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# REGULATORY COOPERATION FOR TRADE IN SERVICES IN THE EU AND US TRADE AGREEMENTS WITH THE REPUBLIC OF KOREA: HOW DEEP AND HOW COMPATIBLE?

EUGENIA COSTANZA LAURENZA\* AND JAMES MATHIS†

*This article compares domestic regulation provisions in the field of international trade in services for two economic integration agreements with the Republic of Korea: the Free Trade Agreement between the United States of America and the Republic of Korea (2011) and the Free Trade Agreement between the European Union and the Republic of Korea (2011). It examines the subjects of transparency, regulatory cooperation, competition law and policy and their institutional context in order to assess the depth of integration generated and the level of compatibility that results between the agreements. The article determines that many of the subjects are treated in a softer law manner that establishes ongoing systems of cooperation in order to realise the agreements' objectives of addressing regulatory barriers for foreign services and service providers. In some cases these softer law approaches may reflect the policy space parties choose to retain in their own domestic systems for balancing trade and regulatory objectives. For most of the subjects, the approaches employed are similar, suggesting that the two agreements are rendered generally compatible for the types of regulatory activities incurred by the common signatory. The two subject areas of transparency and sector-specific domestic regulation present some more legally binding and actionable elements and there are some differences between the agreements in how these elements are addressed. For these, there is more risk of regulatory fragmentation as between the agreements and questions can be raised as to how this is resolved by a national regulatory system. Finally, the article considers some implications for the multilateral trading system of the World Trade Organization presented by the provisions examined in these agreements. To the extent that softer regulatory approaches emphasise the building of agency relationships over time, one can question whether this is a likely possible model of a larger group of WTO members. For those subjects that present somewhat more rigorous legal approaches, one can more easily consider how these models might translate to the WTO discussion as potential benchmarks for enhancing multilateral trade in services.*

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## I INTRODUCTION

This article makes a comparative analysis of the approaches used for the treatment of regulatory barriers to trade in services by the European Union and the United States in their respective *General Agreement on Trade in Services* ('GATS')<sup>1</sup> art V economic integration agreements with the Republic of Korea. Both trade agreements have made commitments to eliminate barriers and provide national treatment for trade in cross-border commercial presence and professional services.<sup>2</sup>

Of particular interest are the approaches being developed in these agreements for the subjects of regulatory cooperation, as these rules affect the delivery of a service and the ability of foreign firms and service providers to function in the market. In our discussion, we subdivide this general theme of regulatory cooperation into two areas: transparency and domestic regulation.

<sup>1</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') ('GATS').

<sup>2</sup> Ibid art V.1: 'Economic Integration' agreements require substantial sectoral coverage and the elimination of substantially all discrimination.

‘Transparency’ includes publication and notice; rights to inquire and receive a response; and elements of administrative proceedings, such as the right to notice and to be heard. Within ‘domestic regulation’, we consider tests for assessing domestic rules in light of the trade objectives of the parties and their convergence activities, such as references made to international standards. ‘Recognition’ is also included as a subject under domestic regulation where parties may develop approaches for accepting the equivalency of each other’s diplomas, licences or certificates. In addition, we compare the agreements’ provisions for competition policies, as these can affect the ability of firms to function in the domestic market. Finally, we look at the larger context of the agreements’ institutional settings for maintaining processes of regulatory cooperation and their systems of recourse (dispute settlement).

A number of these aspects were raised in the 2011 World Trade Organization World Trade Report 2011 (‘2011 WTO Report’), which found an increasing emphasis on ‘deep integration’ subjects and documented the trend for trade agreements to concentrate on ‘behind-the-border’ barriers to trade and establishment.<sup>3</sup> Since services trade is, by its nature, predominantly governed by domestic regulations, rather than by traditional border restrictions, it serves as a most appropriate subject area for identifying some of the elements that may be occurring in these deeper integration trade agreements.<sup>4</sup> While the 2011 WTO Report also documented the increasing attention to domestic regulation for trade in goods subjects, this article remains more narrowly focused on services alone. This allows more focus on analysing domestic regulatory cooperation in modern economic integration agreements.

Several points of methodology can be briefly noted. First is the selection of these two trade agreements by the EU and the US with Korea as a basis for our study. The agreements are both relatively recent EU and US trade agreements<sup>5</sup> with a single common signatory that is also an economically developed service economy.<sup>6</sup> All these parties have a continuing stake in the development of international trade and services via the *GATS* or otherwise. The underlying assumption suggested by studying these agreements is that if there are new regulatory developments and/or cooperative approaches on the horizon for services trade, then one could expect to find them emerging in recent agreements between developed countries like these. If these innovations are present, then we

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<sup>3</sup> Secretariat, World Trade Organization, ‘World Trade Report 2011 — The WTO and Preferential Trade Agreements: From Co-Existence to Coherence’ (Report, Economic Research and Statistics Division, 2011) 9–10. ‘Deep integration’ is defined in the report as referring to any arrangement that goes beyond a simple free trade area: at 9.

<sup>4</sup> On the importance of domestic regulation for enhancing domestic and traded services performance, see, eg, Bernard Hoekman and Aaditya Mattoo, ‘Services Trade Liberalization and Regulatory Reform’ (World Bank Policy Research Working Paper No 5517, World Bank, January 2011) 3.

<sup>5</sup> The United States agreement was signed in 2007 and ratified in 2011. The European Union agreement was signed in 2010. See Parts II and III.

<sup>6</sup> Korea’s level of development as an international services economy is reflected in the bilateral trade in services. EU services exports to Korea in 2010 were €7.5 billion and its imports from Korea were €4.5 billion. European Commission, *South Korea* (20 March 2013) <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>>: US services exports to Korea in 2011 were US\$16.8 billion and its imports from Korea were US\$8.4 billion. See also Office of the United States Trade Representative, *Korea* <<http://www.ustr.gov/countries-regions/japan-korea-apec/korea>>.

can proceed to characterise and compare the provisions and perhaps see some implications that might flow from the commonalities and differences in each.

This raises a second question: how to characterise whether a provision is 'deep' integration or not. In one sense, any treatment of 'domestic regulation' is 'deep' in comparison with a border measure upon imports in the form of an external tariff duty or quantitative restriction. A legal perspective, however, is also oriented to determining whether the resulting provisions oblige the treaty signatories to actually 'do anything' for the implementation of the provisions. This inevitably raises characterisations of 'hard' and 'soft' law, the latter residing somewhere in a spectrum that extends from the purely political ('non-law') to hard law obligatory expressions that are subject to operable dispute resolution mechanisms.<sup>7</sup> While identifying any particular treaty provision as either hard or soft law is a judgment call, the approach taken here is to not only look at whether the treaty says 'shall' or 'may' but also to consider other elements, including: the clarity of the provisions; the establishment of operating bodies and ongoing systems of implementation; and the manner in which recourse is provided in the event of a failure of implementation. This recognises that although many of the domestic regulation subject areas are treated in a softer law fashion, they are nonetheless intended by the parties to achieve certain results in the form of ongoing cooperative activities, even if one might not characterise these results as having formal legal effects.<sup>8</sup>

A third consideration is how to assess the agreements' compatibility. Here we refer to the common signatory, Korea, and ask whether the resulting overall regulatory environment remains legally coherent when the country engages in these multiple agreements. This is subject to the understanding that Korea also has its own approaches to these subjects that could also be expected to be reflected in the sum outcomes of its trade agreements. Finally, to the extent that we see the development of common approaches, can we draw any implications from these developments for the multilateral trading system and for the course of deeper integration approaches among larger groups of countries over time?

The article begins by examining each agreement's general regulatory provisions covering all trade (goods and services) and then proceeds through the general services chapters and their more specific sectoral provisions. The subject areas examined in turn are as noted above: transparency (notification and publication); regulatory cooperation (harmonisation, recognition and their related mechanisms); competition policies; and finally, institutional considerations including dispute settlement and recourse. We conclude (generally) that the subject areas of regulatory cooperation, competition policy and institutional mechanisms show a high degree of compatibility between the approaches used in the respective agreements. At the same time, the depth of some of these subject areas, notably regulatory cooperation and competition policy, display a 'lighter'

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<sup>7</sup> For definitions and characterisations of soft law in international law, see, eg, Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171, 201–21; C M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

<sup>8</sup> A more formal description of these elements would be those of 'obligation, precision and delegation', as in Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, 424.

integration approach exhibited by a preponderance of softer law provisions. While these do not establish binding obligations with rights recourse, they do commence processes of cooperation for reaching stated general objectives over non-designated time periods. The subject area of transparency demonstrates more binding legal benchmarks which, in some cases, vary between the two agreements. These differences might raise some regulatory compatibility issues for the common party, Korea. The conclusion considers that each side of this 'deep versus shallow' regulatory coin presents implications for the multilateral trading system and asks whether any patterns established by these agreements can be effectively taken up by a larger group of WTO members.

## II THE US–KOREA FREE TRADE AGREEMENT

The *Free Trade Agreement between the United States of America and the Republic of Korea* ('*KORUS FTA*')<sup>9</sup> negotiations were substantially completed in the spring of 2007 and ratified by each party in October (US) and November (Korea) of 2011.<sup>10</sup> The agreement's initial provision, art 1.1, states that the parties are establishing a free trade area in accordance with *General Agreement on Tariffs and Trade* ('*GATT*')<sup>11</sup> art XXIV and *GATS* art V. For international trade in services, the *KORUS FTA* has four separate chapters, one each for cross-border trade in services,<sup>12</sup> financial services,<sup>13</sup> telecommunications<sup>14</sup> and electronic commerce.<sup>15</sup> In addition, there are annexes covering nonconforming measures for services,<sup>16</sup> investment<sup>17</sup> and financial services.<sup>18</sup> The agreement has a separate chapter for investment.<sup>19</sup> In this chapter, market access for cross-border investment — which includes aspects of the *GATS* mode for commercial presence — is addressed in its national treatment article which extends to establishment and acquisition.<sup>20</sup> Otherwise, the substantive provisions of this chapter resemble a bilateral investment treaty.

The cross-border services chapter is the broadest of the *KORUS FTA*'s chapters dealing with services. Its definitional scope does not precisely mimic

<sup>9</sup> *Free Trade Agreement between the United States of America and the Republic of Korea*, signed 30 June 2007 (entered into force 15 March 2012) ('*KORUS FTA*').

<sup>10</sup> Office of the United States Trade Representative, 'Statement by US Trade Representative Ron Kirk on Korean Parliament's passage of US–Korea Free Trade Agreement' (Press Release, November 2011) <<http://www.ustr.gov/about-us/press-office/press-releases/2011/november/statement-us-trade-representative-ron-kirk-korean>>. See also Evan Ramstad, 'South Korea Clears US Trade Deal', *The Wall Street Journal* (online), 23 November 2011 <<http://online.wsj.com/article/SB10001424052970204531404577053413714833468.html>>.

<sup>11</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade*') ('*GATT*').

<sup>12</sup> *KORUS FTA* ch 12.

<sup>13</sup> *Ibid* ch 13.

<sup>14</sup> *Ibid* ch 14.

<sup>15</sup> *Ibid* ch 15.

<sup>16</sup> *Ibid* annex I ('*Schedule of the United States*'); *ibid* annex I ('*Schedule of Korea*').

<sup>17</sup> *Schedule of the United States*; *Schedule of Korea*.

<sup>18</sup> *KORUS FTA* annex III ('*Schedule of Korea with Respect to Financial Services*').

<sup>19</sup> *KORUS FTA* ch 11.

<sup>20</sup> *Ibid* art 11.3.

the *GATS* language of four modes of supply.<sup>21</sup> Instead, elements of *GATS* modes three and four (commercial presence and temporary movement) are merged into one: ‘by a national of a [p]arty in the territory of the other [p]arty’.<sup>22</sup> The definitional scope of the cross-border services chapter ‘does not include the supply of a service in the territory of a [p]arty by a covered investment’.<sup>23</sup> This is covered by the investment chapter, which defines ‘investment’ to include the commitment of capital in the form of an enterprise.<sup>24</sup> To the extent that such an enterprise would deliver a service, the investment chapter appears to control that activity, at least to the point of any inconsistency with the cross-border services chapter.<sup>25</sup> An additional level of hierarchy is established, as the investment chapter also yields to the superiority of the financial services chapter for any measure covered there.<sup>26</sup>

The *KORUS FTA* has three sectoral chapters: financial services,<sup>27</sup> telecommunications<sup>28</sup> and electronic commerce.<sup>29</sup> Each of these chapters prescribes its own relationship to the other chapters of the agreement (including the cross-border and investment chapters) and to the agreement’s general chapters, through different methods of incorporation or exclusion. Thus, the financial services chapter incorporates items from other chapters by specific article reference. The electronic commerce chapter incorporates all applicable provisions from the chapters on cross-border services and investment but then provides its own exceptions and list of nonconforming measures. The telecommunications chapter is overall silent on incorporation, suggesting that any relevant provisions from other chapters apply to the subjects in telecommunications. Any peculiarities caused by these various relationships will be raised when pertinent in the regulatory subject area discussion.

## A Transparency

### 1 General Provisions

The *KORUS FTA* has its own general chapter on transparency.<sup>30</sup> An article on publication in the chapter applies to any matter covered by the agreement and commits each party to publish its laws, regulations, procedures and administrative rules in advance and to provide interested persons and the other party a reasonable opportunity to comment on the proposals.<sup>31</sup> ‘[I]nterested persons’ is not defined in the chapter and can certainly be read to include private parties (firms) as well as public entities. For publishing proposals, in most cases

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<sup>21</sup> Ibid art 12.13. Cf *GATS* art 1.

<sup>22</sup> *KORUS FTA* art 12.13(c).

<sup>23</sup> Ibid art 12.13.

<sup>24</sup> Ibid art 11.28.

<sup>25</sup> There are, however, three articles in the cross-border chapter which specifically indicate that measures covering investment are also subject to it. These are for market access (art 12.4), domestic regulation (art 12.7) and transparency (art 12.8), as listed in art 12.1.3(a). Thus, cross-border services in the form of investment are covered by these three articles.

<sup>26</sup> Ibid art 11.2.

<sup>27</sup> Ibid ch 13.

<sup>28</sup> Ibid ch 14.

<sup>29</sup> Ibid ch 15.

<sup>30</sup> Ibid ch 21.

<sup>31</sup> Ibid art 21.1.

there is an additional timing provision of not less than 40 days prior to the date on which public comments are due.<sup>32</sup> This provides a benchmark for an open comment process and, for those proposals finally adopted, publication of them is to include an explanation of the purpose of and rationale for the regulation,<sup>33</sup> which ‘shall’ address the ‘significant, substantive comments received during the comment period’.<sup>34</sup> There is also a provision providing for a prompt response to a party’s request for information on any proposed or actual measure that might affect the operation of the agreement regardless of its notification.<sup>35</sup>

The *KORUS FTA*’s general transparency chapter also contains two articles on administrative proceedings and their appeals,<sup>36</sup> which have the same scope as the notification and publication provisions. These provide for a right to notification of proceedings and a reasonable right to be heard for persons of the other party who are directly affected by a proceeding. Each party also has an obligation to provide for an impartial review of final administrative actions for matters covered by the agreement and are also granted a reasonable opportunity to support or defend their positions.<sup>37</sup>

The *KORUS FTA*’s transparency provisions are interesting, in that they extend notice and participation for administrative actions and reviews to ‘persons’ of the other party rather than to the other signatory party alone. They set a fairly clear benchmark on the form and time of notice to the parties and for responding. Also, they create a general standard for the impartiality of those officers who govern the review. Apart from these due process standards, the provisions rely on the ‘good faith’ of a party applying its own laws. In this sense, the provisions could be characterised as a form of procedural national treatment for interested and affected private persons of each signatory party.

The chapter on cross-border trade in services provides its own art 12.8 for ‘[t]ransparency in [d]eveloping and [a]pplying [r]egulations’. This requires each party to have a mechanism for responding to inquiries from interested persons regarding regulations that fall under the subject matter of the chapter. This extends the scope of the general transparency chapter by establishing an ongoing response system for inquiries made on the operation of existing regulations and not just on proposals.

## 2 *Sector-Specific Provisions*

Additional provisions on transparency and notification are found in the agreement’s chapters on financial services and telecommunications. As indicated in the introduction, the electronic commerce provisions incorporate all the applicable provisions from the other chapters on cross-border services and financial services and, of course, the agreement’s overall general provisions.

Article 13.11 (transparency) in the financial services chapter supplements the general transparency articles from ch 21. It stipulates that a return address for comments be provided by the publishing party, with a further notation on the

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<sup>32</sup> Ibid art 21.1.3(b).

<sup>33</sup> Ibid art 21.1.4(b).

<sup>34</sup> Ibid art 21.1.4(c).

<sup>35</sup> Ibid art 21.2.

<sup>36</sup> Ibid arts 21.3, 21.4.

<sup>37</sup> Ibid art 21.4.2.

practice of the Korean Financial Supervisory Service. The balance of the article deals with the handling of applications for the supply of financial services, including information on the status of applications, timely (120 days) decisions and providing applicants with the reasons for denial. This section is a finetuning exercise that tailors the provisions to applications.

The approach to telecommunications reflects a similar finetuning; the core components from ch 21 are represented but with more direct reference to rule-making by telecommunications regulatory bodies and their measures on tariffs, technical interface, conditions for attaching equipment to the network and permit and licensing requirements.<sup>38</sup> The telecommunications chapter also has a provision with elements of transparency for licensing in the criteria and procedures, periods of decision-making and disclosing the terms and conditions of all licences in effect.<sup>39</sup>

In summary, these transparency provisions facilitate the underlying scheduling of services commitments and the process of foreign providers adapting to the local market. They appear to proactively bring interested foreign service providers into the domestic process and use clearly stated time benchmarks to achieve that.

## B Regulatory Cooperation

As noted, the *KORUS FTA* does not have a general chapter on regulatory cooperation or a regulatory framework. Its chapter on institutional provisions establishes the Joint Committee for the governance of the agreement as a whole, co-chaired by the US Trade Representative and the Korean Trade Minister.<sup>40</sup> The Joint Committee is the sole governing institution established by the agreement. There is no general provision directing the Committee to develop any particular regulatory approach to the agreement's subject matter.

### 1 Domestic Regulation

The cross-border services chapter in the *KORUS FTA* includes an article on domestic regulation,<sup>41</sup> which is directed at the process of obtaining authorisation when this is required as a condition for obtaining the legal right to supply in the market. There are elements of transparency requiring authorities to inform the applicant of their decision within a reasonable time and to inform the applicant of the status of the application, subject to authorisation requirements set out in the party's schedule to *Annex II on Non-Conforming Measures for Services and Investment*.<sup>42</sup> The balance of the article mimics some elements of *GATS* art VI (domestic regulation) in providing that qualification requirements and procedures, technical standards and licensing requirements be based on objective and transparent criteria and not be themselves a restriction on the supply of a service.<sup>43</sup> These itemised conditions are formed '[w]ith a view' that they 'do not

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<sup>38</sup> Ibid art 14.20.

<sup>39</sup> Ibid art 14.16.1.

<sup>40</sup> Ibid art 22.2.1.

<sup>41</sup> Ibid art 12.7.

<sup>42</sup> Ibid art 12.7.1; *Schedule of the United States; Schedule of Korea*.

<sup>43</sup> Ibid art 12.7.2. Cf *GATS* art VI.

constitute unnecessary barriers to trade in services'.<sup>44</sup> This phrasing suggests that a necessity test itself is not being applied as a legal criterion for assessing the restrictiveness of a requirement. *GATS* art VI.4 is the essential comparative point of reference here, as it calls for disciplines that 'shall aim to ensure that such requirements are ... not more burdensome than necessary to ensure the quality of the service'.

One can conclude from this treatment that the *KORUS FTA* is not moving beyond the status of the *GATS* negotiations on this point and is not seeking to develop any advanced approach on its own for assessing the trade restrictiveness of a domestic requirement for permission to supply. This is confirmed when we see that any future results from the *WTO GATS* negotiations regarding art VI are to be incorporated into the *KORUS FTA* and that footnote 7 to the agreement indicates that nothing in the agreement shall bind a party's positions or approach to that *GATS* discussion.<sup>45</sup> Strikingly, with regards to the *GATS* art VI comparison, there is no reference in the *KORUS FTA* to international service standards to be applied or considered between the parties, an improvement that one might think would be reasonably obtainable in a bilateral agreement between these two signatories.

## 2 Sector-Specific Provisions

The chapter for telecommunications appears to be the only one of the three sectoral chapters that provides standards for regulation in its art 14.21 entitled 'Measures Concerning Technologies and Standards'. The intention here is to draw a balance (with some criteria) between the value of allowing service suppliers flexibility to choose their technologies of supply and the right of regulators to prescribe technologies for legitimate public policy objectives. The article uses some language recognisable from the *WTO Technical Barriers to Trade Agreement* ('*TBT Agreement*'),<sup>46</sup> for example, that measures limiting technology serve a legitimate public policy and not be 'prepared, adopted, or applied in a manner that creates unnecessary obstacles to trade'<sup>47</sup> or that technical requirements be based on 'performance rather than design or descriptive characteristics'.<sup>48</sup> There are additional legal criteria to be applied when a party does choose to adopt a specific technology or standard. Such a decision must be based on rule-making, with a determination that market forces cannot be expected to achieve the same public policy result and that suppliers be allowed an opportunity, during and after rule-making, to demonstrate that alternative technologies will also suffice for the same objective.<sup>49</sup> Generally, art 14.21 sets out the kind of criteria that can be assessed by not only the rule-maker of a party but also by an arbitral body reviewing whether the domestic process has fairly limited a technology standard. In this sense, the

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<sup>44</sup> *KORUS FTA* art 12.7.2.

<sup>45</sup> *KORUS FTA* art 12.7 n 7.

<sup>46</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Technical Barriers to Trade Agreement*') ('*TBT Agreement*').

<sup>47</sup> *KORUS FTA* art 14.21.2. Cf *TBT Agreement* art 2.2.

<sup>48</sup> *KORUS FTA* art 14.21.4. Cf *TBT Agreement* art 2.8.

<sup>49</sup> *KORUS FTA* art 14.21.5.

provisions are legally quite firm, more along the lines of a 'hard law' expression, even while the underlying notion is assessing what is inherently a point of regulatory balance. A final '[i]ndependent [r]egulatory [b]odies' provision is also found in the telecommunications chapter, where the parties oblige themselves to ensure that their regulatory bodies in this sector do not own equity or maintain any operating or management role in a supplier.<sup>50</sup> Decisions made by the body are to be impartial to all market participants.<sup>51</sup>

### C Recognition

Recognition is a voluntary activity in the cross-border services chapter. A party 'may recognize' the other party's standards or criteria for the authorisation or licensing of service suppliers.<sup>52</sup> Recognition can be accomplished by harmonisation (or otherwise), by agreement or autonomously.<sup>53</sup> Where recognition has been granted by a party to a non-party, there is no obligation to extend it to the other *KORUS FTA* party (no most-favoured-nation ('MFN')) as otherwise would be provided by art 12.3) but the excluded party does have a right to seek a negotiated accession to the existing agreement or to attempt to negotiate a comparable recognition arrangement.<sup>54</sup>

This relatively soft recognition approach is further detailed in the professional services annex to the cross-border services chapter.<sup>55</sup> However, the resulting recognition regime still retains a wholly voluntary approach to recognition. As such, where the '[p]arties agree' they assume only an obligation to 'encourage' their own relevant bodies to develop mutual standards or develop recommendations to the Joint Committee on mutual recognition or to develop procedures for temporary licensing.<sup>56</sup> These activities can occur for professional service sectors upon which the parties may 'mutually' agree and they 'may' agree on the sectors listed by further appendix.<sup>57</sup> Three sectors are listed by appendix 12-A-1: engineering; architecture; and veterinary services.<sup>58</sup> The parties do not actually commit themselves to a process of commencing recognition for these listed areas, so they are being listed as potential areas where the parties may agree to go further.

While this is certainly not a strong set of recognition provisions, the institutional follow-up aspects hold some additional promise. This is because a Working Group was established for professional services with the remit to consider procedures for fostering recognition between relevant professional bodies; for developing model procedures for licensing and certification; and for dealing with inconsistent regional level measures that would prevent

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<sup>50</sup> Ibid art 14.14.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid art 12.9.1.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid arts 12.9.2, 12.9.4.

<sup>55</sup> Ibid annex 12-A ('*Professional Services*').

<sup>56</sup> *Professional Services*, annex 12-A para 2.

<sup>57</sup> Ibid.

<sup>58</sup> *KORUS FTA* appendix 12-A-1 ('*Sectors for Mutual Recognition and Temporary Licensing*').

recognition.<sup>59</sup> The follow-up activities for the Working Group require it to report to the Joint Committee of the *KORUS FTA* within two years of the date the agreement entered into force.<sup>60</sup> The Joint Committee can then make its recommendations on the compatibility of the Working Group's report with the overall agreement and, if it does make a positive recommendation, then each party thereafter 'shall work with' and 'encourage' its own respective bodies to implement the recommendations.<sup>61</sup>

This provides for some definite forward motion in the process of recognition, particularly with reference to the working group's remit and the obligation of reporting within two years, presumably with a recognition approach identified for specific services in hand. The soft 'encourage' language with respect to the actual certifying bodies may be a reflection of the inherently sub-national and often non-governmental nature of many professional certification bodies — certainly the predominant model in US professional service qualifications.<sup>62</sup>

### 1 *Sector-Specific Provisions*

The chapter for financial services also provides recognition provisions for prudential measures.<sup>63</sup> These closely mimic the character of the general provisions in the cross-border services chapter in their voluntary approach to either autonomous or agreement-based recognition. As in those provisions, the parties have a right to attempt to secure the recognition that has been granted to a non-party.<sup>64</sup>

Overall, the *KORUS FTA* charts a relatively informal process for future action that relies strongly on the voluntary goodwill of the parties going forward. While the Joint Committee has power to select the sectors for attention, there is no mechanism for ruling on requests and denials for recognition and there is no legal structure for 'acts' to be promulgated for broader activities, such as vocational or medical certificates. What the agreement does with its 'identification and encouragement' approach reflects a form of 'going forward' in the style of informal rule-making.

### D *Competition Policy*

The *KORUS FTA* contains a chapter for '[c]ompetition [r]elated [m]atters'.<sup>65</sup> The chapter does not establish independent regional legal criteria for monopolies or cartels, such as proscribing behaviour inconsistent with the proper function of the agreement. Rather, the approach is to make reference to the establishment and maintenance of existing national competition laws. There are provisions for

<sup>59</sup> *Professional Services*, annex 12-A para 3.

<sup>60</sup> *Ibid* para 6.

<sup>61</sup> *Ibid* para 7.

<sup>62</sup> For an example of sub-federal recognition, see the mutual recognition agreement ('MRA'), between the Texas Board of Professional Engineers and the Institution of Engineers Australia: *Notification Pursuant to Article VII:4 of the General Agreement on the Trade in Services*, WTO Doc S/C/N/539 (18 March 2010); *Notification Pursuant to Article VII:4 of the General Agreement on Trade in Services*, WTO Doc S/C/N/539 (18 March 2010).

<sup>63</sup> *KORUS FTA* art 13.14.

<sup>64</sup> *Ibid* art 13.14.3.

<sup>65</sup> *Ibid* ch 16.

designated monopolies and state enterprises which resemble the *GATT* and *GATS* articles on the same subjects.<sup>66</sup> State enterprises cannot act in a manner inconsistent with the obligations of the agreement or accord discriminatory treatment.<sup>67</sup> Designated monopolies have additional obligations to act in accordance with commercial considerations and may not engage in anti-competitive practices.<sup>68</sup> Other competition provisions deal with transparency and cooperation for both competition and consumer protection. The competition cooperation provision is quite brief, referring simply to the instruments of mutual assistance, notification, consultation and information exchange.<sup>69</sup> In contrast, the consumer protection provision is more detailed.<sup>70</sup> The obligations to maintain laws and for agency cooperation are exempt from dispute settlement,<sup>71</sup> however, the provisions on state monopolies and designated monopolies are not.

### E Institutional Aspects/Dispute Settlement

The *KORUS FTA* is governed by a Joint Committee. Comprised of officials from each party and co-chaired by the United States Trade Representative and the Korean Minister for Trade, it operates entirely by consensus.<sup>72</sup> The Joint Committee is obliged to supervise the implementation of the agreement and to supervise its committees, working groups and other bodies, to seek to resolve disputes and to consider any matter that affects the operation of the agreement.<sup>73</sup> The Joint Committee may establish additional bodies other than those called for under the existing provisions and may also consider amendments or modifications to the agreement and its commitments.<sup>74</sup> It also has the power to issue interpretations of the provisions.<sup>75</sup> The frequency of meetings is dictated by a regular session each year to be held alternately in the territory of each party and within 30 days upon a request by a party.<sup>76</sup>

The general dispute settlement provisions in art 22 of the *KORUS FTA* follow an ad hoc panel model with additional procedures for adequacy of compensation or compliance.<sup>77</sup> The agreement requires consultations with and referrals to the Joint Committee when a measure is claimed to be inconsistent with a party's obligations under the agreement or when a party has otherwise failed to carry out its obligations.<sup>78</sup> A cause of action is also provided for benefits reasonably expected to accrue.<sup>79</sup> This does not apply to cross-border services.<sup>80</sup> Following consultations and a failure to resolve the matter by the Joint Committee, a party

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<sup>66</sup> Ibid arts 16.2, 16.3. Cf *GATT* art XVII; *GATS* art VIII.

<sup>67</sup> *KORUS FTA* art 16.3.1.

<sup>68</sup> Ibid art 16.2.1.

<sup>69</sup> Ibid art 16.1.7.

<sup>70</sup> Ibid art 16.6.

<sup>71</sup> Ibid art 16.8.

<sup>72</sup> Ibid art 22.2.

<sup>73</sup> Ibid art 22.2.2.

<sup>74</sup> Ibid art 22.2.3.

<sup>75</sup> Ibid arts 22.2.2–22.2.3.

<sup>76</sup> Ibid art 22.2(4).

<sup>77</sup> Ibid arts 22.9–22.11.

<sup>78</sup> Ibid art 22.7–22.8.

<sup>79</sup> Ibid art 22.4(c).

<sup>80</sup> Ibid arts 22.4(c), 23.1.

then has a right to refer the case to a three-person ad hoc panel which is to return a report within 180 days of the appointment of the panel chair.<sup>81</sup> Implementations of the panel's recommendations are to be made by elimination of the party's nonconforming measure.<sup>82</sup> If a measure is not resolved within 45 days, then the responding party shall enter negotiations for compensation and, failing that, a suspension of equivalent benefits by the complainant, which is also reviewable by a reconvened panel.<sup>83</sup> The system also has a final procedure permitting a compliance review on the respondent's request.<sup>84</sup> The agreement has a choice of forum clause between it and the WTO, stating that the choice of forum by the complainant is exclusive.<sup>85</sup>

The financial services chapter of the agreement provides for additional expertise criteria for panel selection in a state-to-state case within this subject area and limits suspension of benefits to the financial services sector.<sup>86</sup> Additional provisions for investment disputes defended by nonconforming measures under the financial services annexes are provided,<sup>87</sup> but are beyond the scope of this discussion.

### III THE EU–KOREA FREE TRADE AGREEMENT

The *Free Trade Agreement between the European Union and the Republic of Korea* ('EU–Korea FTA')<sup>88</sup> was signed on 6 October 2010 — after eight rounds of negotiations conducted between May 2007 and October 2009 — and was implemented on 1 July 2011.<sup>89</sup> It not only constitutes the first free trade agreement ('FTA') signed by the EU with an Asian country but is also the most comprehensive and far-reaching FTA concluded by the EU so far,<sup>90</sup> inasmuch as it provides for commitments and obligations on aspects traditionally left outside the scope of FTAs, including: investment (through establishment); non-tariff barriers; competition and state aid; public procurement; and intellectual property rights.

Through the agreement, the parties 'establish a free trade area on goods, services, establishment and associated rules'.<sup>91</sup> The aim of the agreement is to liberalise trade in goods and services, in accordance with, respectively, *GATT* art XXIV and *GATS* art V.<sup>92</sup> In addition, the objectives include: promoting competition in the parties' economies; liberalising government procurement;

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<sup>81</sup> Ibid arts 22.8, 22.11.1.

<sup>82</sup> Ibid art 22.12.2.

<sup>83</sup> Ibid art 22.13.

<sup>84</sup> Ibid art 22.14.

<sup>85</sup> Ibid art 22.6.

<sup>86</sup> Ibid arts 13.18.3–13.18.4(a).

<sup>87</sup> Ibid art 13.19.

<sup>88</sup> *Free Trade Agreement between the European Union and the Republic of Korea*, signed 6 October 2010, [2011] OJ L 127/6 (entered into force 1 July 2011) ('EU–Korea FTA').

<sup>89</sup> European Commission, 'The EU–Korea Free Trade Agreement in Practice' (Report, 2011) 3 <[http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc\\_148303.pdf](http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf)>.

<sup>90</sup> Ibid.

<sup>91</sup> EU–Korea FTA art 1.1.1.

<sup>92</sup> Ibid arts 1.1.2(a), 1.1.2(b).

protecting intellectual property; and contributing to the expansion of world trade by, *inter alia*, removing barriers.<sup>93</sup>

Services are dealt with under ch 7, entitled 'Trade in Services, Establishment and Electronic Commerce'. This chapter provides the scope and definitions of the framework applicable to services, establishment and electronic commerce. It also includes provisions on cross-border supply of services,<sup>94</sup> establishment<sup>95</sup> and temporary presence of natural persons for business.<sup>96</sup>

The structure of the services and establishment chapter differs from the *GATS* template in a number of aspects. However, the terminology employed by the parties is widely taken from the *GATS*, including those areas which are not currently covered by the WTO (establishment in non-services sectors). Of specific interest here, ch 7 includes a section on '[r]egulatory framework', which aims, through a set of provisions of general application and sector-specific disciplines, to enhance regulatory cooperation by strengthened transparency provisions and regulatory dialogue as well as regulatory convergence through mutual recognition or minimum harmonisation.<sup>97</sup> The provisions of general application cater for mutual recognition, transparency, domestic regulation and governance.<sup>98</sup> Sector-specific provisions are included for computer services,<sup>99</sup> postal and courier services,<sup>100</sup> telecommunications services,<sup>101</sup> financial services<sup>102</sup> and maritime transport.<sup>103</sup> Electronic commerce is dealt with in s F of ch 7, with parties agreeing to promote the development of electronic commerce through regulatory cooperation.<sup>104</sup>

Other chapters in the *EU-Korea FTA* touch upon the issues of competition, transparency and dispute settlement and are relevant to services trade as they apply horizontally throughout the whole agreement. The relationship between the specific provisions in ch 7 and the other provisions of general application is, in most cases, clarified in ch 7. For example, the transparency obligation in art 7.22 builds upon the transparency mechanism of general application established in ch 12 of the *EU-Korea FTA*, which is expressly recalled. Another example is provided by art 7.45 on dispute settlement on financial services, according to which the general provisions on dispute settlement apply except as otherwise provided in the article.

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<sup>93</sup> Ibid arts 1.1.2(c)–(f).

<sup>94</sup> Ibid ch 7 s B.

<sup>95</sup> Ibid ch 7 s C.

<sup>96</sup> Ibid ch 7 s D.

<sup>97</sup> Ibid ch 7 s E.

<sup>98</sup> Ibid ch 7 s E(A).

<sup>99</sup> Ibid ch 7 s E(B).

<sup>100</sup> Ibid ch 7 s E(C).

<sup>101</sup> Ibid ch 7 s E(D).

<sup>102</sup> Ibid ch 7 s E(E).

<sup>103</sup> Ibid ch 7 s E(F).

<sup>104</sup> Ibid art 7.49(1).

## A Transparency

## 1 General Provisions

The *EU–Korea FTA* includes a chapter devoted to transparency which has general application.<sup>105</sup> In addition, a specific transparency article for services and establishment can be found in ch 7.<sup>106</sup>

Chapter 12 aims to create an efficient and predictable regulatory environment for economic operators, ‘especially small ones’.<sup>107</sup> While reaffirming the parties’ commitments to the relevant WTO obligations, the provisions of ch 12 lay down a number of clarifications and improvements in terms of transparency, consultation and a better administration of measures of general application, where they may have an impact on any matter covered by the *EU–Korea FTA*. The scope of the general transparency mechanism covers ‘measures of general application’, which comprise ‘any general or abstract act, procedure, interpretation or other requirement, including non-binding measures’.<sup>108</sup> It does not, however, include rulings that apply to a particular person.<sup>109</sup> A publication provision requires parties to ensure that: such measures of general application are ‘readily available to interested persons, in a non-discriminatory manner, via an officially designated medium, and ... in such a manner as to enable interested persons and the other [p]arty to become acquainted with them’; to ‘provide an explanation of the objective of, and rationale for, such measures’; and to ‘allow for sufficient time between publication and entry into force of such measures, taking due account of the requirements of legal certainty, legitimate expectations and proportionality’.<sup>110</sup> ‘[I]nterested persons’ are ‘natural and legal persons that may be subject to any rights or obligations under measures of general application’, which indicates that private parties and public utilities figure among the beneficiaries of this obligation.<sup>111</sup>

The general transparency mechanism contains no obligation for parties to ‘publish in advance’ measures of general application. Parties are simply required to ‘endeavour’ to publish in advance proposed measures of general application.<sup>112</sup> When such advanced publication occurs, parties must provide opportunities for interested persons to comment, allowing, in particular, sufficient time for comments to be transmitted. The softer language (eg, ‘endeavour’) applies to the consideration that parties must give to the comments provided by interested persons on proposed measures.<sup>113</sup>

Chapter 12 requires the establishment and maintenance of appropriate mechanisms (such as enquiry or contact points) for responding to enquiries from interested persons.<sup>114</sup> This obligation covers measures of general application which may have an impact on matters covered by the *EU–Korea FTA* and which

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<sup>105</sup> Ibid ch 12.

<sup>106</sup> Ibid art 7.22.

<sup>107</sup> Ibid art 12.2.

<sup>108</sup> Ibid art 12.1.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid art 12.3.1.

<sup>111</sup> Ibid art 12.1.

<sup>112</sup> Ibid art 12.3.2(a).

<sup>113</sup> Ibid art 12.3.2(c).

<sup>114</sup> Ibid art 12.4.

are both proposed or in force, as well as the way in which they would be applied. There appears to be no clear obligation to provide for answers to such enquires. The relevant article clarifies that, where responses are provided, they are for information purposes only and are not definitive or legally binding.<sup>115</sup> There is an obligation for parties to promptly provide information and respond to questions pertaining to any actual or proposed measure that are transmitted by the requesting party (regardless of whether the requesting party has been previously notified of that measure).<sup>116</sup> This obligation applies to parties only, thus establishing a double standard on this particular aspect of transparency (one for interested persons and one for the parties to the agreement). There is also an obligation to endeavour to identify or create contact points for interested persons of the other party, with the aim of seeking to 'effectively resolve problems that may arise from the application of measures of general application'.<sup>117</sup> Such a process should be 'easily accessible, time-bound, result-oriented and transparent'.<sup>118</sup> There is no further detail on the profile of such a mechanism but the wording of art 12.4 suggests that it may act as a non-judicial means for the swift solution of (technical) obstacles and hurdles created by the application of 'measures of general application'. This represents a novelty in EU FTAs, although comparable mechanisms have been seen in agreements between Asian countries.<sup>119</sup>

The *EU-KOREA FTA*'s transparency chapter includes two articles on administrative proceedings and reviews and appeals of administrative action relating to matters covered by the agreement. The administrative proceeding provision requires parties to endeavour to provide interested persons notice of the initiation of a proceeding and 'afford such ... persons reasonable opportunity to present facts and arguments in support of their positions ... in so far as time, the nature of the proceeding and the public interest permit'.<sup>120</sup> Each party must also provide an impartial review of an administrative action relating to matters covered by the agreement and must ensure that parties to the proceedings are

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<sup>115</sup> Ibid art 12.4.2.

<sup>116</sup> Ibid art 12.4.3.

<sup>117</sup> Ibid art 12.4.4.

<sup>118</sup> Ibid.

<sup>119</sup> For an example, see the Association of Southeast Asian Nations' Consultation to Solve Trade and Investment Issues ('ACT'), which is an informal, non-legally-binding dispute resolution mechanism consisting of an internet-based problem-solving network of government agencies created for business operators: Secretariat, Association of Southeast Asian Nations, *ACT Background* (2005) ACT Website <[act.aseansec.org](http://act.aseansec.org)>; 'Declaration of ASEAN Concord II' (Association of Southeast Asian Nations, 7 October 2003) annex 1 ('*Mechanism of the Dispute Settlement System*'). Note, the website for the ACT has expired. An archived version can be accessed at: <<http://web.archive.org/web/20121013083002/https://act.aseansec.org/act/login/index.do>>.

<sup>120</sup> *EU-Korea FTA* art 12.5(b).

provided with the right to:

- (a) a reasonable opportunity to support or defend their respective positions; and
- (b) a decision based on evidence and submissions of record or, where required by its law, the record compiled by the administrative authority.<sup>121</sup>

As in the *KORUS FTA*, one of the most interesting aspects of the general regulation on transparency under the *EU–Korea FTA* is the extension of some transparency requirements to private persons. In addition, the inclusion of non-binding measures within the scope of the mechanism allows greater scrutiny and representations to be made over instruments such as governmental guidelines and ‘best practices’. The provisions on administrative proceedings are generally aimed at ensuring consistency, impartiality and reasonableness of administrative action but fail to set binding requirements on the notice to be given to interested persons. More stringent are the provisions on reviews and appeals, which include a standard on the impartiality of the office in charge of reviews, other due process requirements and a provision on enforcement.

A dedicated provision on ‘[r]egulatory quality and performance and good administrative behaviour’ calls for cooperation in the promotion of regulatory quality and performance, including the exchange of information and best practices on the parties’ respective regulatory reform processes and impact assessments.<sup>122</sup> This provision is relevant inasmuch as it may de facto provide additional context for transparency and representations in the regulatory reform processes framework. Finally, a non-discrimination standard requires parties to apply transparency standards to interested persons of the other party no less favourable than those accorded to their own interested persons, to the interested persons of any third country or to any third country, whichever is best.<sup>123</sup>

An additional services and establishment-specific article on ‘[t]ransparency and confidential information’ is found in ch 7 of the agreement<sup>124</sup> in the section devoted to ‘[r]egulatory framework’.<sup>125</sup> The provision clarifies the scope of transparency requirements in the area of services and establishment and requires parties, through the general mechanism provided for in ch 12 of the agreement, to respond promptly to all requests by the other party for specific information on:

- (a) international agreements or arrangements, including on mutual recognition agreements, which ... affect matters falling under [the services] Chapter, and
- (b) standards and criteria for licensing and certification<sup>126</sup>

to which services suppliers may be subjected. The same article provides for enhanced transparency standards where the supply of a service is subject to an application procedure. Such disciplines are addressed to the relevant regulatory

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<sup>121</sup> Ibid art 12.6.2.

<sup>122</sup> Ibid art 12.7.

<sup>123</sup> Ibid art 12.8.

<sup>124</sup> Ibid art 7.22.

<sup>125</sup> Ibid ch 7 s E.

<sup>126</sup> Ibid art 7.22.

authorities, which must:

- make publicly available the requirements for completing applications relating to the supply of services;
- upon request, inform the applicant of the status of its application and notify the applicant, without ‘undue delay’, of the need for additional information; and
- to the extent possible, inform the applicant of the reasons for denial.<sup>127</sup>

Regulatory authorities are to make a decision on the application of an investor or a cross-border supplier within 120 days and notify the applicant without undue delay when more time is needed for a decision to be finalised.<sup>128</sup>

## 2 *Sector-Specific Provisions*

The agreement has one sector-specific transparency provision which can be found in the subsection on regulatory framework for financial services.<sup>129</sup> The provision requires parties to promote regulatory transparency in financial services.<sup>130</sup> The obligation follows on parties’ recognition of the importance of transparency in financial regulations and policies in facilitating access to each others’ markets.<sup>131</sup> This provision of ‘soft law’ does not appear to add any *lex specialis* to the general transparency framework as it applies only to financial services.

In summary, the transparency framework established under the *EU–Korea FTA* provides for an obligation to publish ‘measures of general application’,<sup>132</sup> including making such measures readily available to interested persons, providing for an explanation of the objective of and rationale for the measures and allowing for sufficient time between publication and entry into force. One of the most innovative aspects of the framework can be found in the involvement of private parties within this mechanism, as well as the inclusion of non-binding rules within the scope of the transparency obligation. Softer language is applied in relation to ‘advanced publication’ and the related opportunity to put forward comments and have them addressed.<sup>133</sup> This general framework affects trade in services and establishment, with the clarifications seen above. Of particular relevance are the disciplines set forth for regulatory authorities evaluating cross-border suppliers’ and investors’ applications to provide services. These establish clear standards of transparency and procedural fairness which benefit services suppliers and investors.

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid art 7.22.6.

<sup>129</sup> Ibid ch 7 s E(E).

<sup>130</sup> Ibid art 7.39.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid art 12.3.1.

<sup>133</sup> Ibid arts 12.3–12.4.

## B Regulatory Cooperation

The provisions falling within ‘regulatory cooperation’ are among the most interesting aspects of the *EU–Korea FTA*. As indicated above, ch 7 of the agreement devotes all of s E to ‘[r]egulatory framework’. Through a set of general provisions and sector-specific disciplines, this framework aims to enhance regulatory cooperation through regulatory dialogue and to foster regulatory convergence through mutual recognition or harmonisation of minimum common standards in specific sectors.

### 1 Domestic Regulation

While domestic regulation provisions are relevant for the category of regulatory cooperation, they also contain features which are important for transparency (eg, *EU–Korea FTA* arts 7.23.1 and 7.23.2 mirror, respectively, *GATS* arts VI(3) and VI(2)(a)). The relevant article frames the relationship between domestic regulation and services trade, as it applies to the *EU–Korea FTA*, by requiring parties to ‘endeavour to ensure’ — as appropriate for individual sectors — that measures relating to qualification requirements and procedures, technical standards and licensing requirements are ‘based on objective ... criteria, such as competence and the ability to supply the service’; and, ‘in the case of licensing procedures, not in themselves a restriction on the supply of the service’.<sup>134</sup> This ‘soft language’ follows the common intention to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade, as well as the recognition that parties maintain the ‘right to regulate’ and to introduce new regulations on the supply of services in order to meet public policy objectives.

No relevant body is established to develop common horizontal disciplines or minimum standards for specific sectors. The provision’s low level of ambition is linked to the results of the ongoing negotiations under *GATS* art VI.4, or ‘of any similar negotiations undertaken in other multilateral fora’.<sup>135</sup> Any future deeper commitment on the domestic regulation framework between the EU and Korea appears conditional on the achievement of (meaningful) results within the multilateral context.

The provisions of general application included in s E on ‘[r]egulatory framework’ also contain a provision on ‘[g]overnance’.<sup>136</sup> Parties are to ensure, to the extent practicable, that internationally agreed standards on the regulation of financial services sectors and on the fight against tax evasion are implemented and applied in their territory. Article 7.24 lists some of these internationally agreed standards but the list is by no means exhaustive. The aim of this provision is to ensure that the relevant international framework is equally applied and implemented by the parties. Although it represents a (further) form of harmonisation pursued by the EU and Korea — that is, through reference to internationally agreed standards — the non-exhaustive nature of the list raises questions as to the exact scope of this provision.

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<sup>134</sup> Ibid art 7.23.3.

<sup>135</sup> Ibid art 7.23.4.

<sup>136</sup> Ibid art 7.24.

## 2 Sector-Specific Provisions

Sector-specific regulatory cooperation is anticipated in the *EU–Korea FTA* on computer services, postal and courier services, telecommunications services, financial services and maritime services. For electronic commerce, a separate section of the agreement lays out the principles, objectives and content for cooperation on regulatory issues.<sup>137</sup> Regulatory cooperation in these areas takes different approaches, ranging from clarifications on the scope and content of the services (computer services<sup>138</sup> and maritime services<sup>139</sup>), to minimum regulatory convergence through the provision of sector-specific frameworks, whether to be developed in the future or already laid out in the agreement, containing regulatory principles including pro-competitive clauses (postal and courier services<sup>140</sup> and telecommunications services<sup>141</sup>).

The aim of these regulatory frameworks appears to be the inclusion of binding provisions on the regulatory environments affecting the concessions exchanged and to avoid these being impaired by uncertainty about the scope of the commitments or by practices, restrictions and domestic regulations commonly regarded as affecting trade in the services sectors concerned. The relevant experience taken into account by the parties includes, notably, that offered by the WTO, in which the two signatories attempt to solve obstacles to trade in services by either reflecting sectoral plurilateral disciplines agreed within the multilateral fora or taking stock of ongoing debates and tabled negotiation proposals.

For example, for computer services, parties have clarified the classification and scope of such services by incorporating elements of a tabled common proposal, together with other WTO members in 2005<sup>142</sup> and, in particular, of the *Understanding on the Scope of Coverage of CPC 84*, co-sponsored by the EU and other WTO Members but not Korea.<sup>143</sup>

The sole article dealing with postal and courier services requires the Trade Committee, the governing body established under the agreement comprising the parties' representatives, to 'set out the principles of the regulatory framework applicable to those services'.<sup>144</sup> The intention is to develop a

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<sup>137</sup> Ibid ch 7 s F.

<sup>138</sup> Ibid art 7.25.

<sup>139</sup> Ibid art 7.47.

<sup>140</sup> Ibid art 7.26.

<sup>141</sup> Ibid arts 7.28–7.36.

<sup>142</sup> *Joint Statement on the Negotiations on Computer and Related Services*, WTO Doc TN/S/W/38 (25 February 2005) (Communication from Australia, Canada, Chile, the European Communities, Hong Kong China, India, Japan, Korea, Mexico, New Zealand, Mexico, New Zealand, Norway, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and United States).

<sup>143</sup> *Understanding on the Scope of Coverage of CPC 84 — Computer and Related Services*, WTO Doc TN/S/W/60 (26 January 2007) (Communication from Albania, Australia, Canada, Chile, Colombia, Croatia, the European Communities, Hong Kong China, Japan, Mexico, Norway, Peru, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Turkey and the United States). See also *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991) (Note by the Secretariat); Statistical Office of the United Nations, Department of International Economic and Social Affairs, *Provisional Central Product Classification*, UN Doc ST/ESA/STAT/SER.M/77 (1991) (the *WTO Services Sectoral Classification List* is based on the UN *Provisional Central Product Classification*). 'CPC 84' is the UN CPC code for 'computer and related services'.

<sup>144</sup> *EU–Korea FTA* art 7.26.

framework that ensures that competition in postal and courier services is not restricted to a monopoly, following principles aimed at addressing 'anti-competitive practices, universal service, individual licences and the nature of the regulatory authority'.<sup>145</sup> The inclusion of pro-competitive and pro-regulatory principles in the postal and courier sector, along the lines of what has been developed for the telecommunications services through the WTO *Reference Paper on Telecommunications Services*,<sup>146</sup> has been proposed by the EU in the context of the stalled Doha Development Agenda negotiations.<sup>147</sup> The agreement on future inclusion of such disciplines in the *EU–Korea FTA*, to be developed within three years after its entry into force, shows a common approach by the two signatories on the sector's regulation and identifies the scope for harmonisation through regulatory convergence on core issues.<sup>148</sup>

The regulatory framework on telecommunications is quite detailed and furthers, in certain respects, the one provided by the WTO *Reference Paper on Telecommunications Services*, to which both parties are signatories. For example, additional transparency requirements are anticipated for the 'regulatory authority' of telecommunications.<sup>149</sup> New disciplines are included on the authorisation to provide telecommunications services.<sup>150</sup>

In particular, the relevant article stipulates that the provision of telecommunications services 'shall, to the extent practicable, be authorised following a simplified ... procedure'.<sup>151</sup> It also provides a potential licensing requirement for attributions of 'frequencies, numbers and rights of way' but stipulates that the terms and conditions for such a licence be made publicly available.<sup>152</sup> Where a licence is required 'all the licensing criteria and the reasonable period of time' required for a decision on the application to be made must be made publicly available; the 'reasons for the denial ... shall be made known in writing to the applicant upon request'; and the licence fees required must not 'exceed the administrative costs normally incurred in the management, control and enforcement of the applicable licences'.<sup>153</sup> 'Licence fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision'.<sup>154</sup>

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<sup>145</sup> Ibid.

<sup>146</sup> Negotiating Group on Telecommunications, *Telecommunications Services: Reference Paper* (24 April 1996) World Trade Organization <[http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm)> ('*Reference Paper on Telecommunications*').

<sup>147</sup> See *Postal/Courier: Proposal for a Reference Paper*, WTO Doc TN/S/W/26 (17 January 2005) (Communication from the European Communities and Their Member States).

<sup>148</sup> See *EU–Korea FTA* art 7.26 n 31 (clarifying that the provision shall not be 'interpreted as intending to change the regulatory framework of the existing regulatory body in Korea which regulates private delivery service suppliers upon the entry into force of' the agreement).

<sup>149</sup> *EU–Korea FTA* art 7.28.2.

<sup>150</sup> Ibid art 7.29.

<sup>151</sup> Ibid art 7.29.1.

<sup>152</sup> Ibid art 7.29.2.

<sup>153</sup> Ibid art 7.29.3.

<sup>154</sup> Ibid art 7.29.3(c) n 34.

A specific provision deals with number portability, requiring parties to 'ensure that suppliers of public telecommunications transport services ... provide number portability to the extent technically feasible, and on reasonable terms and conditions'.<sup>155</sup> Lastly, art 7.36 of the *EU-Korea FTA* deals with recourse and review and the applied standard for the resolution of telecommunications disputes. In particular, parties are required to ensure that service suppliers have recourse to a regulatory authority (or other relevant body) of the other party to resolve disputes between suppliers or between suppliers and users. Further standards are envisaged where disputes arise between suppliers of public telecommunications transport networks or services. In these cases parties must ensure (upon request of either party to the dispute) that a binding decision is issued to resolve the dispute with the 'shortest possible' delay and 'in any case within a reasonable period of time'.<sup>156</sup> Article 7.36 further provides for the appeal of such decisions of regulatory authorities (including the standard of impartiality of the appeal body in relation to specific disputes) and for judicial review.

As in the telecommunications sector, the regulatory framework for financial services reflects, with some differences, the one agreed within the WTO framework. For example, the definitions incorporate both those listed in the *Annex on Financial Services*<sup>157</sup> and the *WTO Understanding on Commitments in Financial Services*.<sup>158</sup> Other WTO elements have either been expanded or their scope has been clarified, such as the provision on self-regulatory organisation, which not only demands the anticipated WTO national treatment requirement but also an MFN obligation.<sup>159</sup> The agreement also inserts new provisions such as, *inter alia*, the loose provision on transparency in financial regulations and on prudential carve-outs seen above.<sup>160</sup> A set of specific exceptions are also anticipated for financial services.<sup>161</sup>

For international maritime services, the relevant regulatory framework provides a set of definitions and principles, as well as a set of obligations concerning: access to the parties' international maritime markets and trades; the establishment of international maritime services suppliers for the other party (which must be granted under conditions no less favourable than those accorded to domestic services suppliers or those of any third party); and non-discriminatory treatment in the use of port services.<sup>162</sup>

Finally, as mentioned above, electronic commerce is dealt with in a separate section.<sup>163</sup> Here the approach chosen by the parties is that of cooperation on regulatory issues. In particular, the parties agreed on a common set of objectives and principles, including the applicability of the *Marrakesh Agreement*

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<sup>155</sup> *Ibid* art 7.32.

<sup>156</sup> *Ibid* art 7.36.1.

<sup>157</sup> *GATS* annex ('*Annex on Financial Services*').

<sup>158</sup> *Understanding on Commitments in Financial Services*, WTO Doc LT/UR/U/1 (15 April 1994).

<sup>159</sup> *EU-Korea FTA* art 7.40.

<sup>160</sup> *Ibid* arts 7.38–7.39.

<sup>161</sup> *Ibid* art 7.44.

<sup>162</sup> *Ibid* art 7.47.

<sup>163</sup> *Ibid* art 7.48.3.

*Establishing the World Trade Organization* ('WTO Agreement')<sup>164</sup> to measures affecting electronic commerce. Neither party is to 'impose customs duties on deliveries by electronic means'.<sup>165</sup> Regulatory cooperation continues through dialogue on regulatory matters, which are listed in art 7.49 of the *EU–Korea FTA* and include, notably, issues concerning facilitation of trade through electronic commerce and the protection of consumers.

### 3 Mutual Recognition

Article 7.21 of the *EU–Korea FTA* provides the institutional framework and the procedures for parties to negotiate mutual recognition agreements ('MRA'). The focus of the mechanism is on the criteria applied for the authorisation, licensing, operation and certification of services suppliers and investors in services sectors, particularly in professional services, the fulfilment of which is a condition for the provision of the service. The development of MRAs relies on the parties' initiative and on action by the relevant representative professional bodies, which shall be 'encouraged' by the parties to jointly develop and provide recommendations to the Trade Committee.<sup>166</sup> Once the Trade Committee receives the recommendations developed by the professional bodies it will, within a reasonable time, review them to determine if they are consistent with the provision of the agreement.<sup>167</sup> If the recommendations have been found to be consistent and 'a sufficient level of correspondence' is found between the relevant regulations of the parties, they are then required to negotiate an MRA.<sup>168</sup> A reference to the need to comply with the *WTO Agreement* (and, in particular, with *GATS* art VII) suggests that the Council for Trade in Services must be informed of any MRA negotiated by the parties.<sup>169</sup>

A Working Group on MRAs, operating under the Trade Committee and composed of the parties' representatives, was established to consider, for services in general as well as for individual services:

- (i) procedures for encouraging the relevant representative bodies in [the parties'] territories to consider their interest in mutual recognition; and
- (ii) procedures for fostering the development of recommendations on mutual recognition by the relevant representative bodies.<sup>170</sup>

Such procedures have not yet been established. Further, there is no preliminary indication of the sectors that will be opened to mutual recognition. It is likely these will be agreed at a later stage in the context of developing the 'procedures' referred to above and when a clear indication is provided by the relevant representative professional bodies entrusted to manage the process.

The relatively soft approach of this mechanism, which relies on the initiative of the professional bodies, is balanced by an obligation upon parties to

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<sup>164</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*WTO Agreement*').

<sup>165</sup> *EU–Korea FTA* art 7.48.3.

<sup>166</sup> *Ibid* art 7.21.2.

<sup>167</sup> *Ibid* art 7.21.3.

<sup>168</sup> *Ibid* art 7.21.4.

<sup>169</sup> *Ibid* art 7.21.5.

<sup>170</sup> *Ibid* art 7.21.6(a).

‘encourage’ such bodies to jointly develop and provide recommendations for mutual recognition. The efficacy of the mutual recognition mechanism will depend on the modalities and procedures through which professional bodies are encouraged, as well as on the actual ‘level of correspondence’ between the relevant regulations of the parties, which must be judged by the Trade Committee to be ‘sufficient’. The *EU–Korea FTA* does not provide any criteria that would determine when the level of correspondence between relevant professional regulations is considered ‘sufficient’. There is, therefore, an element of discretion left entirely to the parties.

The provision includes an obligation for a party, having entered into an agreement or arrangement on the recognition of prudential measures, to

afford adequate opportunity for the other Party to negotiate its accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information ...<sup>171</sup>

Where recognition is accorded autonomously by a party, this must ‘afford adequate opportunity for the other [p]arty to demonstrate that such circumstances exist’.<sup>172</sup> The provision on recognition reflects an equivalent provision included in para 3 of the *Annex on Financial Services*.

### C Competition Policy

The *EU–Korea FTA* has a chapter on competition.<sup>173</sup> This contains provisions on competition (that is, antitrust, public enterprises and state monopolies) and subsidies. Parties commit to a set of core principles, including: (i) to apply their respective competition laws, which are listed and defined for both parties;<sup>174</sup> and (ii) to maintain

comprehensive competition laws which effectively address restrictive agreements, concerted practices and abuse of dominance by one or more enterprises, and which provide effective control of concentrations between enterprises.<sup>175</sup>

A list of activities restricting competition deemed incompatible with the ‘proper functioning’ of the agreement is provided, which includes agreements between enterprises, abuse of dominant position and concentrations between enterprises which impede effective competition.<sup>176</sup> The parties committed to maintaining an authority (or authorities) responsible for the implementation of their respective competition laws<sup>177</sup> and to make available, upon request from the other party, public information concerning competition law enforcement activities and legislation.<sup>178</sup> A provision states that parties recognise ‘the importance of applying their respective competition laws in a transparent, timely

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<sup>171</sup> Ibid art 7.46.2.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid ch 11.

<sup>174</sup> Ibid art 11.2.

<sup>175</sup> Ibid art 11.1.2.

<sup>176</sup> Ibid art 11.1.3.

<sup>177</sup> Ibid art 11.3.1.

<sup>178</sup> Ibid art 11.3.3.

and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence of the parties concerned'.<sup>179</sup>

Two provisions refer to public enterprises and enterprises entrusted with special rights or exclusive rights<sup>180</sup> and state monopolies.<sup>181</sup> The agreement requires that, with respect to the former, neither party shall apply or maintain any measure contrary to principles of protection of competition laid out in art 11.1 and that they be subject to the parties' competition laws, inasmuch as the application of these principles and competition laws does not obstruct the performance of the particular task assigned to them. In the case of state monopolies, the agreement requires each party to adjust state monopolies of a commercial character to ensure that no discriminatory measures — that is, measures that do not comply with national treatment, as set out in the agreement — regarding the conditions under which goods are procured and marketed exists between natural or legal persons of the parties.

An article on cooperation stresses the importance of cooperation and coordination between the parties' competition authorities in furthering effective competition law enforcement.<sup>182</sup> There is an obligation for parties to cooperate in their respective enforcement policies and in the enforcement of their respective competition laws, including through enforcement cooperation, notification, consultation and exchange of non-confidential information based on the *Agreement between the European Community and the Government of the Republic of Korea Concerning Cooperation on Anti-Competitive Activities*, which was signed in May 2009 ('*2009 Competition Cooperation Agreement*').<sup>183</sup>

The provisions on competition can be generally regarded as quite robust, with the inclusion of 'concentrations' that impede effective competition among the range of anti-competitive practices incompatible with the agreement and an outright obligation to maintain comprehensive competition laws and authorities to enforce them. However, under the *EU–Korea FTA*, parties are prevented from resorting to the dispute settlement mechanism for any matter arising in relation to the provisions on competition described above.<sup>184</sup> A consultation mechanism is provided, in the absence of more specific rules in the *2009 Competition Cooperation Agreement*, for parties to make representations, foster mutual understanding or address specific matters arising in competition provisions.<sup>185</sup>

The subsidies section does not apply, for the most part, to services. In this area, parties 'shall use their best endeavours to develop rules applicable to ... services, taking into account developments at the multilateral level, and to exchange information at the request of [a] Party'.<sup>186</sup> The first exchange of views

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<sup>179</sup> Ibid art 11.3.2.

<sup>180</sup> Ibid art 11.4.

<sup>181</sup> Ibid art 11.5.

<sup>182</sup> Ibid art 11.6.

<sup>183</sup> *Agreement between the European Community and the Government of the Republic of Korea concerning Cooperation on Anti-Competitive Activities*, signed 23 May 2009, [2009] OJ L 202/36 (entered into force 1 July 2009) ('*2009 Competition Cooperation Agreement*').

<sup>184</sup> *EU–Korea FTA* art 11.8.

<sup>185</sup> *2009 Competition Cooperation Agreement* art 8.

<sup>186</sup> *EU–Korea FTA* art 11.15.2.

on subsidies to services is to take place within three years after the entry into force of the agreement.<sup>187</sup>

#### D Institutional Aspects/Dispute Settlement

The *EU–Korea FTA* is managed by a Trade Committee, comprising representatives of the EU and Korea. The Trade Committee meets once a year (in Brussels or Seoul alternately) or upon either party’s request and is co-chaired by the Minister for Trade of Korea and the EU Trade Commissioner.<sup>188</sup> The Trade Committee must, inter alia, supervise and facilitate the implementation of the agreement and the work of all specialised committees, working groups and established bodies and seek appropriate ways to solve matters which might arise in areas covered by the agreement or disputes that may arise regarding the interpretation or application of the agreement.<sup>189</sup> The agreement also establishes a number of specialised committees and working groups, under the auspices of the Trade Committee.<sup>190</sup> A relevant example of the former is the Committee on Trade in Services, Establishment and Electronic Commerce;<sup>191</sup> and of the latter is the Working Group on MRA.<sup>192</sup> The Trade Committee may also decide to establish and delegate responsibilities to specialised committees, working groups and other bodies.<sup>193</sup>

The *EU–Korea FTA* has a dispute settlement mechanism which applies to any dispute concerning the interpretation and application of the provisions of the agreement — unless otherwise specified — and is provided in ch 14 of the agreement.<sup>194</sup> The mechanism is largely inspired by the *WTO Dispute Settlement Understanding*,<sup>195</sup> with a consultations phase, an arbitration procedure, provisions on compliance (including a compliance arbitration) and ‘temporary’ remedies in case of non-compliance.<sup>196</sup> The time limits that apply at various stages of the dispute are shorter than the *WTO Dispute Settlement Understanding* and there is no appellate review.<sup>197</sup> A provision allows for the review of any ‘measure taken to comply’ after the suspension of obligations.<sup>198</sup>

The arbitration panel is an ad hoc panel composed of three arbitrators from a list of 15 individuals to be established by the Trade Committee.<sup>199</sup> It interprets the provisions of the agreement in accordance with customary rules of interpretation of public international law. Interestingly, it is specified that where

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187 Ibid.

188 Ibid art 15.1.2.

189 Ibid art 15.1.3.

190 Ibid art 15.2.1.

191 Ibid art 15.2.1(d).

192 Ibid art 15.3.1(e).

193 Ibid art 15.2.2.

194 Ibid art 14.2.

195 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*WTO Dispute Settlement Understanding*’).

196 *EU–Korea FTA* ch 14 ss B, C.

197 Ibid arts 14.3, 14.5.2, 14.6.1, 14.7. Cf *WTO Dispute Settlement Understanding*, annex 2 art 1.2.

198 *EU–Korea FTA* art 14.12.

199 Ibid arts 14.5.1, 14.18.

an obligation is identical to an obligation under the *WTO Agreement*, the arbitration panel is to adopt an interpretation which is consistent with any relevant interpretation established under WTO Dispute Settlement Body rulings.<sup>200</sup> The arbitration panel is to make every effort to reach a decision by consensus.<sup>201</sup> When consensus cannot be reached, the issue is to be decided by majority vote. The rulings are binding on the parties.<sup>202</sup> A specific provision deals with the relationship of this mechanism with recourse under the WTO dispute settlement system.<sup>203</sup>

A sector-specific dispute settlement mechanism applies to the settlement of disputes on financial services subject to the specific rules provided for in ch 7.<sup>204</sup> These act as *lex specialis* over the general framework described above. The specific carve-outs relate to the list of individuals that are to serve as panellists in disputes relating to financial services (a separate list must be established by the Trade Committee with experts on financial services) and to the composition of the panels (which must be drawn from the mentioned specific list).<sup>205</sup> They also provide specific rules for remedies in case of non-compliance in disputes on measures also affecting financial services.<sup>206</sup>

#### IV DISCUSSION

This study has been drawn narrowly to consider only domestic regulatory issues as they apply to trade in services in only two trade agreements. This narrow approach allows more focus on the provisions at hand and provides a more detailed description of what the FTA parties are attempting to achieve and how they are intending to achieve it in their regulatory approaches. Thus, to the extent that other regulatory mechanisms are specially tuned to other trade subjects of the agreement, such as trade in goods or technical barriers, this survey necessarily misses those innovations. At the same time, there are general chapters in these agreements that are relevant to all (or most) of the subjects of the agreements. For example, transparency and competition chapters are provided by both of these agreements, at first with general application but also capable of being finetuned to some degree in the services sections of the agreements. This ‘general to specific’ approach is not apparent in the ‘regulatory cooperation’ area where the frameworks for establishing mutual recognition are tuned to services trade from the outset.

We also see the inclusion in both agreements of the same subject areas within larger fields of transparency and regulatory cooperation. For transparency, both agreements have provisions on publication, the right to comment, the right of inquiry and response and the treatment of parties in administrative actions. For regulatory cooperation, both agreements provide for a type of assessment standard for domestic regulations and both address mutual recognition for

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200 Ibid art 14.16.

201 Ibid art 14.17.1.

202 Ibid art 14.17.2.

203 Ibid art 14.19.1.

204 Ibid art 7.45.

205 Ibid.

206 Ibid.

service providers. With this as a basis, we note some of the subtleties in the different sections treated.

## A Transparency

### 1 Publication and Right to Comment

Both agreements require that measures of general application be published and that an explanation of the objectives and rationale be provided. Both also require a reasonable time between publication and entry into force. The *KORUS FTA* has a clear obligation for any matter it covers to be published prior to adoption, together with an obligation to accord interested persons and the other party a reasonable opportunity to comment.<sup>207</sup> It also sets a timing benchmark of 40 days prior to the date for receiving comments and lays out the burden on the party opting to address comments in its final decision.<sup>208</sup> The *EU–Korea FTA* is less rigorous on this aspect, maintaining the obligation of publication only for measures adopted,<sup>209</sup> with a ‘best endeavours’ provision for proposed measures.<sup>210</sup> When a party does publish in advance, interested persons are entitled to comment and must be given sufficient time for comments to be transmitted.<sup>211</sup> In this area, the *KORUS FTA* appears more dedicated to drawing foreign operators into the administrative process of rule-making. While neither agreement allows discrimination between domestic and foreign operators, the *KORUS FTA* is more committed to the process of participation itself.

### 2 Right of Inquiry and Response

The *EU–Korea FTA* uses a ‘split approach’ on the right of inquiry and the obligation to respond. Whether or not a proposed or adopted matter has been published, a party has a right to request and receive information from the other.<sup>212</sup> However, there is no obligation to respond to inquiries from interested persons. The *KORUS FTA* alternatively provides this right in the dedicated cross-border services chapter (not the general chapter) and, for subjects in that narrower scope, provides the obligation to respond to inquiries from interested persons.<sup>213</sup> The *EU–Korea FTA* indicates that when a response is made, it is for information purposes and is not legally binding on the party.<sup>214</sup> The legal effect of a response is not stated in the *KORUS FTA*. Other and more subtle differences include some indicative benchmarking for time in the *KORUS FTA* and some additional detailing on the making of a record in the *EU–Korea FTA*. The *EU–Korea FTA* also defines ‘interested person’ while the *KORUS FTA* does not.<sup>215</sup>

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<sup>207</sup> *KORUS FTA* art 21.1.

<sup>208</sup> *Ibid* art 21.1.3(b).

<sup>209</sup> *EU–Korea FTA* art 12.3.

<sup>210</sup> *Ibid* art 12.3.2(a).

<sup>211</sup> *Ibid* art 12.3.2(b).

<sup>212</sup> *Ibid* art 12.4.

<sup>213</sup> *KORUS FTA* art 12.8.

<sup>214</sup> *EU–Korea FTA* art 12.4.2.

<sup>215</sup> *Ibid* art 12.1.

### 3 *Administrative Reviews*

Both agreements detail rights of participation and due process in administrative actions, including rights to notice, participation and impartial review.

### 4 *Sector-Specific Transparency Provisions*

The *KORUS FTA* has sector-specific transparency provisions in both telecommunications and financial services, the former emphasising rule-making and both putting some focus on the treatment of licensing applications. The *EU–Korea FTA* has a softer provision encouraging transparency for financial services.

### 5 *Transparency Conclusions*

While both agreements address the subject of transparency, there are small differences in the rights and obligations established throughout. Some of these differences simply reflect an emphasis on one point or another and some can be said to be in the realm of softer law and therefore perhaps not easily made actionable or clearly interpreted. But not all the provisions in transparency subjects are that soft and, where there are some clear legal rights being accorded, one has to assume that these are intended to be actionable.

This raises a question about how a party common to multiple agreements, in this case Korea, responds in its own domestic order to the different approaches in play with each separate signatory. Is the result a complex and possibly fragmented domestic regulatory environment or a somewhat unified regulatory approach? One can imagine that the ‘easy’ way to obtain a more coherent result is to take the obligations from either agreement that set the higher thresholds of conduct and that are also clear enough to be actionable and then apply that process or standard through the domestic regulatory system — thereby extending the benefit to all or at least to the signatory parties of the other agreement. For example, if one agreement sets a benchmark for a specific number of days between publication and closing for comments, this standard could fairly easily be integrated into the overall regulatory approach; as if to say, ‘we now use the 40 day indicator and consider that reasonable for all other agreements whether other agreements specify it or not’. This would provide a common regulatory regime.

Some other aspects are not so easily transferred. For example, these two agreements vary in designating the right to receive advance notice of a proposed rule and the obligation to respond to inquiries: in one, parties have a right to a response but interested persons do not. If one agreement does not provide that right for interested persons, then the common signatory (Korea) could arguably bifurcate the treatment of its responses since it has not bargained to take up the obligation to one of these other signatories. After all, why extend the treatment if the other side is not also taking on the same obligation?

On this particular example, the function of a specific MFN clause in the *EU–Korea FTA*, which is not provided as a general right in either agreement, would also appear to have an impact as it extends better treatment offered to interested persons (not parties) of any third country in respect of transparency

standards.<sup>216</sup> However one might choose to interpret the scope of this clause, it would appear that both Korea and the EU assumed an obligation to screen all of their trade agreements in order to locate points of preferential regulatory treatment and then to actively extend that treatment to the other party to the agreement or at least be prepared to do so if and when the other party invokes the clause.

Whether or not MFN might apply to an agreement, one can sense the complexity of the subtle variations in regulatory approaches and note that the resulting environment is not limited to the three parties discussed here, since they all (including, of course, Korea) have more than only one or two of these agreements.

## B Regulatory Cooperation

### 1 Domestic Regulation

Both agreements provide standards for assessing domestic regulations in their respective services chapters, with the *KORUS FTA* being less generalised by only providing these in the chapter for cross-border services. Both agreements provide that service requirements be based on objective criteria and not be themselves restrictions on the supply of a service;<sup>217</sup> both thus apply two of the criteria also provided in *GATS* art VI. Both agreements pose these criteria ‘with a view’ to ensuring that service requirements are not ‘unnecessary barriers to trade’.<sup>218</sup> Neither of them attempts to formulate a necessity test, that is, a provision that would say, ‘requirements shall not be more burdensome than necessary to ensure the quality of the service’. One can conclude from this that, for general domestic regulatory treatment, these provisions are arguably ‘*GATS* minus’, in that they do not include the explicit use of a necessity test that would call for assessment of lesser restrictive measures as a means of either validating or invalidating the regulation. This more tentative construction is confirmed by provisions in both agreements that affirm the intent to translate any results from the *GATS* negotiations on art VI into their respective FTAs. Rather than forming a new approach irrespective of the *GATS* process, the agreements take a ‘wait and see’ approach to what happens in the *GATS* process.

One might remark that if an FTA was going to go ‘deeper’ than applicable WTO regimes, then the provision of a test for assessing the balance point of a regulation should be an instrumental part of the agreement. On the other hand, if such a test were refined in one of these FTAs, then any dispute settlement issue arising from it would also not be presented in the dispute settlement forum of the WTO, since the WTO does not yet have such a test. That would leave the development of a key aspect of trade regulation to take place only within the confines of an ad hoc arbitral body system and without the possibility of clarification of interpretation by a standing body on appeal. Given this, one can understand why the parties might prefer to wait and see how the *GATS* framework eventually emerges.

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<sup>216</sup> Ibid art 12.8.

<sup>217</sup> Ibid art 7.23.3; *KORUS FTA* art 12.7.2.

<sup>218</sup> Ibid.

## 2 Sector-Specific Regulation Provisions

While both agreements use a very similar approach to general regulation, the *EU–Korea FTA* demonstrates a much more proactive sector-specific agenda than the *KORUS FTA* does. The latter has three sectoral chapters, of which only the telecommunications provisions set out criteria for regulatory treatment, posing the use of a balancing test between the right of regulators to prescribe technologies and the need for service suppliers to choose their favoured technology of supply. In contrast, the *EU–Korea FTA* presents activities in regulation in telecommunications, electronic commerce, computer services, postal and courier services, financial services and maritime services. These range from clarification of the scope of the service in question, to setting out goals for minimum regulatory convergence, to affirming pro-competitive approaches and non-discrimination. The telecommunications and financial services provisions use the existing *GATS* agreements on those subjects and add to them. The treatment for postal and courier services draws principles from the existing WTO telecommunications framework to set objectives for minimum regulatory convergence. The computer and maritime services provisions both provide definitions of scope and classification that are in discussion but not yet settled in WTO law.

Here, the integration style of the EU is apparent. While the general treatment of regulation may not be so advanced, the sector activities are not only ‘WTO plus’ but also reflect a bit of ‘EU minus’ in at least broaching the idea of common principles and minimum regulatory convergence, coupled with a process intended to move it along over time. In this sense the services treatment in this agreement can be characterised as ‘very regulatory’ in nature.

### C Mutual Recognition

In each agreement, the provisions for recognition of qualifications in professional services show a close, if not nearly identical, approach. Both rely on a voluntary system of developing recognition over time, with the establishment of a working group operating under the governing Joint Committee/Trade Committee with the power to recommend procedures for encouraging professional bodies and for fostering its development. In both, the governing committee can accept recommendations and approve them; this has the effect of the parties encouraging their own professional bodies to establish the basis for recognition. There are minor differences on display where, for example, the *KORUS FTA* lists three sectors targeted for further action and the *EU–Korea FTA* refers to *GATS* art VII and the notification of recognition agreements. This otherwise high degree of alignment between the two systems is carried through in the financial provisions of each agreement, which call for the possibility of recognising prudential measures.

While there is nothing mandatory about the recognition provisions of the agreements, they do set out a way forward of an institutional character, albeit one that relies on voluntary acts. The potential firmness of such a system is enhanced somewhat by the procedures developed by a working group and by that fact that the ‘decision’ to move forward can be generated by the governing bodies of the agreement. Given the somewhat less than productive history of voluntary

recognition systems, one can question whether this type of approach is robust enough to generate the gains that are possible for professional services recognition. At the same time, the process requires the participation of numerous regulatory participants and professional bodies, both public and private. In such an environment, it is easy to imagine how a more mandatory 'top down' system could be developed and how it could take hold at agency levels and function institutionally. If these more voluntary systems prove unsuccessful over time, there is the implication that recognition in FTAs remains aspirational in the absence of stronger and ongoing rule-making and of enforcement authorities.

#### D Competition

With a few differences, this regime also displays a high degree of alignment, particularly given the EU's history of emphasising competition in its trade agreements, with the US perhaps less so. This may be because the EU and Korea have an existing bilateral competition agreement and, arguably, not much can be added to this trade agreement other than proscribing anti-competitive practices and linking them to the agreement as incompatible with its 'proper functioning'. The US agreement does not commit to this linkage but it is a minor point in the absence of any formulation on regional competition policy. Both agreements address some conditions for public enterprises and those having special or exclusive rights or state and designated monopolies in the *KORUS FTA*'s terminology.

The generally close alignment of the two agreements on this subject may also reflect the fact that all the parties have well-developed and functioning competition laws and authorities. Thus, the *EU-Korea FTA* does not carry the types of provisions found in trade agreements with countries without developed competition authorities, in which the criteria for the national law is set and it is possible to invoke safeguards if the law is not enacted and made functional.<sup>219</sup> The emphasis here is rather upon the maintenance of existing competition laws. Each agreement also has a cooperation provision with similar characteristics, both reciting the instruments of enforcement/mutual cooperation, notification, consultation and exchange of information, with the single difference that cooperation is stated as an obligatory activity in the *EU-Korea FTA*.

Both agreements also address, with some different terminology, public enterprises (EU)/state enterprises (US) and enterprises entrusted with special and exclusive rights (EU)/designated monopolies (EU and US). Both agreements prescribe a non-discrimination requirement for public/state enterprises. Both agreements refer designated monopolies to the operation of competition principles or law with only slight differences in the point of reference. The *KORUS FTA* is silent on the treatment of subsidies and the *EU-Korea FTA* exempts them from applying to services, both thus having the same effect of non-application. Similarly, matters falling under the competition chapter are exempt from dispute settlement in both agreements, except for a difference in the *KORUS FTA*, which provides that provisions on state monopolies and designated

<sup>219</sup> See, eg, *Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the One Part, and the Republic of South Africa, of the Other Part*, opened for signature 11 October 1999, [1999] OJ L 311/3 (entered into force 1 May 2004) arts 36–7.

monopolies are not exempt. Another difference between the agreements is the EU sector-specific provision for developing disciplines for postal and courier services and a reference to the WTO *Reference Paper on Telecommunication Services* for the supply of telecommunications.

One does not expect convergence on the details of competition law in assessing anti-competitive practices. Rather, the emphasis is on cooperation among agencies in order to address practices which affect the markets of one or both of the parties. The provisions contained in these two agreements are on par with what is normally seen in the modern free-trade area.

#### E *Institutional Aspects/Dispute Settlement*

This is yet another area of very close alignment in the approach of both agreements. The governing committee of each (Trade Committee/Joint Committee) is composed at trade minister level and each has a quite similar, if not identical, set of powers, including the governance of other bodies established under the agreement and setting the point of reference for dispute settlement. Both meet yearly and in alternate locations. The dispute settlement sections for each agreement also have close alignment. Both use an ad hoc three-person panel procedure whose findings are given legal effect. Neither provides for an appeal process on questions of law. Both agreements provide for some additional criteria for panellists in disputes concerning financial services.

### V CONCLUSIONS

There is such close alignment in the two agreements on the general approach to domestic regulation (that is, the *GATS* art VI subjects) — mutual recognition, competition law and institutional matters — that one can imagine each signatory being quite comfortable with the provisions of the other parties' agreement. Differences in scheduled commitments aside, one can imagine these elements extended to a plurilateral agreement between the three parties. This degree of convergence serves the common signatory, Korea, well since what it engages in on behalf of one party it engages in on behalf of the other. These regimes then function as a single external 'boilerplate'.

A point in common on the substantive regimes listed immediately above is their overall lack of ambition in the sense of 'deeper integration'. This is not to say that there are no elements present that provide for clear rights and obligations but that the objectives set for results are set somewhat low or are non-prescribed. This is most apparent in the *GATS* art VI (regulation) elements, in which both agreements avoid including necessity and (the possibility of) proportionality testing. For mutual recognition, the 'process' itself is more the point and the 'top down' aspect of institutional motivation has a decidedly light touch. Whether this is effective for generating recognition agreements in the medium and longer term is another question. While the competition provisions are more or less typical of what one would expect to see in agreements among developed country signatories with functioning laws, there is an absence of effort to reach a deeper level of integration. There is no attempt to frame a regional policy and there is no process of attempting convergence in the assessment criteria for anti-competitive practices. Further, the cooperation mechanism, while provided as obligatory for one of the agreements, does not move beyond a recitation of common

cooperation instruments. Aside from the application of dispute settlement procedures to the *KORUS FTA*'s categories of state monopolies and designated monopolies, the agreements preserve the discretion of national competition authorities.

As a group (and institutional issues aside) we could say that these subjects are treated in a relatively 'shallow' but 'compatible' manner. That said, however, consider the nature of regulatory barriers. Agreements in these subject areas carry the tone of establishing an ongoing relationship. The processes established, light as they are, reflect an approach to regulation that allows a cooperative relationship to develop over time and permits the parties to make of it what they choose. While this may not be 'deep' in the sense of binding common rules and procedures, this is not to say that it may not bear fruit. It depends on what the parties make of it over time. While one can be sceptical that multiple recognition agreements might emerge from these light provisions, one cannot discount the fact that a process is provided to allow them to emerge.

This leaves the subjects of transparency and sector-specific domestic regulation, the two areas where there is more detail in the provisions and, consequently, more apparent divergence between the agreements. For transparency, because these countries will not likely be adopting common standards or otherwise changing their own standards, enhanced transparency can be a means of limiting the impact of these regulatory differences. Together they lay out the 'deeper' in deep integration and also raise more questions of how domestic systems function to service different agreements. These two areas may be characterised as 'deeper' and 'potentially less compatible'. The relationship element noted above is still present in these subject areas as well but there is also a stronger reliance on clearer benchmarks.

Finally, we look at the multilateral implications. For the softer areas, one can imagine these types of processes being engaged in larger groups of states in agreements designed to encourage 'best practices'. However, the extent to which they succeed would have much to do with the same relationship aspect as noted above. Is this type of ongoing cooperation possible in a larger and more disparate group of participants? Perhaps that is not a realistic expectation. For those deeper areas where some rules emerge, there may be a stronger argument for multilateral action. We have not chosen here to make a *GATS* MFN analysis of advanced transparency rules and regulatory sectoral treatments but some of them may well affect the supply of a service and fall within the scope of the *GATS* general MFN obligation. More pertinent perhaps is the idea that regulatory systems are not that easily bifurcated for differential treatment. It may well be that when a regional party undertakes a transparency reform, this is likely to be extended to all as a matter of course. If so, then the larger trading system is benefited. For those aspects that may be bifurcated, for example, advance notice and the right to comment by private interested parties, such innovations could perhaps enter into a larger discussion on generally enhancing *GATS* transparency. The same might be said for some of the advanced sectoral approaches, even while we acknowledge some of the sector approaches are built on *GATS*-annexed sectoral agreements. Overall, that these agreements approach so many subjects in a similar manner may also have resonance. After all, repeated practice can become custom.