



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **A**  
ECONOMIC AND SCIENTIFIC POLICY

The Consequences of Brexit on Services and Establishment: Different Scenarios for Exit and Future Cooperation



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# The Consequences of Brexit on Services and Establishment: Different Scenarios for Exit and Future Cooperation

In-depth analysis for the IMCO Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

# The Consequences of Brexit on Services and Establishment: Different Scenarios for Exit and Future Cooperation

IN-DEPTH ANALYSIS

## Abstract

This paper addresses the challenges Brexit will pose to the future of trade in services between the EU and the UK. It discusses the specific barriers to cross-border establishment and trade in services and possible solutions for a future EU-UK trade agreement. Hereby, it takes existing EU Free Trade Agreements with other states into consideration.

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# CONTENTS

<b>LIST OF TABLES</b>	<b>4</b>
<b>EXECUTIVE SUMMARY</b>	<b>5</b>
<b>1. TRADE IN SERVICES AND ESTABLISHMENT: CHALLENGES FOR MARKET INTEGRATION</b>	<b>8</b>
<b>2. SERVICES AND ESTABLISHMENT: CONDITIONS FOR INTEGRATED MARKETS</b>	<b>9</b>
<b>3. SERVICE MARKETS AND ESTABLISHMENT UNDER DIFFERENT TRADE REGIMES</b>	<b>11</b>
3.1. Service Markets and Establishment under the EEA	11
3.2. Service Markets under EU-Ukraine Association Agreement	12
3.3. Service Markets and Establishment under a Customs Union: EU – Turkey Customs Union	12
3.4. Service Markets and Establishment under CETA	13
3.5. Service Markets and Establishment under FTA EU-Korea	13
3.6. Service Markets under World Trade Law (GATS)	14
<b>4. COMPARISON AND LESSONS FOR FUTURE EU-UK TRADE IN SERVICES</b>	<b>15</b>
<b>5. CHALLENGES FOR EU-LEGISLATION: TRANSITORY MEASURES TO MATCH LEGITIMATE EXPECTATIONS</b>	<b>17</b>
5.1. Legal Uncertainties for EU-Citizens in UK and UK-Citizens in EU after Brexit	17
5.2. Specific Policies of EU Legislation Affected by Brexit	17
5.3. Upholding Rights in the UK; Categorisation of rights by the UK High Court	23
5.4. Possible Solutions	23
5.4.1. Legitimate Expectations and the Principle of Acquired Rights; Fundamental Freedoms	23
5.4.2. Adapting EU Legislation	24
5.4.3. Negotiating Rights in the Withdrawal Agreement	25
<b>6. CONCLUSIONS: CHALLENGES FOR NEGOTIATION AND REGULATION</b>	<b>26</b>
<b>REFERENCES</b>	<b>27</b>

## LIST OF TABLES

Table 1:	Comparison of different trade agreements	15
Table 2:	Market Access in detail	16

## EXECUTIVE SUMMARY

Unlike goods, services are intangible products. Therefore, international trade in services and cross-border establishment pose specific regulatory problems. Liberalizing trade in services and opening borders for establishment requires regulation, such as common standards for licenses or diplomas. Future EU-UK relations should consider the specific challenges for cross-border trade in services and establishment.

To facilitate cross-border trade in services, hindering regulation and discrimination have to be eliminated as a means of negative integration. Cross-border trade in services and establishment is largely dependent on mutual recognition, which only works when standards are similar. Therefore positive integration (e.g. mutual standards) is often necessary. However, the efficiency of liberalisation by market law is dependent not only on the scope and substance, but also on the quality of law. Enforceable rules with direct effect together with judicial review such as provided for by the European Treaties and the EEA will lead to a high level of market liberalisation and integration.

On the way towards a withdrawal agreement, existing International Trade Agreements between the EU and Third Parties to some extent can serve as blueprints for future EU-UK relations.

If the UK stayed in the EEA (or would regain membership, herein), for service markets and establishment not much would change. The substance of EEA Law is largely aligned to the EU single market law. Whereas, other Trade Agreements in substance (scope of the agreements, rights to market access, passporting) and efficiency (quality of law) lag way behind the EU's and EEA's level of integration: Most of those agreements only have limited scope (e.g. only specific sectors are subject to liberalisation), do not provide for enforceable rules with direct effect or judicial review and are rather reluctant regarding common standard setting.

In order to make trade in services effective, a future EU-UK Trade Agreement should not only grant market access, but also find a mechanism to ensure and monitor common standards as condition for far-reaching rights to market access. This could be done by granting market access as well as mutual recognition as long as standards in the UK and the EU are still approximated. Market access and mutual recognition could be suspended when either the EU or the UK change standards unilaterally – until standards are in line again. This would require to developing a mechanism to monitor the alignment of standards in the UK and the EU.

Worst case would clearly be a Brexit without agreement as then the relation between UK and the EU in trade in services would be governed by the General Agreement on Trade in Services (GATS). Here, the status of the UK in detail remains to be unclear. Also, GATS as a rather weak framework does not allow for passporting and leaves numerous uncertainties.

Furthermore, Brexit will lead to the result that British citizens and companies no longer fall within the personal scope of EU law, and EU law will no longer be applicable in UK. Service providers and natural or legal persons established in an EU-UK relationship will suffer from massive legal uncertainties. Not only the access to the markets is affected but also, e.g., judicial cooperation, intellectual property, data protection or consumer rights. As there are no reliable legal instruments to solve the problem of legal uncertainties, it is necessary to find a political solution and at least preliminarily uphold the rights of UK and EU citizens on a reciprocal basis.

The main challenges for a future EU-UK Trade Agreement are: (1) to find a common standard setting mechanism; (2) agree on mutual recognition and on (3) effective

enforcement mechanisms; (4) clarify the rights of persons which have made use from their right of establishment in the past.



## 1. INTRODUCTION

Trade in services is an increasingly important factor in our economy as it is growing even faster than trade in goods. In the European Union the freedom to provide services and the freedom of establishment are widely guaranteed in Art. 56 and 49 TFEU. Furthermore, to facilitate the use of these freedoms, a wide range of EU secondary law has been implemented.

There is a great deal of uncertainty how Brexit will affect trade in services between the UK and the EU. This is because the character of trans-border trade in services makes any future agreement particularly challenging. The specific barriers to trade in services need to be identified and addressed in order to effectively uphold the freedom to provide services between EU and UK.

The EU is a member of a multiplicity of Free Trade Agreements, including the European Economic Area (EEA), the Deep and Comprehensive Free Trade Area (DCFTA) with the Ukraine, the EU-Turkey Customs Union, the Comprehensive Economic and Trade Agreement (CETA) with Canada, the EU-Korea FTA and the General Agreement on Trade in Services (GATS). Those agreements differ considerably regarding their scope and their quality of law – making it difficult to serve as blueprint for any future EU-UK relationship.

One of the most important issues is the possible loss of rights after Brexit for EU-citizens in UK and UK-citizens in EU. Not only will Art. 49 and 56 TFEU no longer be applicable but also a variety of secondary law will cease to apply. This particularly affects regulated services (e.g. financial services, insurance services, transport services) and regulated professions (e.g. legal professions). It is yet unclear whether service providers and established persons in an EU-UK relationship can rely on previously “acquired rights”.

This paper gives an overview of the described problems and discusses possible solutions for a future EU-UK agreement.

## 2. TRADE IN SERVICES AND ESTABLISHMENT: CHALLENGES FOR MARKET INTEGRATION

### KEY FINDINGS

- International trade in services and cross-border establishment pose specific regulatory problems which have to be identified and addressed in trade agreements.
- Liberalizing trade in services and opening borders for establishment requires regulation, such as common standards for licenses or diplomas.

The exit of the United Kingdom will pose challenges to the future of trade in services between the EU and the UK. In any case, a trade agreement has to address specific regulatory problems. In order to make trade in services effective and cross-border establishment possible, specific barriers to trade must be identified.

It is the character of trans-border trade in services which makes trade agreements challenging: Domestic rules may set specific standards aiming at consumer or environmental protection or protection of any other public good; barriers may stem from mere differences between legal orders.<sup>1</sup> *Secondly*, barriers to trade in services very often do not address the product but rather the service supplier.<sup>2</sup> For example, the practice of legal professions normally is reserved to professionals in possession of a domestic legal diploma. This makes it difficult to meet the requirements of domestic law whereas adapting to technical standards on goods often rather results to be a mere cost factor. *Thirdly*, trade in services often requires the establishment of a branch or at least temporary access of staff.<sup>3</sup> A topic which dives into the conflict of immigration control schemes and therefore affects core national interests.<sup>4</sup>

One of this paper's main arguments shall be that liberalising trade in services and opening borders for establishment requires regulation, such as common standards for licenses or diplomas. On this basis Member States can be obliged to allow mutual recognition of standards or may even waive supervision.

This, as an ideal solution, allows the application of the country of origin principle, or, what is called "passporting"<sup>5</sup>.

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<sup>1</sup> *Delimatsis*, International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity, 2007, p. 70; for an overview over barriers to trade in services see: *Hoekman/Braga*, Protection in Trade in Services – a Survey, The World Bank Policy Research Working Paper No 1747, 1997, pp. 5 et seqq.

<sup>2</sup> *Sampson/Snape*, Identifying the Issues in Trade in Services, The World Economy 1985, 171.

<sup>3</sup> *Delimatsis*, International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity, 2007, pp. 63 et seqq.; *Sampson/Snape*, Identifying the Issues in Trade in Services, The World Economy 1985, 171, p. 172.

<sup>4</sup> See: *Lehmann/Zetzsche*, Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK, referring to the Prime Minister's statement saying, that 'We need to find a solution that addresses the concerns of the British people about free movement, while getting the best possible deal on trade in goods and services. We should be driven by what is in the best interests of the UK and what is going to work for the European Union, not by the models that already exist.', <http://www.reuters.com/article/us-britain-eu-may-idUSKCN1081QL>, accessed 20 March 2017.

<sup>5</sup> See: *Cherednychenko*, The UK's Potential Withdrawal from the EU and Single Market Access under EU Financial Services Legislation, In-Depth Analysis for the ECON Committee, 2016, p. 11.

### 3. SERVICES AND ESTABLISHMENT: CONDITIONS FOR INTEGRATED MARKETS

#### KEY FINDINGS

- Hindering regulation and discrimination have to be eliminated as a means of negative integration.
- Mutual recognition only works for services and establishment when standards are similar. Therefore positive integration (e.g. mutual standards) can be necessary.
- Unlike Art. 56 and 49 TFEU, International Trade Agreements usually only have a restricted scope, which makes it difficult and complex to handle the trade agreement.
- The efficiency of liberalisation by market law is dependent on the quality of law.

There are several conditions for integrated service markets which can also be applied to integrated establishment markets.

First, hindering regulation and discrimination have to be eliminated as a means of **negative integration**.<sup>6</sup> The EU treaties allocate this task primarily to the fundamental freedoms, **granting market access** and **prohibiting discrimination**. This may lead – in the best case – to a self-executing rule of **mutual recognition** as the Court of Justice of the EU has spelled out in its *Cassis de Dijon*-jurisdiction concerning the freedom of goods<sup>7</sup>.

However, as mentioned above, mutual recognition only works for services and establishment when standards are similar. Otherwise, the receiving country might want to insist on its own standards and therefore argue to justify restrictions of the freedoms of services and establishment.<sup>8</sup> Therefore, it is often necessary to **set standards** to approximate national laws.<sup>9</sup> This **positive form of integration eases mutual recognition**, cuts of **justification of restrictions** and allows **passporting** as a principle. Without common standards, the integration of markets may be a lengthy process in small steps, each step based on an uncertain lawsuit, sometimes without success.

As a third important point, it is necessary to bear in mind **the scope of a trade agreement**. Whereas Art. 56 and 49 TFEU are applicable almost without restrictions, International Trade Agreements tend to have a restricted scope laid down in commitments or in an annex to the treaty, making it difficult and complex to handle the trade agreement. Some trade agreements apply specific sectors to liberalisation (**positive list method**),<sup>10</sup> others exclude specific sectors from liberalisation (**negative list method**)<sup>11, 12</sup> One can

<sup>6</sup> *Craig/De Burca*, EU Law, 6th edition 2015, p. 608.

<sup>7</sup> Judgment of the Court of 20 February 1979, Case 120/78, *Cassis De Dijon*, ECLI: EU: C:1979:42.

<sup>8</sup> Judgement of the Court of 12 December 1996, Case C-3/95, *Reisebüro Broede*, ECLI:EU:C:1996:487; Judgement of the Court of 29 November 2007, Case C-393/05, *Commission/Austria*, ECLI:EU:C:2007:722 ; Judgement of the Court of 15 November 2011, Case C-320-03, *Commission/Austria*, ECLI:EU:C:2005:684.

<sup>9</sup> *Craig/De Burca*, EU Law, 6th edition 2015, p. 608.

<sup>10</sup> See for example EU-South Korea FTA, Articles 7.5, 7.11; GATS, Article XVI.

<sup>11</sup> See: CETA, Chapter IX, Article 9.2.

<sup>12</sup> For a more detailed explanation, see: European Commission, Services and investment in EU trade deals – Using positive and negative lists, 2016, [http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154427.pdf](http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf), accessed 20 March 2017.

argue that the negative list method is more efficient in terms of trade liberalisation.<sup>13</sup> In particular, Member States should be bound by positive or negative lists.

Finally, as a fourth point: the efficiency of liberalisation by market law is dependent on the quality of law. Enforceable rules with **direct effect** will serve better. Together with **judicial review** it allows to enforce subjective rights through the affected market players which, as the ECJ called it, would amount to an effective supervision by increasing the vigilance of individuals concerned with the protection of their rights.<sup>14</sup> Trade rules without direct effect may need enforcement under an international jurisdiction; the efficiency of such a dispute settlement is dependent on the procedures provided for in the trade agreement.

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<sup>13</sup> *Sauvé/Mattoo*, Regionalism in Services Trade, 2004, p. 43, [http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/sauve-mattoo\\_regionalism\\_april2004.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/sauve-mattoo_regionalism_april2004.pdf), accessed 20 March 2017; *Low/Mattoo*, Is there a better way? Alternative Approaches to Liberalization under GATS, in: Sauvé/Stern (ed.), GATS 2000: New Directions in Services Trade Liberalization, 2000, pp. 467 et seq.

<sup>14</sup> Judgment of the Court of 5 March 1963, Case 26/62, Van Gend en Loos, ECLI: EU: C:1963:1, p. 13.

## 4. SERVICE MARKETS AND ESTABLISHMENT UNDER DIFFERENT TRADE REGIMES

### KEY FINDINGS

- If the UK stayed in the EEA or would regain membership, for service markets and establishment not much would change. The substance of EEA Law is largely aligned to the EU single market law.
- Other existing Free Trade Agreements fall way back behind the EU`s level of integration, in particular regarding the scope of the agreements and the quality of law.
- Worst case would clearly be a Brexit without agreement as then the relation between the UK and the EU in trade in services would be governed by GATS. Here, the status of the UK in detail remains to be unclear and GATS as a rather weak framework does not allow for passporting and leaves numerous uncertainties.

A trade agreement between the EU and the UK could be inspired by different trade regimes such as the EEA, the EU-Ukraine Association Agreement or other International Trade Agreements.

#### 4.1. Service Markets and Establishment under the EEA

The best solution for future EU-UK trade relations after Brexit would be – from a market point of view – an EEA membership. At this point, the legal problems of the UK staying or becoming a member in the EEA shall not be addressed; they seem to be more political than legal in nature.<sup>15</sup> If the UK stayed in the EEA or would regain membership,<sup>16</sup> for service markets and establishment not much would change. The substance of **EEA Law is largely aligned** to the EU single market law. The fundamental freedoms are identical<sup>17</sup> and, most importantly, the EEA Members<sup>18</sup> outside the EU adopt almost 100% of EU single market legislation. Apart from a few exceptions, the scope of EEA law is very wide. The quality of law is also very similar. Even though EEA law does not necessarily have direct effect, the Law has to be transposed into national law with direct effect and stands under an efficient legal review by the EFTA Court.

Assessing the EEA, it appears to be the perfect solution: comprehensive market integration, functioning legal review both of which allow for passporting in regulated sectors. However, the UK would be bound by the fundamental freedoms including the freedom of workers. It would have to transpose single market law into domestic law without having voting rights in the Council or sending representatives to the European Parliament.

<sup>15</sup> One of the resulting problems would be that the EEA States only have a right to participate in the preparation of new legislation on the expert level, but don't have any voting rights, see: EEA Agreement, Articles 99 f. and *Baudenbacher*, After Brexit: EEA plus as a solution for the UK, NZKart 2016, 498.

<sup>16</sup> See: *Baudenbacher*, After Brexit: EEA plus as a solution for the UK, NZKart 2016, 498, In order to join the EEA, the UK would first have to join EFTA. For that the consent of the four EFTA States Iceland, Liechtenstein, Norway and Switzerland would be required, see EFTA Convention, Article 56 para 1 (though Switzerland is an EFTA State it is not a Contracting Party to the EEA Agreement following a negative referendum`s result on 6 December 1992).

<sup>17</sup> See: EEA Agreement, Article 1 (2).

<sup>18</sup> These are Iceland, Liechtenstein and Norway.

#### **4.2. Service Markets under EU-Ukraine Association Agreement**

A rather new model for trade relations is the Deep and Comprehensive Free Trade Area (DCFTA),<sup>19</sup> which is part of the EU-Ukraine Association Agreement. It aims at aligning the Ukrainian economy with EU standards. For two reasons this agreement cannot serve as a blueprint for a Brexit-agreement: Firstly, the UK economy already matches EU standards. Secondly, contrary to the EU-Ukraine Association Agreement, an UK-EU agreement would rather be aimed at disengagement than at rapprochement.

Like CETA (see below, 3.4), DCFTA is rather ambitious regarding negative integration. The agreement provides for a right of establishment including national treatment and MFN-treatment in services and non-services sectors, subject to reservations in a negative list.<sup>20</sup> For cross-border supply of services the agreement follows a positive list approach.<sup>21</sup>

For some key services sectors (financial services, telecommunications services, postal and courier services, and international maritime services) the agreement provides for an implementation of the EU-acquis and thus a gradual expansion of the internal market in those sectors.<sup>22</sup>

Another approach of positive integration is to present a framework which facilitates future mutual recognition agreements, empowering the professional bodies to provide recommendations on mutual recognition, which would allow service suppliers and investors to rely on their domestic diplomas, licences and market admissions.<sup>23</sup>

Even though the agreement does not yet contain investment protection provisions and investor-to-state dispute settlement procedures,<sup>24</sup> it obliges the parties to provide effective legal protection in areas covered by the agreement.<sup>25</sup> However, regarding the quality of law, the agreement remains behind the EEA, as it is not directly applicable.<sup>26</sup>

#### **4.3. Service Markets and Establishment under a Customs Union: EU – Turkey Customs Union**

Service markets and free establishment between the EU and the UK might also be formed through agreements establishing a customs union. However, a customs union as such does not make a big difference for service markets and establishment. Customs unions abolish tariffs for trade within the customs union and provide for an external tariff. Services and establishment are normally not subject to tariffs as these – typically – cover goods.<sup>27</sup> The effect of a customs union on services and establishment depends on other trade arrangements in the agreement which could be more similar to the EEA or to CETA or GATS. In the EU-Turkey customs union there are rules on national treatment and on market access for services, but there is no basis for positive integration which in the end hinders passporting rights in the area of services and establishment.

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<sup>19</sup> EU-Ukraine Association Agreement, Title IV.

<sup>20</sup> See: EU-Ukraine Association Agreement, Title IV, Article 88.

<sup>21</sup> See: EU-Ukraine Association Agreement, Title IV, Article 95.

<sup>22</sup> See: EU-Ukraine Association Agreement, Title IV, Articles 114, 124, 133 and 138.

<sup>23</sup> See: EU-Ukraine Association Agreement, Title IV, Article 106.

<sup>24</sup> See: EU-Ukraine Association Agreement, Title IV, Article 89.

<sup>25</sup> See: EU-Ukraine Association Agreement, Title IV, Article 286.

<sup>26</sup> See: Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, recital 5.

<sup>27</sup> *Hoekman/Braga*, Protection in Trade in Services – a Survey, The World Bank Policy Research Working Paper No 1747, 1997, p. 5

#### 4.4. Service Markets and Establishment under CETA

Instead, CETA could be treated as a possible solution for EU-UK trade relations in the future, as it is the EU's most ambitious trade agreement. A first glance at the substance of the law shows that rather far-reaching approaches concerning negative integration can be found<sup>28</sup>. There are rules on national treatment<sup>29</sup> and on market access.<sup>30</sup> CETA also requires domestic regulation on standards affecting services to be fair and equitable instead of being arbitrary.<sup>31</sup> There also are rules on the temporary entry of staff and of natural persons for business purposes,<sup>32</sup> though this does remain subject to conditions<sup>33</sup>. This framework of negative integration falls short to standards of EU law but is, compared to other trade agreements, rather progressive.

However, there are no legal bases to enact **common standards**. One can find, as an approach of positive integration, a framework to facilitate future mutual recognition agreements<sup>34</sup> which would allow service suppliers and investors to rely on their domestic diplomas, licences and market admissions. This as such will not be sufficient for closely integrated service markets such as the EU and will not allow passporting as long as mutual recognition agreements are not concluded.

On the positive side of CETA falls the wide **scope of the agreement** which is mainly based on a negative list.<sup>35</sup>

Talking about the **quality of law**, there is no direct effect.<sup>36</sup> Investors, however, can rely on the right to claim for damages if obligations under CETA have been breached.<sup>37</sup> Here, the agreement provides for direct access to arbitration<sup>38</sup> whereas service suppliers do not have the right to invoke their rights directly. In this respect, judicial review is restricted to state-to-state dispute settlement<sup>39</sup>. The bottom line is that CETA represents an ambitious approach. However, parties can be required to obey national laws, there is no setting of common standards, no self-executing mutual recognition and therefore no passporting.

#### 4.5. Service Markets and Establishment under FTA EU-Korea

The EU-Korea FTA contains quite similar provisions to CETA. Regarding negative integration, it is slightly less ambitious than CETA as it follows a positive list approach.<sup>40</sup> In the liberalised sectors, the principles of National Treatment and MFN-Treatment apply.<sup>41</sup> Like CETA, the agreement contains provisions on the temporary entry of natural persons.<sup>42</sup> It also does not include any base to enact common standards but only a framework for future mutual recognition agreements.<sup>43</sup>

<sup>28</sup> See: CETA, Chapter VIII, Articles 8.1 et seq., Chapter IX, Articles 9.3, 9.6.

<sup>29</sup> See: CETA, Chapter IX, Articles 9.3 and 9.5.

<sup>30</sup> See: CETA, Chapter IX, Article 9.6.

<sup>31</sup> See: CETA, Chapter XII, Article 12.3.

<sup>32</sup> See: CETA, Chapter X.

<sup>33</sup> See: CETA, Chapter X, Article 10.2.

<sup>34</sup> See: CETA, Chapter XI.

<sup>35</sup> See: CETA, Chapter IX, Article 9.2.

<sup>36</sup> See: CETA, Chapter XXX, Article 30.6.

<sup>37</sup> See: CETA, Chapter VIII, Article 8.39.

<sup>38</sup> See: CETA, Chapter VIII, Article 8.23.

<sup>39</sup> See: CETA, Chapter XXIX, Article 29.2.

<sup>40</sup> See: EU-South Korea FTA, Articles 7.5, 7.11.

<sup>41</sup> See: EU-South Korea FTA, Articles 7.7 and 7.8 regarding cross-border supply of services; Articles 7.12 and 7.14 regarding establishment.

<sup>42</sup> EU-South Korea FTA, Articles 7.17 et seqq.

<sup>43</sup> EU-South Korea FTA, Article 7.21.

Like other International Trade Agreements, the EU-Korea FTA does not have direct effect.<sup>44</sup> Furthermore, it does not contain any investor-to-state but only state-to-state dispute settlement mechanisms.<sup>45</sup> In conclusion, regarding the **quality of law**, it is rather unattractive to have this agreement serving as a blueprint for future EU-UK relations.

#### 4.6. Service Markets under World Trade Law (GATS)

An older trade agreement is GATS, whose objective is to extend the WTO system to the trade in services. GATS constitutes a **broad framework for the liberalisation** of trade in services rather than setting compulsory rules. However, GATS as a general instrument in international trade has to be viewed as the worst possible outcome of negotiations between the EU and the UK, if no withdrawal agreement were to be concluded. In any case, UK would remain within the WTO system and therefore would remain to be a GATS member.<sup>46</sup> The details are difficult and should be assessed accurately, because GATS is a shared agreement and, for example, the commitments of GATS which open the application of the trade rules are commitments laid down by the EU; also, they apply only to territory of the EU. Maybe, the UK would have to submit new commitments; the details are controversial in legal discourse.<sup>47</sup> There are several good reasons for the possibility to transfer the EU commitments to the UK by legal interpretation.

Looking closer at GATS, we find that the substance of the law is less far-reaching compared to CETA. There are no rules on positive harmonisation and also **no approach to ease mutual recognition**. This can be subject to negotiation, but agreements between states may trigger the principle of most-favoured-nation and open mutual recognition to all parties. As mutual recognition requires common or similar standards there is no basis for mutual recognition of standards from states who aren't are a member of the respective agreements.

The scope of GATS is restricted to a **positive list**<sup>48</sup> which is submitted by each Party for their territory unilaterally and is not binding; it can be changed **unilaterally** which makes trade relations less reliable.

The quality of the law obeys **international principles**, so GATS law has no direct effect. Judicial review is restricted to a procedure under the Dispute Settlement Understanding<sup>49</sup>, which provides for a complex and rather slow process without the possibility for individuals of invoking their rights.

The **assessment** is clear: GATS is a rather weak framework which does not allow for passporting and leaves a lot of uncertainties.

One last word concerning establishment: it is covered by GATS, but only when the established company itself supplies services.

<sup>44</sup> Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Article 8.

<sup>45</sup> See: EU-South Korea FTA, Articles 14.1 et seqq.

<sup>46</sup> Both the EU and the UK have signed the WTO Agreements (Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994). The UK will therefore continue to be bound by the revised GATT and the GATS, see: *Lehmann/Zetzsche*, European Business Law Review 2016, 999, 1003. For a more detailed discussion of the UK's status as a WTO Member see *Bartels*, The UK's status in the WTO after Brexit, pp. 3 et seqq., [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747), accessed 20 March 2017.

<sup>47</sup> See: *Lehmann/Zetzsche*, European Business Law Review 2016, 199, 1003. Some authors argue that a renegotiation of the UK's membership is needed as it will not be able to fulfil the obligations undertaken by the EU on its behalf; *Gehring*, EU Law Analysis: Brexit and EU-UK Trade Relations with Third States, <http://eulawanalysis.blogspot.com/2016/03/brexit-and-eu-uk-trade-relations-with.html>, accessed 20 March 2017 and *Bartels*, The UK's status in the WTO after Brexit, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747), accessed 20 March 2017.

<sup>48</sup> See: GATS, Article XVI.

<sup>49</sup> See: GATS, Article XXIII.



## 5. COMPARISON AND LESSONS FOR FUTURE EU-UK TRADE IN SERVICES

### KEY FINDINGS

- Whereas all trade agreements include rights for market access and a non-discrimination rule, the effects of these rights are very different in substance and in their enforcement.
- Most attention should be paid to the relation between common standards and market access.
- As a principle, market access as well as full and self-executing mutual recognition should be granted as long as standards in the UK and the EU are still approximated.
- Market access and mutual recognition could be suspended when either the EU or the UK change standards unilaterally – until standards are in line again.
- A mechanism to monitor the alignment of standards in the UK and the EU should be developed.

Comparing these different trade agreements shows several main points: Whereas all trade agreements include rights for market access and a non-discrimination rule, the effects of these rights are very different in substance and in their enforcement. Mainly because only the EU and the EEA allow standard setting and have effective judicial review.

**Table 1: Comparison of different trade agreements**

	European Union	CETA	FTA EU-S.Korea	GATS
Negative Integration	Art. 56, 49 TFEU Market access National treatment	Art. 9.6, 9.3: limited market access, national treatment Art. 8.1 ff.: limited market access for investment	Art. 7.5 f., 7.9 f: limited market access, national treatment	Art. XVI, XVII: limited market access, national treatment
Mutual Recognition	Art. 56, 49 TFEU, Principle of origin	framework to develop Mutual Recognition Agreements (Art. 11)	mechanism on negotiation of Mutual Recognition Agreements	framework for further negotiation
Common Standards	Art. 114, Art. 62, 53 TFEU	(-)	(-)	(-)
Scope	not restricted	Negative list	Positive list	Positive list, unilateral
Direct Effect	yes	no	no	no
Judicial Review	CFEU	arbitration, restricted	restricted	restricted

The table shows an overview of trade in service regimes. There are big differences in the rule of mutual recognition and standard setting, the scope of the agreements, the quality of law and judicial review. But also market access rules are rather different, as the following table shows.

**Table 2: Market Access in detail**

	European Union	CETA
<b>Market Access in the Treaty Law</b>	Art. 56, 49: right to access markets free from unjustifiable discrimination and hindrances (e.g., national diploma) self-executing mutual recognition	Art. 9.6, 8.4: prohibition of free from unjustifiable discriminations and quantitative restrictions no self-executing mutual recognition
<b>Secondary Law</b>	numerous regulations and directives (see EU mapping: overview of the internal market and consumer protection related legislation)	negotiation to achieve MRA

Firstly, it has to be taken into account, that free market access can be facilitated by secondary law.<sup>50</sup> For example, the harmonization of private or procedural law removes obstacles to trade.<sup>51</sup> Secondly, also the wordings of the rules giving rights to market access are different. Whereas CETA, for example, only guarantees market access “free from unjustifiable discriminations and quantitative restrictions”, Art. 56 and 49 TFEU cover mere hindrances which affect market access.

What lessons can be learned from this for future EU-UK trade in services? As trade in services is growing faster than trade in goods, and the financial sector is extraordinarily important for the UK as well as for the EU, great efforts should be made to approximate a future trade agreement in this sector to current EU-law as much as possible. Most attention should be paid to the relation between common standards and market access. Starting conditions are very good, as the UK currently is in line with EU law. As a principle, market access and full and self-executing mutual recognition should be granted as long as standards in the UK and the EU are still approximated. Market access and mutual recognition could be suspended when either the EU or the UK change standards unilaterally – until standards are in line again. This mechanism would give the UK an incentive to voluntarily align their law in sectors which are important for trade in service. It remains to be seen if the negotiations lead to a trade regime which provides treaty rules with direct effect and effective judicial control.

<sup>50</sup> See for example: Directive 2011/83/EU of 25 October 2011 on consumer rights, recital 7: « The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. »; Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, recital 5 et seqq.

<sup>51</sup> Gómez, The Harmonization of Contract Law through European Rules: a Law and Economics Perspective, in: European Review of Contract Law, 2008, 89; for an overview over the advantages and disadvantages of harmonizing private and procedural law, see: *Visscher, A Law and Economics View on Harmonization of Procedural Law*, RILE Working Paper No. 2010/09, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669944](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669944), accessed 20 March 2017.

## 6. CHALLENGES FOR EU-LEGISLATION: TRANSITORY MEASURES TO MATCH LEGITIMATE EXPECTATIONS

### KEY FINDINGS

- Brexit will lead to the result that British citizens and companies no longer fall within the personal scope of EU law and EU law will no longer be applicable in UK.
- Service providers and natural or legal persons established in an EU-UK relationship will suffer from massive legal uncertainties.
- Not only the access to the markets is affected but also, e.g., judicial cooperation, intellectual property, data protection or consumer rights.
- As there are no reliable legal instruments to solve the problem of legal uncertainties, it is necessary to find a political solution and at least preliminarily uphold the rights of UK and EU citizens on a reciprocal basis.

The last chapter deals with a **transitory problem**. Thinking about the future of services and establishment in EU-UK relations, the EU might have to adopt transitory measures concerning British citizens and companies, who already made use of their freedom to services or establishment.

### 6.1. Legal Uncertainties for EU-Citizens in UK and UK-Citizens in EU after Brexit

The question at stake is whether Brexit would, for the persons indicated above, lead to a **loss of rights** granting free and non-discriminatory access to European or British markets. It must be kept in mind, that British business in EU Member States always relies on the rights given by EU primary and secondary law. On the one side, Brexit will lead to the result that British citizens and companies no longer fall in the personal scope of EU law as most rules granting market access address EU citizens or companies established in the EU.<sup>52</sup> On the other side, EU law will no longer be applicable in the UK as the territorial scope of EU law is restricted to the territory of the EU Member States which the UK no longer will be.

The topic can be explained by highlighting a specific problem in Germany with English companies such as private limited companies, after transferring the company's headquarters to Germany. This has been a popular instrument to circumvent German company law and in particular the German minimal capital condition. Such companies have to be recognised as legal persons as a result of the ECJ's jurisdiction on Art. 49 TFEU in the *Überseering* case.<sup>53</sup> When the UK leaves the EU, British companies would be excluded from the scope of Art. 49 TFEU and therefore would lose their right to be recognised as legal persons.

However, the problem has much broader effects. These can be experienced by service providers concerning different market access rules, for example the recognition of diplomas or licenses, the rule of mutual recognition, passporting rules and anti-discrimination rules.

### 6.2. Specific Policies of EU Legislation Affected by Brexit

Self-employed persons, professionals and legal persons in the EU may transfer their economic activity without hindrances and discriminations to another Member State

<sup>52</sup> One important exception is the freedom to capital, Art. 63 TFEU.

<sup>53</sup> Judgement of the Court of 5 November 2002, Case C-208/00, *Überseering*, ECLI:EU:C:2002:632.

(freedom of establishment, Art. 49 TFEU) or offer and provide their service in other Member States on a temporary basis (freedom to provide services, Art. 56 TFEU). To allow the effective use of these freedoms and to make them effective, EU legislation has been implemented. The following – not exhaustive – list gives a first overview on relevant secondary legislation and areas potentially affected by Brexit.

(i) Freedom to provide services

- In addition to special rules for specific sectors (see next sections), secondary EU law establishes a general legal framework for the freedom to provide services. The main set of general rules is laid down in the **Services Directive**<sup>54</sup>: It requires the Member States to abolish discriminatory and particularly restrictive requirements, such as nationality requirements or economic needs tests. It establishes points of single contacts – one-stop-shops for services providers to get information and complete administrative formalities in all EU Member States. It also contains rules on administrative cooperation and mutual assistance in the supervision of service providers which is performed – in general – by the country of origin (no double supervision). After Brexit, EU service providers in the UK and UK service providers in the EU cannot rely on continuance of these rules.

(ii) freedom of establishment

- Currently, **legal persons** of any EU member state have to be acknowledged as such in any Member State. After Brexit, in Member States following the “incorporate system”, British companies would still be acknowledged as legal persons. EU corporations in the UK would still be acknowledged there as legal persons as the UK traditionally follows the “incorporate system”. It should be noted however that the UK would not be obliged to hold on to this. The situation is more difficult for British companies in Member States following the “seat theory” – meaning that a company must fulfil the conditions for setting up a company in the state where their headquarter is located: In those States UK companies would not necessarily be recognised as legal persons anymore. The withdrawal agreement should address this topic to avoid legal uncertainty and clarify whether or not companies are acknowledged in all Member States and the UK.
- **EU legal entities**, Societas Europea/SE<sup>55</sup>, European Cooperative Society/SCE<sup>56</sup>, European Economic Interest Groupings/EEIGs<sup>57</sup>, require having their true centre of operations in an EU Member State. The withdrawal agreement should address the issue of EU legal entities with their true centre of operation in the UK and their future legal acknowledgment.

(iii) mutual recognition of diplomas and Academic qualification

- **Legal professions:** Under the Lawyers’ Establishment Directive<sup>58</sup>, lawyers have the right of establishment on a permanent basis in another Member State. They have to register with the competent authority in the host State and can pursue activities under their home-country professional title (e.g. Barrister, Rechtsanwalt, Abogado). After three years of effective and regular practice in

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<sup>54</sup> Directive 2006/123/EC.

<sup>55</sup> Directive 2157/2001/EC.

<sup>56</sup> Regulation 1435/2003/EC.

<sup>57</sup> Regulation 2137/85/EC.

<sup>58</sup> Directive 98/5/EC.

the host Member State they are entitled to acquire the professional title of the host State. Under the Lawyers' Services Directive<sup>59</sup>, lawyers are allowed to advise clients in other Member States on a temporary basis under their home-country title with no requirement to register. It should also be noted that, according to Article 19 Statute of the Court of Justice, only lawyers authorised to practice before a court of a Member State or an EEA State may represent or assist a party before the European Court. The withdrawal agreement at least should find a solution for those lawyers that have acquired the professional title of the host State and answer the question whether or not they can continue to provide services under this title.

- **Other regulated professions:** For professions whose minimum training conditions are harmonised at European level (doctors, nurses responsible for general care, dentists, veterinary surgeons, midwives, pharmacists and architects), the Professional Qualification Directive<sup>60</sup> provides for automatic recognition of qualifications obtained in a Member State; other professionals may request recognition of their qualifications if they can demonstrate they are fully qualified in their home-country. However, in such cases if the authorities of the host country find significant differences between the training acquired in the country of origin and that required for the same activity in their country, they can require the individual to undertake an adaptation period or an aptitude test, in principle at the choice of the individual. The withdrawal agreement should clarify whether qualifications obtained before Brexit still are recognised in the Member States and the UK.
- Although there is no automatic recognition of other qualifications in the EU on the basis of secondary law,<sup>61</sup> European citizens can use the European Qualifications Framework<sup>62</sup> and the Europass<sup>63</sup> to list their skills and qualifications when applying in other Member States. These are standardised documents that help to compare applicants from countries across Europe. A withdrawal agreement should make sure that UK institutions continue to issue the documents, such as the diploma supplement.

(iv) secondary legislation including passporting rights, e-Commerce, etc.

- **Financial services:** The financial services "passport" under Directive 2013/36/EU allows financial institutions authorised and regulated in one of the EEA Member States to provide cross-border services, to provide certain products cross-border and to set up branches to provide financial services in any EEA state. For third countries there is only an equivalence regime. Even though the UK most likely would fulfil equivalence requirements (at least until it would liberalise financial market in the UK), the recognition of equivalence is time-consuming and brings legal uncertainty. Furthermore, a third country pass would not allow EU firms to provide services in the UK. The easiest way to deal with this problem in the withdrawal agreement would be maintaining status quo at least for a transition period. However, it should be noted, that "passporting" is only possible due to a number of EU legislation that establishes common rules for financial services, consumers and market participants can rely on. Those

<sup>59</sup> Directive 77/249/EC.

<sup>60</sup> Directive 2005/36/EC.

<sup>61</sup> Service providers may rely on the fundamental freedoms (Art. 56 or Art. 49 TFEU) directly.

<sup>62</sup> See Recommendation 2008/C 111/01.

<sup>63</sup> See Decision 2241/2004/EC.

include: The Markets in Financial Instruments Directive<sup>64</sup>, the Mortgage Credit Directive<sup>65</sup>, the Banking Directive<sup>66</sup>, the Banking Regulation<sup>67</sup>, and the Consumer Credit Directive<sup>68</sup>. Maintaining mutual recognition seems only possible as long as the UK accepts to further comply with these common rules.

- **Insurance services:** For insurance services, EU secondary legislation has established an EU “passporting” system. It is based on the concept of harmonisation and mutual recognition through the Solvency II Directive<sup>69</sup>, the Omnibus II Directive<sup>70</sup>, and implementing acts by the Commission<sup>71</sup>. The common framework covers three main areas, related to capital requirements, risk management and supervisory rules. The European Commission can recognise that the supervisory regime for insurers in force in certain non-EU countries is equivalent to the Solvency 2 regime. Such an *equivalent decision* allows third country insurers to operate in the EU without need to prove compliance with all EU rules and EU insurers to use local rules to report on their operations in these countries. An equivalent decision for the UK would allow insurers to continue their EU-UK services.
- **Transport services:** This sector is largely covered by EU legislation providing a framework for market liberalisation across a number of sectors including aviation, rail, maritime and road transport, e.g.: The Reservation System Regulation<sup>72</sup>, the Air Service Regulation<sup>73</sup>, the Single European Sky Regulation<sup>74</sup>, the Single European Railway Area Directive<sup>75</sup>, the Road Haulage Regulation<sup>76</sup>, the Coach and Bus Services Regulation<sup>77</sup>, the Interoperability Directive<sup>78</sup>, the Inland Navigation Regulation<sup>79</sup>, the Maritime Cabotage Directive<sup>80</sup>, the Non-resident Carriers Regulation<sup>81</sup>, and the Maritime Transport Regulation<sup>82</sup>. The rules differ from sector to sector. Some of the legislation also applies to third country nationals, e.g. the right to carry passengers or goods by sea between any port of an EU country and any port or offshore installation of another EU country or of a non-EU country also applies to non-EU nationals established in the EU. Brexit will also effect international agreements concerned with transport services, such as the US-EU Open Skies Agreement. Due to the numerous different rules governing transport services in the European Union

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<sup>64</sup> Directive 2014/65/EU.

<sup>65</sup> Directive 2014/17/EU.

<sup>66</sup> Directive 2013/36/EU.

<sup>67</sup> Regulation (EU) 575/2013.

<sup>68</sup> Directive 2008/48/EC.

<sup>69</sup> Directive 2009/138/EC [recast], amended by Regulation EU/2016/567.

<sup>70</sup> Directive 2014/51/EU.

<sup>71</sup> Under the Solvency 2 directive the European Commission can adopt delegated and implementing acts, including technical standards and information for the calculation of technical provisions and basic own funds, such as Regulation (EU) 2015/35.

<sup>72</sup> Regulation (EC) 80/2009.

<sup>73</sup> Regulation (EC) 1008/2008.

<sup>74</sup> Regulation (EC) 549/2004.

<sup>75</sup> Directive 2012/34/EU.

<sup>76</sup> Regulation (EC) 1072/2009.

<sup>77</sup> Regulation (EC) 1073/2009.

<sup>78</sup> Directive 2008/57/EC.

<sup>79</sup> Regulation (EC) 1356/96.

<sup>80</sup> Regulation (EEC) 3577/92.

<sup>81</sup> Regulation (EEC) 3921/91.

<sup>82</sup> Regulation (EEC) 4055/86.

and the major impact of those services to the economy, there is particular need for a quick solution here.

- **Payment services:** Right now, the UK is an active member of two harmonised regulatory frameworks, the Single Euro Payments Area (SEPA)<sup>83</sup> and Payment Service Directive (PSD)<sup>84</sup>. The payment services directive establishes the same set of rules on payments across the whole European Economic Area. It is yet unclear what impacts Brexit will have on cross-border payment services. This uncertainty is even further intensified as by 2018 the new Payment Service Directive<sup>85</sup> will become applicable. One of the aims of this new directive is to strengthen the role of the European Banking Authority (EBA) to coordinate supervisory authorities and draft technical standards – possibly contradicting the UK's will to self-govern. Other secondary legislation in this field that are possibly affected include: The E-Money Directive<sup>86</sup>, the Funds Transfer Regulation<sup>87</sup>, and the Regulation on Interchange Fees<sup>88</sup>.
- **Postal services:** The Postal Services Directive<sup>89</sup> sets out the rules that EU Member States must implement to complete the EU's internal market for postal services. After Brexit, postal services between the EU and UK will be governed by the Universal Postal Union and CERP (Committee of European Postal Regulators).

(v) Secondary Law in the Area of Justice

Cross-border trade is less attractive if service providers could not judicially enforce claims against their customers.

- **Recognition and Enforcements of Judgements:** Currently, the Brussels Ia Regulation<sup>90</sup> provides for enforceability of judgments of courts of EU member States within the EU. The Regulation also contains provisions on international jurisdiction. After Brexit, it is uncertain whether or not jurisdiction clauses still will be respected and judgements with a British party to the proceedings continue to be enforceable throughout the EU. The withdrawal agreement insofar could be based on the Denmark-EU Jurisdiction Agreement which basically leads to the applicability of the Brussels Ia regulation under international law.
- **Insolvency:** The Regulation on insolvency proceedings<sup>91</sup>, soon to be replaced by Regulation 2015/848/EU, establishes common rules on the court competent to open insolvency proceedings, the applicable law and the recognition of insolvency proceedings and judgments. The withdrawal agreement should particularly address the question what happens to insolvency proceedings commenced but not completed before Brexit.

(vi) Other secondary law with effects on service providers

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<sup>83</sup> Regulation (EU) 1215/2012.

<sup>84</sup> Directive 2007/64/EC.

<sup>85</sup> Directive 2015/2366/EU.

<sup>86</sup> Directive 2009/110/EC.

<sup>87</sup> Regulation (EC) 1781/2006.

<sup>88</sup> Regulation (EU) 2015/75.

<sup>89</sup> Directive 2008/6/EC.

<sup>90</sup> Regulation (EU) 1215/2012.

<sup>91</sup> Directive (EC) 1346/2000/EC.

All legislation granting rights to service providers will affect EU-UK business after Brexit. Some examples are:

- **Intellectual Property:** As the European Patent Convention is not part of the EU legislation but an international treaty, it will not be affected by Brexit. Other intellectual property rights derive from EU legislation and thus will cease to apply to the UK. These include the Community Trade Mark<sup>92</sup>, Registered Community Designs<sup>93</sup> and Community Plant Variety Rights<sup>94</sup>. The Copyright Directive<sup>95</sup> which harmonises key rights granted to authors and neighbouring rights holders (the reproduction right, the right of communication to the public and the distribution right) is possibly affected by Brexit, too. Under international law, acquired rights are not automatically invalid in the case of State Succession.<sup>96</sup> This outcome could possibly be applied to Brexit. However, this would prevent neither the UK nor the EU to change the law and for example stop the recognition of an EU trade mark registered by an UK company. To avoid legal uncertainty, the withdrawal agreement should address this issue. There is a particular need for transition rules.
- **E-commerce:** The E-commerce Directive<sup>97</sup> establishes harmonised rules on electronic commerce, such as transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service. According to the Directive, E-commerce in principle is subject to the law of the Member State in which the service provider is established and Member States are not allowed to restrict incoming services. The Directive will cease to apply to the UK after Brexit and the UK as well as EU Member States would be able to impose restrictions on incoming services. More legal acts possibly affected by Brexit include the Directive on Privacy and Electronic Communications<sup>98</sup> that sets out specific rules and safeguards to ensure the users' right to privacy and confidentiality, the Access Directive<sup>99</sup> that harmonises the way in which EU Member States regulate access to, and interconnection of, electronic communications networks and associated facilities, the Universal Service Directive<sup>100</sup> ensuring specific rules for the provision of electronic communications services within the EU. As E-commerce is one of the fastest growing industries, it should be given high priority.
- **Data protection law:** It is yet unclear whether it will be legal for companies to transfer data to the UK after Brexit. This issue should be addressed to avoid legal uncertainty, the requirements set out by the ECJ in the Case Schrems<sup>101</sup> should be considered. However, under the General Data Protection Regulation<sup>102</sup>

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<sup>92</sup> Regulation (EC) 207/2009.

<sup>93</sup> Regulation (EC) 6/2002.

<sup>94</sup> Regulation (EC) 2100/94.

<sup>95</sup> Directive 2001/29/EC.

<sup>96</sup> *Zimmermann*, State Succession in Other Matters than Treaties, in: Max Planck Encyclopedia of Public International Law [MPEPIL], paragraph 31, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1108?rskey=1KKFI4&result=1&prd=EPIL>, accessed 19 April 2017.

<sup>97</sup> Directive 2001/31/EC.

<sup>98</sup> Directive 2002/58/EC.

<sup>99</sup> Directive 2002/19/EC.

<sup>100</sup> Directive 2002/22/EC.

<sup>101</sup> European Court of Justice, Judgment of 6 October 2015, Case C-362/14, Schrems, ECLI:EU:C:2015:650.

<sup>102</sup> Regulation 679/2016/EU.



British companies offering goods or services to data subjects in the EU would be required to adapt to EU data protection law. Thus, from an EU-perspective, there is no need for an immediate solution.

- **EU consumer law:** It is well known that EU consumer law has the objective to create consumer confidence which encourages them to order from cross-border sellers (goods) or service providers (services). As secondary consumer law is legislated in the form of directives (e.g., directive on consumer rights<sup>103</sup>), Brexit will not affect the transposed British law as long as this law is not repealed.

### 6.3. Upholding Rights in the UK; Categorisation of rights by the UK High Court

The UK High Court in the case *Miller* has categorised the rights of UK citizens that might be lost due to Brexit as following: (1) rights capable of replication in the law of the UK, (2) rights enjoyed in other EU member states, e.g. freedom of movement; and (3) rights that could not be replicated in UK Law, e.g. the right to stand for election to the European Parliament.<sup>104</sup> This was one of the main reasons, why the High Court as well as the Supreme Court<sup>105</sup> ruled that the Government does not have the power to trigger the withdrawal from the EU but that an act of Parliament is needed. The view on selected secondary law, above, identified rights mostly in the category 1. It shows that the UK, in category 1, has *the power* to replicate EU law in a kind of autonomous implementation. If it refrains from doing so, when Brexit becomes effective, all rights deriving from directly applicable EU law, e.g. freedom of movement, freedom of establishment, regulations and general principles, such as non-discrimination for UK citizens as well as EU citizens in the UK will automatically cease to exist with entry into force of the withdrawal agreement. Other rights, deriving not immediately from EU law but from national law based on EU directives, will continue to exist. However, the British parliament will be free to repeal these rights; this power is a source of legal uncertainty. Any withdrawal agreement should address this issue and include at least transitional provisions to temporarily uphold said rights.

### 6.4. Possible Solutions

In the current situation, service providers and established persons in an EU-UK relationship will suffer from massive legal uncertainties which will present great challenges for the EU and UK legislators – and possibly for the courts. Courts could provide for a solution by applying the legal institution of Legitimate Expectations or the principle of Acquired Rights (5.4.1.). However, this might lead to a mitigation of problems in particular cases, but does not overcome the big economic and social costs of legal uncertainties.

#### 6.4.1. Legitimate Expectations and the Principle of Acquired Rights; Fundamental Freedoms

A preliminary question is whether there is a legal obligation to enact transitory measures. A possible legal approach could be based on the idea of legitimate expectations or the principle of acquired rights. British citizens or companies, which are active in business before Brexit, could perhaps rely directly on Art. 56 and 49 TFEU.

<sup>103</sup> Directive 2011/83/EU.

<sup>104</sup> High Court, R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union, [2016] EWHC 2768 (Admin).

<sup>105</sup> Supreme Court, R (on the application of Miller and another) v Secretary of State for Exiting the European Union, [2017] UKSC 5.

Legitimate expectations<sup>106</sup> require a representation of the EU that the rights these companies or service suppliers rely on would continue. Under international law, private persons basically cannot rely on rights when a state chooses to terminate an international agreement or in the case of state succession<sup>107</sup>. The exception to this general rule, namely that of human rights, would not apply. However, the EU is not a normal international organisation. It is therefore possible to argue that Brexit does not lead to a loss of rights under Art. 56 and 49 TFEU of British citizens after Brexit.

Acquired rights<sup>108</sup> however, are restricted to property and certain contractual rights; a right to work or a right to be recognised would probably not be seen as an acquired right.

There might be a solution in legal theory. EU law could be applied to British persons with a sufficient link as a means of intertemporal application of EU law.<sup>109</sup>

The legal problem of legitimate expectations as well as its solution, especially intertemporal application, still need closer legal examination. One could base this solution on the fundamental freedoms themselves: It would be less attractive to make use of the freedoms when one has to take into account a possible exit of the host or home country with the effect of possible loss of rights. However, this solution would only work for the EU, not for the UK after Brexit, as EU law would not be applicable any more.

#### 6.4.2. Adapting EU Legislation

In the end, it seems to be better to find a political solution to secure rights of UK citizens and companies. This would serve to **create legal certainty** and could be done in the form of a European regulation on the basis of Art. 114 TFEU. However, this concept could only be of preliminary nature. Granting equal rights to access EU markets free from discrimination requires a guarantee for equal standards in the UK. The necessity for this becomes clear with a view to the passporting principle in financial markets. Passporting rights and the related principle of supervision on the home Member State are bound to equal standards; concerning consumer protection, the protection of the banking system and the standards of banking supervision.

This would require an in-depth examination of legal instruments in order to

- i. detect necessities for adaption;
- ii. develop solutions for granting rights to UK citizens (EU law or withdrawal agreement);
- iii. develop a mechanism to assess and secure the equivalence of standards.

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<sup>106</sup> *Garner*, After Brexit: Protecting European citizens and citizenship from fragmentation, EUI Working Paper LAW 2016/22, pp. 10 et seq.

<sup>107</sup> *Zimmermann*, State Succession in Other Matters than Treaties, in: Max Planck Encyclopedia of Public International Law [MPEPIL], paragraph 31, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1108?rskey=1KKFI4&result=1&prd=EPIL>, accessed 20 March 2017.

<sup>108</sup> *Zimmermann*, State Succession in Other Matters than Treaties, in: Max Planck Encyclopedia of Public International Law [MPEPIL], paragraph 31, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1108?rskey=1KKFI4&result=1&prd=EPIL>, accessed 20 March 2017. See: *House of Lords*, European Union Committee, Brexit: acquired rights, 10th Report of Session 2016–17; *Lowe*, Written Evidence (AQR0002) to the House of Lords EU Justice Sub Committee, [http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/38137.html#\\_ftn3](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/38137.html#_ftn3), last accessed 20 March 2017; *O'Connell*, *International Law*, 1970, pp. 762 et seqq.

<sup>109</sup> *Weller/Thomale/Benz*, NJW 2016, 2378, pp. 2381 et seq.

#### 6.4.3. Negotiating Rights in the Withdrawal Agreement

Adapting EU legislation, however, can be an option only on a reciprocal and equivalent basis. It would hardly be politically acceptable to secure rights of UK citizens only by the EU without reciprocity. This will make it necessary to introduce the topic of upholding rights of EU and British citizens and companies in the withdrawal agreement. Efforts should be made to ensure individual rights at least preliminarily as uncertainties may lead to suboptimal location decisions affecting general welfare.

## **7. CONCLUSIONS: CHALLENGES FOR NEGOTIATION AND REGULATION**

Barriers to trade in services usually do not derive from tariffs but rather from mere differences between legal orders and a lack of right to temporary presence. The design of a Free Trade Agreement between the EU and the UK should consider these specific challenges for cross-border trade in services and establishment.

Any existing International Trade Agreement between the EU and Third Parties lags way behind the EU's/EEA's level of integration. International Trade Agreements usually do not have a comprehensive scope or allow common standard setting and although they include rules on market access and national treatment, those rules are not directly applicable. Thus, existing trade agreements should not serve as blueprints for future EU-UK relations.

In the meanwhile, specific attention should be paid to identify policy fields where the upcoming Brexit leads to legal uncertainties concerning the loss of rights and the emergence of (trade) barriers in the field of services and establishment.

This leads to some implications for the negotiation process with the UK:

One of the main difficulties will be to effectively extend the scope of the freedom of services and establishment to the post-Brexit UK. This not only requires rules on market access and national treatment but also to find a mechanism to continue setting common standards in the future, such as an EU-UK joint committee or a mechanism that automatically suspends market access when either the EU or the UK change standards unilaterally. This would also allow continuing mutual recognition as a self-executing rule. It is desirable for a future EU-UK agreement to provide for direct applicability and effective judicial protection to guarantee its effective enforceability.

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# NOTES

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