consistently object to any role for 'the feds'. The research is extracted from more extensive research, utilizing a qualitative methods approach by combining cross-case and within case analyses. The results are based on series of over fifty face-to-face and phone interviews with European and American governmental officials and business leaders as well as on research of both primary and secondary sources.

In short, the paper argues that anyone who seeks to understand political economy on either side of the Atlantic or in the TTIP talks must heavily qualify the common-wisdom views of these

markets, and that this recharacterization of the current outcomes of US and EU market-building has major practical and theoretical implications. In practical terms it highlights that some obstacles to TTIP's ambitions are both deeper and more heavily weighted on the American side than even most experts realize. In scholarly terms it mounts a major challenge to practically all of the major explanations of market-building that have been advanced about either polity. None of the leading schools of thought easily makes sense of an EU that has surpassed the US in adopting centralized liberal rules.

### **Barbers without Borders: Free to Cut, Color and Curl?**

As many Americans might realize if they reflect about the licenses they see at their barber, all states retain the right to regulate the access to professions, and all states require barbers and cosmetologists to be licensed. Access to the market of a specific US state is usually governed by the state's health department and/or Barber Board. Licensed hairdressers in the US are not legally allowed to provide services across state borders, even for a day. Any providers need to first make sure that they are also licensed in the state that they would like to temporarily give a haircut. As the president of the National Association of Barbers Boards of America (NABBA) and member of Ohio's Barber Board (BBO), Howard Warner, said, 'I don't know of any state where you can walk in and not' get approval by the local state board of licensing before offering any services (interview, 2010). He emphasized that '[t]hey cannot just go out and start barbering! The barber laws were set up to serve and protect the public. [...] It is not legal, no, no, no' (interview, 2010). The Texas Department of Licensing and Regulation (TDLR) responded similarly. As a TDLR staff member remarked, 'You need to be licensed through the state in order to cut hair, to do nails, to do facials [...] even for just one day' (interview, 2010).

The situation in the United States is characterized by a highly fragmented system when it comes to the provision of services for regulated professions. Each state retains its own rules and grants permission to market access. Zimmerman observes that the US states' licensing authority has led to '[d]iscriminatory licensing requirements [protecting] individuals engaged in a specific profession in a state against competition by their counterparts in other states' (Zimmerman, 2003, p. 6). States strictly enforce these regulations and publicize enforcement actions as deterrent, such as TDLR did when shutting down an illegal haircutting operation at a San Antonio flea market. TDLR informed the public that the perpetrator 'will not get off with a warning, there's too many violations, and unlicensed activity we take very seriously' (Mylar, 2010). The financial repercussions for the hairdresser ranged up to \$3000 (Mylar, 2010).

The only way to access another state's market is to acquire the host state's license. However, this acquisition and the rules vary largely from state to state and not all states have reciprocity with each other. There is no general policy which eases transborder provision of services on which US service providers can rely. No complete list of rules and requirements for all states exists.<sup>2</sup> Service providers are obliged to always check with the specific state whether and how they can gain access to the local market. This in itself can represent a significant hurdle for service providers. Reciprocity is usually not publicly displayed and is decided on a case-by-case basis. According to a TDLR representative, '[t]here is a list that only [licensing officials] can see' (interview, 2010). The situation is largely similar in Oregon with the exception that Oregon Health and Licensing Agency (OHLA) does not maintain a specific list.

---

<sup>2</sup> BeautyTech, maintains a website, with information for many states and professions in the fields of personal appearance: [http://www.beautytech.com/reciprocity/recip\\_a.htm](http://www.beautytech.com/reciprocity/recip_a.htm)

The common reason given why reciprocity is not granted automatically to licensed out-of-state practitioners is that the host state has different training hour requirements than the state from which the practitioner is hailing from and that this would endanger the safety of the public:

If you went to school in Pennsylvania or in Mexico, India or China, and you only had a 1000 hours, it would not be fair to Ohio Barbers to give this person a license. They don't know anything about our sanitation nor health rules. [N]ow if you come from Pennsylvania and you have 20 years barbering experience or ten year or five years and you had the 1250, the Barber Board evaluates that person and will give you a test and you can barber in our state. We don't hold them up (interview with BBO, 2010).

This is an example of how non-tariff barriers to services provision and protectionist attitudes abound in the US. Pennsylvania's actual 1250 hours of training are considered inadequate for understanding sanitation rules and how to cut hair in the Buckeye state, which requires 1800 training hours. But then with twenty years of experience as a barber in Pennsylvania, the Ohio Barber Board, handling each case individually, might allow you to take a test to become licensed without extra courses. Of course this raises the question how a practitioner even after twenty years of practicing in the Keystone state actually would know the sanitation rules in Ohio. Can a Pennsylvania barber be assumed to have acquired Ohio's sanitation knowledge through osmosis with time? If requiring testing for such a veteran does not impede market access and is not protectionist, what is?

In short, where there is no reciprocity, licensed professions from other states have to take extra courses to make up for the perceived lack of knowledge. But even where reciprocity exists, this does not mean automatic access to the local market. Granting reciprocity generally only applies to admitting that the training hours are equivalent. The host state remains free to impose additional conditions for market access, such as criminal background checks, state law exams and a minimum



amount of years of licensed experience, besides requiring the passing of a practical and/or a theoretical exam. According to OHLA, ‘reciprocity between states appears to have become more restrictive’ and Oregon herself has ‘recently established for out-of-state applicants licensed in other states to take and pass the Oregon Laws & Rules examination as well as an examination for each field of practice (barbering, esthetics, hair design, nail technology) in which they are applying’ (correspondence, 2010).

The contrast across the Atlantic is quite stark. Hairdressers have broad freedom to move around Europe today, though the details of regulations controlling their movements are complex. With the enactment of the services directive (2006/123/EC) and the contemporary qualifications directive (2005/36/EC) hairdressers and other service providers are free to provide temporary services across state borders in the 28 member states of the EU and the three states forming part of the European Economic Area.<sup>3</sup> If hairdressers are considered a ‘regulated profession’ in a member state then both directives apply. If not, only the service directive applies. For instance, if hairdressers from another EU member state want to provide their haircutting services over the weekend or a couple of times throughout the year in Germany, where the profession is regulated, they only need to notify the competent authority one time annually. In the case of Germany this declaration can easily be done via the internet. This requirement, however, does not derive from the service directive, but from the qualifications directive. An EU member state is free to add or subtract any profession to or from its list of regulated profession in the future.<sup>4</sup>

---

<sup>3</sup> Iceland, Lichtenstein and Norway

<sup>4</sup> The Commission maintains an on-line database containing all professions regulated in the member states. It can be searched by type of profession or by member state:

[http://ec.europa.eu/internal\\_market/qualifications/regprof/index.cfm?fuseaction=home.home](http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?fuseaction=home.home)

Most importantly, though, the EU has countered the arguments commonly expressed in the US, i.e. the ensuring of public health and safety, to maintain the regulatory barriers for hairdressers. While in the EU it is presumably easy to provide services across borders without any administrative or technical barriers, the service directive does allow, under circumscribed circumstances, the imposition of additional national regulations on incoming service providers. Article 16 of the services directive provides that member states shall not make access to or exercise of a service activity in their territory subject to compliance with any requirement unless it is justified for reasons of: 1) public policy, 2) public security, 3) public health or 4) the protection of the environment. However, requirements justified this way may only be imposed if they are non-discriminatory vis-à-vis nationality or place of establishment, and proportionate, i.e. they are suitable to attain the public interest pursued, do not go beyond what is necessary, and cannot be replaced by less restrictive means. Furthermore, the Commission is required to be notified about any requirement imposed based on public interest concerns and retains the right to reject them.

So what does this mean in practice? Given that the service directive allows for exemptions it is imaginable that member states, like in the US, might invoke health concerns to impose new or to keep existing national requirements. Indeed, when contacted why hairdressers are still listed as a regulated profession in Germany, while this is not the case in some other EU member states<sup>5</sup> and after reducing the regulated professions from 94 to 41 with the reform of the German crafts law in 2004, the response by German authorities was that

Hairdressing remains a regulated profession, because when exercised improperly, threatens the life of customers. Regulated professions should only be exercised by persons who actually

---

<sup>5</sup> Hairdressers are presently regulated professions in a third of the countries composing the European Economic Area.

"understand their trade" and who can prove this by having passed the exam (correspondence, 2010).

An EU official confirmed that on occasion "member states are trying to extend the concept of health and security to justify things that are kind of border line" (interview, 2010). However, EU officials working on the services directive within the Directorate-General Internal Market & Services indicated that such a requirement for hairdressers would be considered disproportionate by the Commission. Actually, 'it's quite difficult to say that a hairdresser, who is coming and had only 1200 hours [instead of 1500], will create problems' (interview, 2010)".

The same applies if a host member state in the EU would require a criminal background check before allowing a hairdresser to provide temporary cross border services. It is conceivable that a state which doesn't regulate the profession and therefore can't ask for a simple declaration would still prefer hairdressers with clean criminal records. The host country would have to justify the criminal record check under the service directive arguing that such an action is justifiable under the public order exemption. The Commission then would assess the request. However, a colleague from the Directorate-General remarked 'we do not consider it justified to request criminal records for hairdressers' (interview, 2010).

While derogations exist for public health and safety, they are considered in the case of hairdressers to be either ludicrous or disproportionate. The European Commission has pointed out that a) other member states have also an interest in not endangering their public, so if professionals are licensed in one state, they should have free access in other states and b) this hinders economic competition and therefore has an economic cost for the entire polity. Conversely in the US there seems to be a lack of awareness regarding potential costs for service providers.

Moreover, the member state needs to demonstrate that the goal which the requirement tries to accomplish cannot be accomplished by any lesser intrusive means. As the former Director General of the Legal Service of the European Commission said:

‘[A]re German citizens different from French citizens across the border to the point that they need an expertise to be dealt with? You end up with the sole argument that we want to be sure that people are well-trained; okay that’s pretty easy. There is no other reason for discrimination’ (interview, 2009).

Overall, the examples revealed not only the Commission’s statutory involvement in the implementation of the service directive but also the active involvement of its staff in ensuring that any of these requirements, which member states might still see as “logical” and justified reasons, are debunked as unjustifiable and simply represent non-tariff trade barriers. Indeed, the service directive has reversed the burden of proof. The service provider is not obligated to demonstrate that a particular requirement is unjustified according to the European Union treaties. Instead it is the member states’ obligation to prove that the maintaining or introduction of a requirement is not only justifiable by one of the four exemptions but also proportionate.

## **Why has the EU surpassed the US in service liberalization?**

Explanations for market integration have mostly been developed and applied to one polity or the other, but when applied to both, they have considerable difficulty accounting for these outcomes. Yet the explanatory frameworks employed to explain each polity's absence or presence of a coherent set of rules for market exchange and the degree to how much they open exchange to competition are very similar. They can be divided in three major categories: 1) structuralist-materialist / rationalist-functionalist ; 2) institutional and 3) ideational/cultural.

Structuralist-materialist / rationalist-functionalist explanations lead us to expect that institutional outcomes and market integration are either the result of self-serving agendas of specific interest groups reacting to general structural economic pressures or the result of shared interests of many socio-economic groups in functionally efficient institutional arrangements. In the European context, this view is especially expressed by Geoffrey Garrett (1992) and Andrew Moravcsik (1998). The latter claims that European economic integration is the result of

A series of rational choices made by national leaders who consistently pursued economic interests – primarily the commercial interests of powerful economic producers and secondarily the macroeconomic preferences of ruling governmental coalitions – that evolved slowly in response to structural incentives in the global economy (Moravcsik, 1998, p. 3).

Chandler (1977) and McCurdy (1978) make similar kinds of arguments about market building and liberalization in the US.

Institutionalist explanations argue that pre-existing institutional arrangements, mediated by the presence or absence of active interest groups, hinder or facilitate mobilization in favor of more centralization, or create difficult-to-alter organizational constellations (Haas, 1958, 1961; Skowronek, 1982; Stone Sweet and Sandholtz, 1998). From a broad institutionalist perspective it may seem like

institutionalism would predict the emergence of a stronger single market in the US due to the earlier delegation of power to the central government in the US, which should have created federal entrepreneurs with an interest in more central power than in the EU.

A third perspective comprises ideational and cultural approaches to market building (Bensel, 2000; Berk, 1994; Dobbin, 1994). Scholars argue that the US has a pro-market liberalization culture relative to Europe. For instance the American internal market is perceived as being the epitome of market integration and liberalization, where any restraints to trade are ‘associated with political tyranny’ and where policies were ‘adopted to guard liberty by precluding restraints of trade’ (Dobbin, 1994, p. 225). Based on many of the ideational accounts we should also expect that the US ended up more liberalized than the EU.

These existing explanations are unable to clearly account for the differences. Therefore, this article proposes a more nuanced explanation based on an institutional argument playing out in a broad ideational context. It argues that taking the notion of American exceptionalism, in both the liberal or cultural nationalist form, *and* the role of the European Commission as centralization and liberalization catalyst due to its comparatively narrow mandate into serious consideration does a better job in explaining the cross-polity variation in outcomes.

#### *European Regime: Commission Pushing the Liberal Market Envelope*

In services liberalization, the Commission has been the main leader, with states conflicted and business largely in the background.

The Commission’s opportunity to embark upon further services liberalization, beyond what exists in the US, arrived at the start of the new millennium. The March 2000 special European Council summit unveiled the Lisbon agenda, setting a ‘*new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world*’. This agenda

tasked the Commission with devising a strategy for the ‘removal of barriers to services’ (Presidency Conclusions, 2000). Yet, the Lisbon agenda itself was the direct result of the continuous prodding of member states by the Commission and can be carefully traced back, through the series of previous European summits, to former Commission President Jacques Delors’ 1993 *White Paper on Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21<sup>st</sup> Century* (COM(93)700) (Jones, 2005). The Lisbon Summit was only the moment when the European heads of state had finally ‘agreed [...] to take ownership of the project’ previously proposed by the Commission (Jones, 2005, p. 8). As Hywel Jones noted, ‘[a]lthough Europeans are undoubtedly sympathetic to Lisbon’s overall objectives, they have not been engaged in the process and the press is correspondingly disinterested’ (Jones, 2005, p. 8). Consequently, ‘[t]he lack of public debate means that there is no bottom-up pressure for the achievement of Lisbon’s goals’ (Jones, 2005, p. 8). This put the Commission at the center of the run-up to the Lisbon agenda and the subsequent market reforms in the services sector.

Moreover, EU member states were only ‘asking for the continuation of the sector-specific approach to internal market legislation’, focusing in particular on three areas: electronic commerce; the services of general economic interest (gas, electricity, postal services and transport) and financial services. There was ‘no trace at all of the idea of a general directive on services’ (De Witte, 2007, p. 2). The member states did not ask for a horizontal approach to services liberalization, which would encompass all remaining services sector in one broad directive. They also did not demand nor anticipate the transformation of mutual recognition into the ‘country of origin’ principle. The idea of a directive which supplements the classic sectoral approach to services policy with a more comprehensive across the board approach, seen as ‘more closely reflect[ing] the way the real economy now works’, did not appear in any previous EU documents until the Bolkestein draft directive on services.

By combining a horizontal approach and extending the mutual recognition principle to services, the Commission undertook a ‘radical shift’ in market integration, what some commentators called a “bold directive” and “a ‘legal revolution’” (De Witte, 2007, p. 1; Nicolaïdis and Schmidt, 2007, p. 722). Undeniably, the Commission went further in the understanding of mutual recognition and the freedom of markets than other EU institutions, such as the European Court of Justice. Nicolaïdis and Schmidt note that “the European Court of Justice (ECJ) balked at applying [mutual recognition] to services” (Nicolaïdis and Schmidt, 2007, p. 719). And De Witte observes that the Commission’s actions, i.e. the ‘imposing, as a matter of principle, the application of the laws of country of origin’, “represented a substantive shift compare to the ECJ’s case law’ (De Witte, 2007, p. 8).

While both elements, ‘country of origin principle’ and horizontal legislative approach, have been applied before, it was the combination of the two, which turned out to be radical (cf. Leslie, 2009, p. 5). Instead of focusing on a specific sector, the Commission proposed a draft that would apply to a large range of services ‘without an attempt at listing those services (unlike what happens in the context of GATS)’ (De Witte, 2007, p. 8). The service directive would thus apply to all services activities and sectors that are not expressly excluded from its scope of application. The Commission calculated that this would encompass approximately 50 per cent of GDP and 86 per cent of the EU firm population (COM(2004)2 final: 6). Moreover, it proposed apropos the temporary delivery of services ‘that these services providers should in principle be *regulated by the state of origin* and not by the host state (Article 16 of the draft)’ (De Witte, 2007, p. 7; emphasis in original). The draft lacked any harmonization propositions related to non-market concerns, such as cultural diversity concerning broadcasting services. The only derogations were for public policy, public security, and public health. These were much more restrictive than ‘the general interest grounds for restriction



recognized by the ECJ in its “mandatory requirements” case-law, and could be seen to *replace* the Treaty-based grounds of derogation recognized by the ECJ’ (De Witte, 2007, p. 9). In short,

[t]his important *regulatory shift* [...] formed a distinct example of Commission entrepreneurship, since it has been advocated neither by the other EU institutions nor by major interest groups. It was the Commission’s own invention [...] (De Witte, 2007, p. 9; emphasis in original).

Commission officials didn’t see the regulatory shift as any ‘original idea’ *per se*, but making creative use of an already established principle somewhere else. As one official observed,

The [country of origin principle] was drafted by the European Commission and my colleagues at the time. [I]t was my unit. There was already the e-commerce directive dealing with this question (interview, 2010).

When it came to liberalization of services ‘the Commission had a pre-conceived view of the matter: even before it had accomplished the comprehensive analysis of existing barriers [...] it already indicated what would be one of its main consequences: the proposal of global legal instrument to deal with those barriers’ (De Witte, 2007, p. 3). This becomes clear when studying the internal market strategy paper for services published December 29, 2000 as response to the European Council’s call earlier that year in Lisbon. While in the document’s main part the Commission remains relative vague and leaves options open, it clearly asserts in the Annex that ‘[f]or barriers which are horizontal in nature, an instrument will be proposed containing [...] [t]argeted harmonisation of requirements affecting several sectors’ and ‘[a] mechanism to ensure that the Internal Market can be used by all European service providers as their domestic market, notably through the efficient application of the principle of mutual recognition’ (COM (2000) 888, p. 15). In other words, the Commission already proposed the remedy before identifying officially the barriers to services trade

and what solutions this might necessitate. Subsequently, and unsurprisingly, the comprehensive analysis leading to an update of the market strategy paper in 2003 came to the conclusion ‘that a general legal instrument was indeed necessary to sweep away the cross-sector barriers to trade in services’ (De Witte, 2007, p. 3).

The Commission was largely left alone in battling for the Bolkestein draft once opposition to it started reframing the issue away from non-discrimination in the EU, ‘the absurdity of barriers’ to services trade and the conveyance of ‘solidarity through open markets rather than harmonization’ towards the undermining of the social welfare state (cf. Nicolaïdis and Schmidt, 2007, pp. 727–28; SEC(2004) 21) . While business, such as the Federation of Small Businesses in Britain, strongly favored services liberalization (House of Lords Sixth Report: Section 90), they did not drive the integration process nor actively help the Commission to overcome any resistance to the services directive. Given the lack of vocal business support defending the original draft (cf. Leslie, 2009; Mallinder, 2006), the politicization of this issue, especially in France and Germany, and persuasive economic data entering late into the game, a compromise seemed ineluctable. Eventually the Commission was obliged to compromise not so much because of the actual content of the directive but because domestic-political motivations whipped up the opposition. While a compromise directive was worked out, with the European Parliament being more active than in the past regarding the depth of market integration (cf. Chang et al., 2010; Nicolaïdis and Schmidt, 2007), the important fact remains that the European Union ended up with services liberalization and the United States did not.

While the ‘country of origin principle’ was abandoned in favor of a vague obligation of member states to respect the right of providers to provide services, its reversal looked ‘less dramatic than many seem to have feared’ (Chang et al., 2010, p. 109). Likewise, the list of grounds, under which member states can enforce derogatory measures, remained far more restrictive than the ‘rule of reason’ recognized by the European Court of Justice (cf. Brunn, 2006). The Commission is still free

to set aside regulation simply based on the proportionality argument, even when the regulation otherwise might be compatible with the EU treaties. The Commission is simultaneously judge and executioner. The victory of opponents to the original draft is therefore largely cosmetic, especially when the Commission personnel implementing the directive are to be believed. One official noted that ‘when you read the service directive, the original draft and this one, you will see difference(s) are really small’ (interview, 2010).

Even if the ‘country of origin principle’ was excluded from the final version, the Commission has continued to operate on precisely that principle. It has been the linchpin of the radical opening of services across the internal market. The courts, member states, and business pushed less than the Commission for market liberalization. The Commission eventually was forced to compromise due to a change in the permissive environment, especially in the notable cases of France and Germany where internal politics, partially due to contemporaneous Eastern enlargement, forced a reversal of their respective supports of the original draft. Despite being the most politicized directive coming out of Brussels in a long time (Barnard, 2008; Griller, 2008) and the accompanying vocal resistance, particularly to the ‘country of origin principle’, services liberalization in the EU remains close to the Commission’s original goal.

Domestic-political timing and the coincidence of enlargement with the services directive made it enticing for politicians to play up opposition to this directive. These external circumstances put a certain limit on the Commission’s influence. The Commission, additionally, botched the presentation of arguments for the economic benefits of the directive by making a strong quantitative economic argument too little, too late and by giving the impression that Bolkestein’s successor, McCreevy, was not going as strongly to bat for the original proposal (Change et al., 2010). No matter what the external constraints and the shortcomings of the Commission have been in this particular case, the fact remains that not only a services directive has been passed, but that despite the

amendments, the changes are minimal, particularly to those implementing it at the European level and most importantly in contrast to the United States.

*American Regime: No Federal-Level Agent for Market Liberalization*

In recent decades there has been practically no mobilization or discussion toward greater services liberalization in the US.

Theoretically the US Congress could preempt the states based on the commerce clause, the privileges and immunity clause as well as the supremacy clause. Pre-emption is the closest American parallel to an EU directive, where federal forces would come in and take over regulation of these activities. The notion of congressional preemption is not far-fetched. Congress has, in recent decades, more frequently exercised 'its power of preemption to remove regulatory authority completely or partially from the states' (Zimmerman, 2004, p. 5).

Congress, however, is not likely to act here given that nobody, similar to the European Commission, has been making the economic case for services liberalization. There is a dearth of data and knowledge to persuade Congress to intervene and/or states and other stakeholders, such as the business community, to seek such preemption. The Commerce Department, which superficially might be considered to play a similar role to the DG Internal Market, is not actively monitoring the US internal market and seeking out non-tariff barriers to trade to the same degree as the European Commission by commissioning cost studies. The absence of one single federal agent able to negotiate international trade treaties on important economic issues for the entire US polity has repeatedly led to frustrations in the EU. The patchwork of different regulatory systems and competences not only hampers internal trade between US states but also has important repercussions when negotiating international trade agreements. Depending on the sector and an individual state's decision, regulatory competence of a specific profession does not necessarily remain in the hands of state authorities but can be delegated to professional bodies, complicating the American situation even more.

To date, the most common solution to the problem of discriminatory practices in the US has been reciprocity. Yet, reciprocity agreements have the disadvantage of requiring common standards to be separately legislated (Zimmerman, 2004). Each state legislature would need to pass a similar law stipulating similar regulations granting access for out-of-state licensed professional. Reciprocity agreements are not universally and consistently applied across the US, giving today the impression of an America à la carte.

Compacts, another potential solution, have the notable advantage that they are jointly negotiated by any number of states, which can lead to bilateral, multilateral, sectional or national compacts and ‘could create a nonlegislative mechanism (in the form of a commission with the authority to promulgate regulations)’ to create uniform standards (Zimmerman, 2004, p. 1). While not all, ‘most compacts are submitted to Congress for its grant of consent’ as stipulated in Article 1, section 10 of the United States Constitution (Zimmerman, 2004). Compacts can also directly involve Congress. Thus, the possibility of a polity-wide compact, including the direct involvement of Congress, to eliminate the remaining non-tariff barriers to the provision of services exists. However, compacts run into the same coordination hurdles as reciprocity agreements. They allow for the possibility of opt-outs, undermining the original goal of regulatory uniformity across the internal market. Hence, they lead frequently to a segmented internal market similar to what exists today with reciprocity agreements. The number of new interstate compacts has been in decline since 1965.

Another disadvantage of reciprocity and interstate compacts is that they have been sectoral in nature, i.e. they only have been created in the past to deal with one specific issue or profession. This is somewhat similar to the EU Commission’s earlier approach to services liberalization. Yet, in contrast to the US, the Commission has recognized the ‘horizontal nature of the barriers’ where ‘[a]n analysis of the wide range of legal barriers reported shows that many of them are common to a large number of widely varying sectors of activity’ (COM (2002) 441 final, p. 51). Thus, the Commission

had subsequently fought for a horizontal approach, of which the services and qualification directives encompassing the majority of services professions are the direct result.

The US states don't perceive any barriers to trade as long as they require largely the same from their in-state and out-of-state state service providers. State authorities get defensive when confronted with the notion that having an already licensed professional from a sister state undergo a number of licensing requirements represents a double burden. The somewhat defiant reply is that if the states wouldn't keep these requirements for out-of-state licensed providers, then the states could simply abolish any regulatory standards for professions. As an Ohio licensing board official said,

If we have somebody that we didn't run through a reciprocity process, then we might as well not have any rules, if anybody could just come in and start cutting hair (interview, 2010).

The EU Commission has led arguments similar to the Ohio official's ad absurdum by observing that the hair of people for instance in the state of Ohio can safely be assumed to not be much different from the hair of people in a neighboring state. Thus, a person deemed qualified in one state to cut hair can relatively safely be assumed to be qualified to cut hair in another state.

Finally, given their centrifugal effects, reciprocity agreements and interstate compacts have been condemned, according to a former EU official, to be the work 'of the devil because the European treaties already establish in principle general reciprocity and bilateral agreements may not be put in place' (interview, 2009). And, as we see in the US, the preference of reciprocity agreements has led to the maintenance of a segmented market, where it is difficult for service providers to test the water across state borders.

*Don't tread on me: levels of trust in federal-level governance*

In addition to differing in the presence or absence of an institutional body mandated to pursue liberalization, the EU and the US are characterized by an important ideological contrast in the nature of their actors' attitude towards market integration and organization. Contrary to what someone might suspect based on the notion that EU member states are officially independent nation-states, it is in the US where state rights are commonly evoked to maintain non-tariff barriers to trade while the EU is emblematic of a strong belief in market efficiency.

A general distrust of federal government in the US was present throughout the interviews and poll data. Broader norms of legitimate governance favor a centralized authority, even a liberalizing central authority, more in the EU than in the US. While an absolute majority of Europeans wants more decision-making at the European level and trusts European level institutions more than their own state institutions, 80 per cent of the American population does not trust the federal government and has little faith in it to solve the nation's problems (Eurobarometer 73; Pew Research Center, 2010). Americans are averse to the federal government solving economic issues, especially at the state and local level. Pew Research reports that 'the public is wary of too much government involvement with the economy' and that 58 per cent say 'the government has gone too far in regulating business and interfering with the free enterprise system', a percentage similar to October 1997 during the booming Clinton years (Pew Research 2010, p. 9).

The ideological difference becomes clear when looking at the arguments that usually shape debates regarding market integration in the EU and the US. Cost savings and efficiency arguments are used in both polities; however, the US prominently evokes state rights and distrust of federal government.

American business has rather been reluctant to go for federal preemption, preferring interstate compacts or reciprocity agreements, because it 'obviates the need for national government regulation'

(Zimmerman, 2004, p. 5). The president of NABBA suggests that ideologically Americans in general and the barbers he represents are not keen on federal level solutions.

Right now it appears that there is too much federal government. If you went to the barbers and asked them, they would still like to see it controlled to where they go to barber school in their state (interview, 2010).

Additionally, while some licensed cosmetologists and barbers have voiced that they would like to have universal market access, organizations representing them don't perceive that the possibility of federal preemption exist, limiting themselves to demand more reciprocity between sister states. The Professional Beauty Association's Government Affairs Manager for example explained that they have not undertaken any lobbying at the federal level, because they are unsure whether the option of preempting states in the regulatory domain exists, noting that they 'have not contacted the U.S. Commerce Department or Congress because this is not a federal issue' (correspondence, 2010).

Even less surprising is that other national level organizations, representing mainly the state boards of cosmetology as well as barbers have not been advocating for congressional preemption. The underlying fear is that such a measure makes them superfluous and that individual board members might lose out on influence and money. As NABBA's president observed:

They don't want to lose control [...] we have three board members. They don't get paid very much for being on the board, but they do the testing and if they didn't do the testing, they would only meet six times a year. So we test every two weeks (interview, 2010).

The fear that state regulatory authorities would lose all control is exaggerated when comparing the situation with the EU. The general framework in the EU allows for different training and qualification standards and the supervision of schools and applicants within a member state. But simultaneously it facilitates cross-border trade for the temporary provisions of services. Nevertheless,



the only national option actors in the US can conceptualize, besides reciprocity, is a national (private) test and not a federal-level governmental intervention or across-the-board policy.

Yet, a national standard, based on a national test, and avoiding federal involvement, still runs into the problem, similar to reciprocity, of needing to be approved by every single state legislature or regulatory body in charge of any regulated profession. The likelihood of this happening soon or at all is slim. Already today there is concern over national testing among barber boards in the United States. As NABBA's president remarks:

There is national testing now and it's pathetic! Big is not always better. We test people for 40 dollars to get their license. The national testing right now is 600 dollars. [State boards] are very much opposing it (interview, 2010).

## **Conclusion**

This study has shown that lurking beneath the prevailing images of the American and European single markets is a much more complex reality, important elements of which are exactly the opposite of the prevailing images. The United States has substantially more non-tariff barriers in place than the European Union which created coherent federal rules for exchange in services and ensures that these rules open up exchange to competition. Even scholars of comparative federalism have not picked up on the depth and scope of these ways in which Europe has adopted more liberalized and centralized rules than the US.

The difference in outcomes is mainly due to the unique role of the European Commission and the absence of a similar actor in the US that takes the entire domestic market into account. The evidence shows that the Commission has played the key role in pushing forward and ensuring the creation of a single set of coherent rules for market exchange and the adoption of rules that open exchange to competition polity-wide. Frequently it succeeded in pushing through proposals against

the expressed interests of some of the major EU member states. As Lord Cockfield noted in his memoirs, when commissioning the Cecchini report on the ‘cost of non-Europe’, the Commission ‘set out a clear philosophy’ and ‘went further than they [UK government officials] had imagined and therein lay the seeds of my disagreement with many of my former colleagues in that government’ (Cockfield 1994, 179-80).

It is this philosophy of market liberalization and the taking advantage of windows of opportunities, which still guides Commission endeavors today. This also shows that government intervention and regulation does not automatically mean a more restricted market. Strong, central government policies can lead to a more open market outcome (cf. Gamble, 1988). It demonstrates that a federal-level advocate, taking into account the entire polity, and having a relatively circumscribed mandate focusing on market-building can make a difference, even in a polity that otherwise has less strong federal-level institutions.

Moreover, trust levels for the EU are higher on average than for member state governments and parliaments, while the reverse is true for federal-level institutions in the US. Europeans are generally more welcoming to federal-level government involvement in the market, even if it means market liberalization.

Thus, the land of the free, home of the brave, is not necessarily home of a free, open, unrestricted services (or public procurement) market. When confronted with the evidence of non-tariff and tariff-style barriers to trade *within* in the United States, Brian Clem, Oregon House Representative and sponsor of HB2763 creating in 2010 a permissible 10 per cent in-state preference for all agricultural goods admitted:

That’s very interesting. They [the EU] have a more perfect union than we do ironically, at least economically a more perfect union (interview, 2010).

The lessons therefore are twofold. First, more empirically-oriented, systematic comparison between the United States and Europe and other polities, especially other federal polities, are necessary to test the existing theories and to either refine them or to develop new ones. Second, the present Trade and Investment Partnership negotiations between the EU and the US are doomed to fail if the individual US states are not invited to sit at the table early on to ensure their buy-in into any future deal.

Such a buy-in was sought in the recent Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, when the EU Commission, against political practice in Canada, insisted on the Canadian provinces' participation in any trade negotiations. In the run-up to the CETA Jan Frydman, Deputy Head of Unit for International Affairs of the EU's Directorate General for Enterprise and Industry, remarked that

when we told the Canadians that we would like to have a possibility for our engineers, architects, and other professions to freely establish in Canada and vice-a-versa, they said, "This is a great idea, but there is only one problem: in Canada if you are an architect from Vancouver you cannot establish yourself in Alberta or anywhere else. We would never be able to agree with you, because we don't even have it ourselves" (interview, 2010).

Of course, the Canadian market and number of political actors compared to the United States is rather small, making any far-reaching EU-US deal, which receives the acquiescence of the US states, still controlling access to their respective services and procurement markets, unlikely.

### *References*

Badré, D., Hermange, M.-T., Bret, R., and Lagauche, S. (2004-2005). 'Que penser de la directive "Bolkestein"'. Rapport d'information, French Senate.

- Barnard, C. (2008) 'Unravelling the services Directive'. *Common Market Law Review*, Vol. 45, No. 2, pp. 323-394.
- Bensel, R. F. (2000) *The political economy of American industrialization, 1977-1900*, (Cambridge: Cambridge University Press).
- Berk, G. (1994) *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917*, (Baltimore and London: The John Hopkins University Press).
- Brooks, D. (March 17, 2009) 'The Commercial Republic'. *New York Times*, p. 27.
- Broussolle, D. (2010) 'Les enjeux du débat sur la directive services à la lumière des spécificités des services.' *Bulletin de l'Observatoire des Politiques Economiques en Europe*, Vol 14, No. 3, pp. 1-18.
- Brunn, N. (2006) 'The Proposed Directive on Services and Labour Law.' *Bulletin of comparative labour relations*, Vol. 58, pp. 19 - 36.
- Chandler, A. D. J. (1977) *The visible hand: the managerial revolution in American business*. (Cambridge, Massachusetts: Belknap Press).
- Chang, M., Hanf, D., and Pelkmans, J. (2010) 'The Services Directive: Trojan Horse or White Knight?'. *Journal of European Integration*, Vol 32, No. 1, pp. 97-114.
- Cockfield, L. (1994) *The European Union: creating the single market*, (Chichester: Wiley).
- De Witte, B. (2007) 'Setting the Scene: How did Services get to Bolkestein and Why?'. European University Institute: Department of Law Working Papers.
- Dobbin, F. (1994) *Forging industrial policy: the United States, Britain, and France in the railway age*, (Cambridge: Cambridge University Press).
- European Commission (1993) 'White Paper on Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21<sup>st</sup> Century'. COM(93)700.
- European Commission (2000) 'An internal market strategy for services. COM(2000) 888.

- European Commission (2002) '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'. *COM(2002) 441 final*
- European Commission (2004a) 'Proposal for a Directive of the European Parliament and of the Council on services in the internal market'. *COM(2004)2 final*.
- European Commission (2004b) 'Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market'. *SEC(2004)21*.
- European Commission (2010). 'Eurobarometer 73: Public opinion in the European Union'.
- European Council (2000) 'Presidency Conclusion'. Lisbon European Council 23 and 24 March 2000.
- European Parliament and Council (2005) 'Directive 2005/36/EC on the recognition of professional qualifications'. *OJ 2005 L 255/22*.
- European Parliament and Council (2006) 'Directive 2006/123/EC on services in the internal market'. *OJ 2006 L 376/36*.
- Gamble, A. (1988) *The free economy and the strong state : the politics of Thatcherism*, (Durham: Duke University Press).
- Garrett, G. (1992) 'International cooperation and institutional choice: the European Community's internal market'. *International Organization*, Vol. 46, No. 1, pp. 533-60.
- Griller (2008) 'General report'. In. Koeck, H.F. Karollus, M. M (eds) *Die neue Dienstleistungsrichtlinie der Europäischen Union: Hoffnungen und Erwartungen angesichts einer (weiteren) Vervollständigung des Binnenmarktes* (Wien, Nomos) , pp. 379-423.
- Haas, E. B. (1958) *The uniting of Europe: political, social, and economic forces 1950-1957*, (Stanford: Stanford University Press).

- Haas, E. B. (1961) 'International Integration: The European and the Universal Process'. *International Organization*, Vol. 15, No. 3, pp. 366-92
- Hohn, S. (2006) *Public Marketing : Marketing-Management für den öffentlichen Sektor*, (Wiesbaden: Gabler)
- Hoffmann, Leif. (2011). *Land of the free, home of the (un)regulated: A look at market-building and liberalization in the EU and the US* (Dissertation), University of Oregon, Eugene. Available from PQDT Open
- House of Lords (2005) Sixth Report, House of Lords, Select Committee on the European Union.
- Jones, H. C. (2005) 'Lifelong learning in the European Union: whither the Lisbon Strategy?' *Journal of the European Institute for Education and Social Policy*, Vol. 34, pp. 1-17.
- Leslie, J. (2009) 'The EU Services Directive, German Labour Market Regulation and Institutional Change'. *Australian and New Zealand Journal of European Studies*. Vol. 1, No. 2, pp. 1-21.
- Mallinder, L. (2006) *McCreevy hits back at services directive critics*. European Voice. Available at <http://www.europeanvoice.com/article/mccreevy-hits-back-at-services-directive-critics/>
- McCurdy, C. W. (1978) 'American Law and the Marketing of the Large Corporation, 1875 – 1890' *The Journal of Economic History*, Vol. 38, No. 3, pp. 631-49
- Melder, Frederick Eugene. 1940. "Trade Barriers Between States." *The Annals of the American Academy of Political and Social Science*, 207: 58.
- Moravcsik, A. (1998) *The choice for Europe : social purpose and state power from Messina to Maastricht* (Ithaca, New York: Cornell University Press).
- Murray, C. (March 22, 2009) 'Thank God America Isn't Like Europe – Yet'. *The Washington Post*, p. B02.
- Mylar, B. (2010). 'Illegal haircut operation found at flea market: State issues violations to men cutting hair at mission flea market'. (San Antonio, Texas: KSAT 12).

- Nicolaïdis, K., Schmidt, Susanne K. (2007) 'Mutual recognition 'on trial': the long road to services liberalization'. *Journal of European Public Policy*, Vol. 14, No. 5, pp. 717-34.
- North Carolina Department of Administration. 2006. *Summary of In-State Preference Practices*. Last Updated August 17, 2005 2006 [accessed May 22, 2006]. Available from <http://www.doa.state.nc.us/PandC/rplaw.htm>.
- Oregon State Procurement Office. 2010. *State by State Reciprocal Preference Data*. 2010 [accessed August 20, 2010]. Available from [http://www.oregon.gov/DAS/SSD/SPO/reciprocal\\_detail.shtml](http://www.oregon.gov/DAS/SSD/SPO/reciprocal_detail.shtml).
- Pew Research Center (2010) *The people and their government: Distrust, discontent, anger and partisan rancor* (Washington, D.C.: Pew Research Center for the People & the Press).
- Saint-Paul, G. (2006) 'Making sense of Bolkestein-bashing: Trade liberalization under segmented labor markets'. *Journal of International Economics* Vol. 73, No. 1, pp. 152-74.
- Skowronek, S. (1982) *Building a New American State: The Expansion of National Administrative Capacities, 1877 – 1920*, (Cambridge: Cambridge University Press).
- Stone Sweet, A., Sandholtz, W. (1998) 'Integration, supranational governance, and the institutionalization of the European polity'. In Stone Sweet, A., Sandholtz, W. (eds) *European integration and supranational governance* (Oxford: Oxford University Press), pp. 1-26.
- Zimmerman, J. F. (2003) 'How perfect is the economic union? Interstate trade barriers'. Paper presented at the Annual Meeting of the American Political Science Association, Philadelphia, 28-31 August.
- Zimmerman, J. F. (2004) *Regulation of Professions by Interstate Compact*. CPA Journal Online, Available at <http://www.nysscpa.org/cpajournal/2004/504/infocus/p22.htm>

*Interviews*

Clem, B. (telephone interview, February 5, 2010). Member of the Oregon House of Representatives.

European Commission Officials (telephone interview, November 30, 2010). Directorate-General  
Internal Market

Frydman, J.E. (telephone interview, October 27, 2010). Deputy Head of Unit for International  
Affairs,- Directorate General for Enterprise and Industry

Irizarry, Myra (correspondence, October 2010). Government Affairs Manager, Professional Beauty  
Association

Oregon Health and Licensing Agency (correspondence, October 2010).

Paul, W. (correspondence, October 2010). Ministerium für Wirtschaft, Verkehr, Landwirtschaft und  
Weinbau, Rheinland-Pfalz.

Petite, Michel (personal interview, September 14, 2009). Former Director General of Legal Service of  
the European Commission.

Texas Department. of Licensing and Regulation (telephone interview and correspondence, Nov. 8 - 9,  
2010).

Von Sydow, H. S. (personal interview, September 22, 2009). Former European Commission official  
in the Directorate General Internal Market.

Warner, H. (telephone interview, November 29, 2010). President of the National Association of  
Barbers Boards of America and member of Ohio's Barber Board.