

Comments from the Council of Bars and Law Societies of Europe (CCBE) regarding the Consultation by European Commission DG Trade on objectives and priorities regarding service negotiations between the EU and the US

The CCBE is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE would like to make the following comments regarding service negotiations between the EU and the US.

The CCBE believes that it is beneficial to launch service negotiations between the EU and the US. We believe that an agreement covering services alone would be a better approach as opposed to a comprehensive agreement. The CCBE would support the adoption of a positive list approach with regard to any agreement.

From the CCBE's point of view, it is important to note that in the negotiations of the so-called Uruguay Round which led to the GATS of 1994, the US requested numerous concessions inter alia from the EU Member States, and at the same time stated that the US Administration on its part was unable to make binding commitments in many service sectors, in particular legal services, because the regulatory power was with the US Federal States, which the US Administration for constitutional reasons was unable to bind. This US constitutional problem continues to exist, and has been relevant also in the present Doha Round which aims to introduce additional liberalisation measures into the GATS of 1994.

This constitutional problem of the US Administration will in all likelihood also come up if the US Administration should enter into negotiations with the EU Commission on the proposed "Transatlantic Jobs and Growth Pact", i.e. the US Administration will claim that it cannot bind the US Federal States while at the same time it requests binding commitments from the EU on behalf of the EU Member States.

The CCBE would like to mention that it is important to note that this position of the US Administration is, in our view, legally incorrect. According to a decision by the US Supreme Court (*Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920)), the US Administration does in fact have the authority to conclude international commerce agreements with binding effect upon the US Federal States also in sectors for which the competency as between US Federal level and US State level lies with the US State level. Despite this ruling, the CCBE believes that the US Administration will not use its authority to bind the US Federal States in international treaties for political considerations.

As regards more specifically EU-US trade in services, the question has been raised whether the various service sectors would have an interest in uncoupling the service negotiations from the other parts and components of the Pact. To do so may be beneficial for legal services in particular because it would reduce the likelihood that liberalisation in legal services may eventually be traded-off against liberalisation in non-service sectors such as in particular agriculture. This is what almost happened in the Uruguay Round, when it had been tentatively already agreed that the European legal market would be opened up for US lawyers in consideration for the US reducing the restrictions on agricultural imports. It was only with considerable difficulties that this tentative agreement could be rolled back to what is now the commitment by many EU Member States in the GATS, namely that US attorneys have been given the right to establish in the respective Member State only for the practice of home country and international public law (with the express exclusion of European Community Law).

We believe that it is very likely that this practice rights issue will come up in the forthcoming negotiations with the US because the US legal profession continues to press for US attorneys to be given the same rights in the EU that EU lawyers enjoy under the Service Directive of 1977 and the Establishment Directive of 1998, i.e. in particular the rights to practise local law and community law.

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