Upgrading Trade and Services in EU and International Economic Law

Simon Tans,

Marc Veenbrink (eds)

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Radboud Economic Law Series

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About This Series

Radboud Economic Law Series

The aim of this series is to disseminate ideas and research presented at the Radboud Economic Law international conferences, which are organised annually by the staff of the International and European Law Department of Radboud University Nijmegen, the Netherlands. The conference and the published contributions focus on economic law. This legal field is dynamic and broad. Its complexity stems from the multitude of sub-domains embedded in it, as well as from the interplay between them. Economic law entails constantly developing policies and frameworks, multi-layered regulatory and law enforcement regimes, and actors active at various (domestic and transnational) jurisdictional levels. This series attempts to unravel some of the complexities which occur in the interplay between various international, EU, and domestic legal aspects pertaining to the economic law realm. Each conference, and consequently each resulting edited volume, discusses a specific economic law development from academic and practical perspectives. Therefore, the interdisciplinary nature of this series makes it attractive for academics and practitioners with an interest in (international, EU, and domestic) economic law.

TITLES IN THIS SERIES

— Boosting the Enforcement of EU Competition Law at the Domestic Level (Cambridge Scholars Publishing, 2017)

— Digital Markets in the EU (2018)

— Upgrading Trade and Services in EU and International Economic Law (2019)

— New Directions in Competition Law Enforcement (forthcoming, 2020)

Acknowledgments

The present volume is based on the contributions presented at the 3rd Radboud Economic Law Conference, held at Radboud University Nijmegen, the Netherlands, on 15 June 2018. The focus of this year's conference was on 'Upgrading Trade and Services in EU and International Economic Law'. From an EU perspective, presentations were held on the way to ensure that the free movement of service provisions are future-proof, how to deal with environmental law and the division of competences between the EU and its Member States when implementing liberalization as adopted in FTAs. The latter topic thus provides an introduction to the international topics dealt with in the second part of the book. That part mainly focuses on service trade liberalization as provided in FTAs. All chapters use CETA as the example to discuss respectively regulatory approximation, recognition of professional qualifications and lastly, the difficulties of enforcing trade commitments relating to mobility rights of service providers. The conference, and this contribution, therefore touch upon multiple aspects relating to the free movement of services.

The editors of this volume would like to express their gratitude to a number of persons without whose help both the conference and this volume would have been not be possible. Firstly, we would like to thank the Faculty of Law of the Radboud University for giving us the opportunity to host this conference in the Grotius Building. We would also like to thank all speakers who presented their research findings at this conference and to those who also contributed to this volume. A special word of thanks goes to professor Johan van de Gronden and Professor Elspeth Guild, who have found the time in their busy schedules to chair the discussion sessions in a stimulating and thought-provoking manner.

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Simon Tans and Marc Veenbrink

Nijmegen, January 2019

List of Abbreviations

AG	Advocate General
BIT	Bilateral Trade Agreement
BV	Business Visitors
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CSS	Contractual Service Suppliers
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
EQF	European Qualification Framework
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GT	Graduate Trainees
HSE	Health Service Executive
ICS	Investment Court System
ICT	Intra-Company Transfers
IP	Independent Professionals
M&A	Mergers & Acquisitions
MA	Market Access
MRA	Mutual Recognition Agreement
MS	Member State

NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PTA	Preferential Trade Agreement
QTL	Qualification Requirements, Technical Standards and Licensing Requirements
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade & Investment Partnership
WTO	World Trade Organization

Foreword

Chapter 1:

Upgrading trade in services: the struggle to move forward

*Simon Tans & Marc Veenbrink**

1. Introduction

The services sector is the biggest contributor to the Gross Domestic Product (GDP) of the EU. It currently amounts to 70% of the EU's GDP.[1] Worldwide 65.1% of the GDP could in 2017 be attributed to the services sector.[2] Liberalization of trade in services is for the EU, internally and externally, therefore an important goal. Besides the importance of services in the global economy in general, and the EU in specific, emphasis is often placed on the potential gains that can still be achieved through liberalization. Trading services internationally is complicated, as service provision tends to be subject to heavy regulation at the national level, which moreover differs significantly between states.[3] Differences in regulation leads to trade barriers and this means that streamlining regulation indeed leads to the emphasis on potential gains to be achieved through services liberalization. This book provides various viewpoints on the EU's efforts in upgrading trade in services, both internally, and with the rest of the world.

When discussing both EU internal and external service trade liberalization, it is helpful to refer to a two-step process. This has to do with the fundamental difference between the level of liberalization reached within the EU internal market and that reached in the General Agreement on Trade in Services (GATS) and various Free Trade Agreements (FTA). First comes the opening of a service market to international competition, the actual right to provide a service across

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1 European Commission, 'Single Market for Services', available at https://ec.europa.eu/growth/single-market/services_en (accessed 5 February 2019).

2 World Bank, 'World Development Indicators: Structure of Output', available at http://wdi.worldbank.org/table/4.2 (accessed 5 February 2019).

3 P. Sauve and M. Roy, Research Handbook on Trade in Services (Edward Elgar Publishing 2016), 161; P. Stoll, 'Setting the Scene' in: T. Rensmann (ed) *Mega-Regional Trade Agreements* (Springer 2017), 7.

a border. What happens after may be referred to as the 'behind the border' issues, borrowing terminology used in international trade law. In this book the terms direct (access to markets) and indirect (behind the border) liberalization are also used. Diploma recognition, the requirement of national legislation to conform with some form of proportionality test (removing unnecessarily restrictive regulations), the application of labour legislation or the rights for family members to join the service provider in the host state are all examples of such behind the border issues. From an EU perspective, the first step is no longer really an issue due to the level of market integration within the EU. Yet, at the international level, the actual opening of services markets is still an important part of negotiations. The chapters on EU law in this book reveal just how detailed and complicated service trade liberalization becomes when truly aspiring a competitive level playing field. At the global level economic development and policy choices are far more divers. This has a clear consequence when trying to reach agreement on behind the border issues, as the manner in which services can be traded across borders, the modes of supply, cause services to impact on various policies at the national level. For instance, Mode 1 involves telecommunications networks, Mode 3 involves foreign direct investment and Mode 4 affects migration policies.[4] Considering the growing importance of services for the economy, the high potential gains and its impact on various policies, it should not be surprising that liberalizing trade in services is an actual topic which receives significant attention.

2. Services in the EU: the intriguing interplay between liberalization regulation

The services sector in the EU is subject to an intriguing interplay between liberalization and regulation. This becomes apparent in light of, amongst others, the digital economy. The expanding scope of the concept of "services"[5] and the introduction of new types of services[6], both particularly due to the digitalization process, have raised challenges for regulators and legislators.[7] The interplay

4 M Fiorini and B Hoekman, *Services Market Liberalization, Economic Governance and Trade Agreements*, workshop paper (Structural Reforms and European Integration, London School of Economics 2017), available online: http://www.structural-reforms.eu/workshops/session2/Fiorini-Hoekman-EU-services-trade-integration-governance-April-2017.pdf, 1 (accessed 9/3/2019).

5 Joined Cases C-360/15 and C-31/16 *X BV and Visser Vastgoed Beleggingen v. Raad van de gemeente Appingedam* [2018] ECLI:EU:C:2018:44. For a discussion on this case see also C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, 'State of the Art and Prospective Directions in the Digitalisation of Economic Law', in J.M. Veenbrink, A. Looijestijn-Clearie & C.S. Rusu (eds), *Digital Markets in the EU* (Wolf Legal Publishers 2018), 28-30 and Chapter 2 by S. de Vries.

6 C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, note 5, 4-7.

7 See for developments at EU level C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, note 5, 9-28.

between liberalization and regulation becomes apparent in light of these contemporary challenges. Nevertheless, this interplay is nothing new. The Court of Justice, for example, has consistently engaged in a balancing exercise between liberalization on the one hand, and thus protecting the (economic) internal market, and regulation on the other hand. By expanding the scope of the free movement provisions from merely a prohibition of discrimination to a prohibition of all restrictions to access to the market, the Court of Justice seems to, at first sight, favour liberalization. The establishment of a restriction of the free movement rules seems to be superfluously when an economic activity is in any way regulated by a Member State. Any rule regulating an economic activity could thus be regarded as a restriction of the free movement provisions. The shift to the market access restrictions was intended to liberalize markets. The introduction of market access approach led the Court of Justice to also introduce the so-called Rule of Reason in its case law, thereby granting Member States the right to regulate markets when there are overriding reasons in the general interest. In this book multiple developments in the services sector in the EU are discussed. Sybe de Vries refers to contemporary challenges within the broader framework of the services sector (Chapter 2), whereas Johan Wolswinkel focuses specifically on the Services Directive and the expansion of this Directive by the Court of Justice (Chapter 3). In this part two developments are discussed. The Commission has proposed multiple legislative actions in order to regulate the services sector. Some of these initiatives will briefly be discussed first (2.1), after which the focus will shift to case law of the Court of Justice (2.2). The Luxembourg Court has substantially expanded the concept of services, and thus the free movement of services, thereby making the regulation of services by Member States subject to the EU proportionality test.

2.1 Initiatives by the Commission

The last of couple of years, multiple initiatives are developed by the Commission to (further) liberalize or regulate the services sector in the EU. Liberalization is for instance ensured by the proposal for a directive to introduce a proportionality test before the adoption of regulations of professions by Member States.[8] Conversely, the proposal for a regulation on the screening of foreign direct investments is intended to regulate these investments in companies which are of strategic interest to Europe.[9] In both cases, the Commission attempts to fine-

8 Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions, OJ 2006, L173/25.

9 Regulation (EU) 2019/... of the European Parliament and of the Council of ... establishing a framework for the screening of foreign direct investments into the Union, 20 February 2019, PE-CONS 72/18.

tune the balance between a free (liberal) market and regulation on the basis of public interests. In this subparagraph, reference is made to four developments, namely (i) the Digital Single Market Strategy (DSM Strategy), (ii) the screening of Foreign Direct Investments (DSI), (iii) the Posted Workers Directive, and (iv) the Directive on a proportionality test before adoption of new regulation of professions.

The DSM Strategy of the Commission is to let business and customers fully benefit from the digitalised economy. The Commission made the DSM Strategy a top priority in 2015.[10] As the Commission asserted in its mid-term review of the DSM Strategy: "A fully functional Digital Single Market could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs."[11] While such figures are clearly estimates, it is apparent that liberalization of the Digital Single Market will benefit the economies in the European Union. In 2017, three key areas in which EU regulation was necessary were identified. The data economy, cybersecurity and the area of online platforms were seen to be of crucial importance to ensure a fully developed DSM.[12]

The first area mentioned is the data economy. The General Data Protection Regulation was adopted on 27 April 2016 and is applicable in the EU since the 25th May of 2018.[13] This GDPR protects personal data by imposing strict requirements on companies and other organisations. Protection of personal data is thus ensured. Conversely, there are also voices which argue that a fifth fundamental freedom should be introduced in the EU, namely the free movement of non-personal data.[14]

The second key area mentioned by the Commission in its mid-term review is the area of cybersecurity. It has been argued that the Commission merely took a piecemeal approach up till now in this area, which led to inconsistent security

10 European Commission, A Digital Single Market Strategy for Europe, (Communication) COM(2015) 192 final. For more information on the DSM, see also C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink, note 5.

11 See European Commission, 'Digital Single Market: Commission calls for swift adoption of key proposals and maps out challenges ahead' (2017), available at http://europa.eu/rapid/press-release_IP-17-1232_en.htm (accessed 8/2/2019).

12 Ibid.

13 See Article 99 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016, L119/1.

14 See for more information S. de Vries, Chapter 2. In Chapter 2 reference is also made to a proposal of the Commission for a Regulation on the Free Flow of Non-Personal Data.

obligations.[15] Review of the multiple measures taken in this area might create more clarity for undertakings, which could lead to an enhanced digital market.

Lastly, the Commission emphasized that certain unfair trading practices by digital platforms should be tackled. Regulation might be needed to challenge these practices. However, there are also authors which mention that competition law might already have sufficient tools to solve problems in this market.[16] The Commission, nevertheless, does see some transparency problems in this market which might not be solved by the competition law rules. It therefore proposed a Regulation on promoting fairness and transparency for business users of online intermediation services.[17] This Regulation tries to open up the digital platform market by imposing transparency obligations on digital platforms. Political agreement between the Council and European Parliament was reached on the 19th of February 2019.[18]

The second development to turn to is the screening of FDI's. In September 2017, the Commission proposed a Regulation which could strengthen the screening processes of FDI's by Member States.[19] The Commission was of the opinion that regulation was needed in this regard. As Juncker mentioned in reaction to the political agreement reached on the 20th of November 2018:

Europe must always defend its strategic interests and that is precisely what this new framework will help us to do. This is what I mean when I say that we are not naïve free traders. We need scrutiny over purchases by foreign companies that target Europe's strategic assets. I commend the European Parliament and the EU governments for reaching this agreement in such a swift manner.[20]

15 P.T.J. Wolters, 'Private Law Cyber Security Obligations in the Digital Single Market', in J.M. Veenbrink, A. Looijestijn-Clearie & C.S. Rusu (eds), *Digital Markets in the EU* (Wolf Legal Publishers 2018), 4-7.

16 V.I. Daskalova, 'Oneerlijke *platform-to-business*-handelspraktijken: oude kwesties, nieuwe regelgeving' (2018) 66 Tijdschrift voor Europees en economisch recht 12; S. O'Keeffe and B. Noé, 'Digital Markets in the EU: The Importance of the Footloose Consumer', in J.M. Veenbrink, A. Looijestijn-Clearie & C.S. Rusu (eds), *Digital Markets in the EU* (Wolf Legal Publishers 2018), 4-7.

17 European Commission, 'Proposal for a Regulation of the European Parliament and the Council on promoting fairness and transparency for business users of online intermediation services', COM(2018) 238 final.

18 See European Commission, 'Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices' (2019), available at http://europa.eu/rapid/press-release_IP-19-1168_en.htm (accessed 22/2/2019).

19 European Commission, 'Proposal for a Regulation of the European Parliament and the Council establishing a framework for screening of foreign direct investments into the European Union', COM(2017) 487 final.

20 European Commission, 'Commission welcomes agreement on foreign investment screening framework' (2018), available at http://europa.eu/rapid/press-release_IP-18-6467_en.htm (accessed 22/2/2019). (italics added).

The European Union is not naïve and thus does not rely solely on liberalized markets. Regulation is sometimes needed to challenge the excesses on the market.
European Parliament officially approved the adoption of this Regulation on the 14th of February 2019.[21] Some Member States have mechanisms to prevent foreign direct investments when such an investment is to the detriment of essential security interests. The proposed Regulation grants the Commission the power to issue opinions regarding such investments and it establishes mechanisms for cooperation between Member States and Member States and the Commission.[22] It grants the power to Member States to maintain or create procedures for the screening of FDI's, as long as those procedures do not discriminate and are transparent.[23] The Regulation also provides a list of factors and effects of FDI's which Member States (and the Commission) may take into account.[24] This is not an exhaustive list. A duty to inform the Commission and the other Member States of the screening of an FDI is introduced.[25] Other Member States and the Commission may submit opinions on allowing the FDI. These comments should be given "due consideration",[26] but will not take away the power to independently reach a decision on allowing the FDI. A similar regime applies when a Member State is not screening an FDI.[27] This could probably lead a Member State to change its policy in relation to the screening of the FDI. It could thus mean that the FDI is indeed screened or that the screening procedures in general are broadened to meet concerns of other Member States or the Commission. As the Commission asserted in its explanatory notes to the proposal:

Affected Member States may provide comments and the Commission may address comments to a Member State in which a foreign direct investment is planned or is completed, even if that Member State does not maintain a screening mechanism or does not conduct a screening of that investment. In such a case, that Member State may consider these comments and opinion in its broader policy making.[28]

21 European Parliament, 'EU to scrutinise foreign direct investment more closely' (2019), available at: http://www.europarl.europa.eu/news/en/press-room/20190207IPR25209/eu-to-scrutinise-foreign-direct-investment-more-closely (accessed 22/2/2019).
22 Article 1 of Regulation (EU) 2019/..., note 9.
23 Article 3(1) and (2) ibid.
24 Article 4 ibid.
25 Article 6 ibid. Article 9 ibid asserts which information needs to be provided to the Commission and the other Member States.
26 Article 6(9) ibid.
27 Article 7 ibid.
28 See the explanatory notes on the cooperation mechanisms in the Proposal for a Regulation on FDI's, note 19. (underlining added)

Nevertheless, the Regulation merely contends that a Member State not screening an FDI should give comments of other Member States or the Commission "due consideration".[29] When an FDI affects the interests of the Union, the Member State where the FDI is planned or completed shall take "utmost account" of the opinion of the Commission.[30] Some other rules in this Regulation concern e.g. confidentiality requirements[31] and the creation of contact points per Member State.[32]

The third area where the Commission saw the need to intervene in the market is the area of the posted worker. The posting of workers falls under the free movement of services. A posted worker provides on behalf of an undertaking a service on a temporary basis in the host Member State and, as such, does not integrate in the labour market of that host Member State. The premises of this aspect, although legally correct, could, in practice on the work floor, be challenged though. Case law of the CJEU is said to have "foster[ed] a system of *unequal* pay for equal work."[33] Furthermore, decisions of the CJEU "are suggested to have fostered a system whereby foreign service providers are able to compete unfairly with their domestic counterparts on a national market, circumventing wage demands and employment conditions that are applicable to domestic undertakings."[34]

The reliance on the free movement of services to post workers in other Member States led to social dumping.[35] It appeared to be difficult to balance the dual economic and social aims of the European Union. The (old) Posted Workers Directive was mainly interpreted by the Court of Justice in light of its economic goals set as such by the Union legislator. As Barnard mentioned: "*Laval* shows that the [old] Posted Workers Directive is primarily a measure to facilitate free movement of services and not a measure to realize social-policy objectives."[36] The Commission in the past also advocated liberalization in this area instead of regulation.[37] The 1996 Posted Workers Directive indeed also led to deregulation

29 Article 7(7) Regulation (EU) 2019/..., note 9.
30 Article 8(2)(c) ibid.
31 Article 10 ibid.
32 Article 11 ibid.
33 D. Carter, 'Equal pay for work in the same place? Assessing the revision of the Posted Workers Directive' (2018) 14 Croatian Yearbook of European Law & Policy 14, 45.
34 Ibid, 32.
35 Ibid, 63; C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (OUP 2016), 423-424; M. Bernaciak 'Social dumping: political catchphrase or threat to labour standards?' (2012), Working Paper 2012.06 European Trade Union Institute, par. 1.2-1.3.
36 Barnard, note 35, 424. See also Zahn (2017), p. 195.
37 J. Cremers, J.E. Dølvik & G. Bosch 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007), 38 Industrial Relations Journal 6, 539.

instead of regulation. However, it became clear over the recent years that it was time to intervene once more in this sensitive area.[38] The Commission itself also saw the need of changing the 1996 Posted Workers Directive. In 2016 it acknowledged that "[t]he 1996 Posting of Workers Directive establishes a structural differentiation of wage rules applying to posted and local workers which is the institutional source of an un-level playing field between posting and local companies, as well as of segmentation in the labour market".[39] The new Posted Workers Directive was adopted on 28 June 2018 and contains three main changes to the old regime, namely:

- application to posted workers of all the mandatory elements of remuneration (instead of the "minimum rates of pay");
- application to posted workers of the rules of the receiving Member State on workers' accommodation and allowances or reimbursement of expenses during the posting assignment;
- for long-term postings (longer than 12 or 18 months), application of an extended set of terms and conditions of employment of the receiving Member State.[40]

The need for regulation of posted workers was thus necessary to challenge the excesses of the liberalization of the services sector, although it is questioned whether this new Directive balances the need to protect workers and the economic goal of the freedom to provide services sufficiently.[41]

The fourth example for the need of regulation can be found in the adoption of Directive 2018/958.[42] The Professional Qualifications Directive was updated in 2013.[43] During the creation of this Directive, it became apparent that Member States encountered quite some difficulties in assessing whether to recognise professional qualifications obtained in another Member State. This showed "an

38 See for a detailed account of the underlying issues: S. Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules* ***(Brill Nijhoff 2017), p173-189.***

39 European Commission Staff Working Document, 'Impact Assessment accompanying the Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services', SWD(2016) 52 final, 10.

40 European Commission, 'Posted Workers. Revision of the Posting of Workers Directive', available at https://ec.europa.eu/social/main.jsp?catId=471 (accessed 22/2/2019).

41 See e.g. Carter, note 33, 66-67.

42 Note 8.

43 Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ 2013, L 354/132.

underlying problem concerning how the need for regulation [of a profession by a Member State] and its effects on the broader business environment are evaluated".[44] Directive 2018/958 therefore introduces a requirement for Member States to conduct a proportionality test before regulating a certain profession. This Directive in general codifies case law by the Union Courts. Member States could regulate a profession when they have a legitimate reason to do so[45] and as long as the measure is "suitable for securing the attainment of the objective pursued and does not go beyond what is necessary to attain that objective".[46] The Directive does exceed, however, case law of the Court of Justice by outright prohibiting all forms of discrimination on the basis of nationality when regulating a profession.[47] Member States are still allowed to regulate access to professions as long as they properly explain why such a (non-discriminatory) restriction would be justified. This Directive therefore favours liberalization as a basic value, whereas regulation is still allowed under strict conditions. The approach in this Directive is in this regard similar to the approach taken by the Union Courts.[48]

It thus becomes apparent that the Commission and the Union legislator see a need for intervention in the liberalized services market in the EU. The DSM Strategy, the screening of FDI's and the new Posted Workers Directive show that non-economic considerations form reasons to regulate the services market. The new Directive on the proportionality test for regulation professions, even though focusing mainly on liberalization, emphasises the need for Member States to regulate professions when it is in the public interest. Complete liberalization is, as Juncker mentioned, a "naïve" aspiration. The need for regulation is a necessary correction mechanism used to intervene in specific sectors when the need arises.

44 Explanatory Memorandum to European Commission, 'Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions', COM(2016) 822 final, par. 1.

45 Article 6(1) Directive 2018/958, note 8. Article 6(2) ibid provides a non-exhaustive list of justification grounds, whereas paragraph 3 of the same article asserts that economic reasons can never form a justification ground.

46 Article 7(1) ibid. Paragraph 2 ff refer to factors which Member States need to take into account when conducting this proportionality assessment.

47 Article 5 ibid.

48 *Infra* par. 2.2.

2.2 Case law developments

The Court of Justice has been a protagonist of liberalization and therefore also of opening up the national markets. Two developments can exemplify this focus by the Luxembourg Court on liberalization.

The first, not so new, development is the choice of the Union Courts to extend the non-discrimination approach to all restrictions to access to the market.[49] In turn, Member States received the right to justify such restrictions under strict conditions when there are overriding reasons in the general interest. The restrictions case law of the Court of Justice shows that liberalization is the basic value in the EU. Regulating markets is only possible when it is in the public interest and when it is proportionate. The strong emphasis on liberalization was slightly corrected by the Court of Justice under the free movement of goods by excluding selling arrangements from the scope of the free movement of goods.[50] In *Alpine Investment,* the Court did not find a need to extend the case law on selling arrangements to the services area.[51] It thus appears that *Keck* is not extended to the free movement of services.[52] There are, however, also authors who argue that *Keck* did find its way to the free movement of persons (and thus including services). As Barnard mentions: "[R]ules which merely *structure the market* on which [...] people carry out their economic activities do not generally breach the Treaty. They are the rules of the game, to which all of those conducting their activities in the state must comply."[53] These rules are thus no restrictions to access to the market and therefore fall outside the free movement provisions. This could, according to Barnard, indicate that *Keck* has found its way to the free movement of services. Nevertheless, this does not abrogate from the fact that the focus of the Union Courts still seems on the abolishment of all barriers in the EU, unless they can be justified under strict conditions.

Another example where the Court seems to focus on liberalization is the far-reaching interpretation of the concept of an economic activity, and thus of a service. The definition of an economic activity under the free movement of services is even applied in a broader manner than under the competition law area. As Van de Gronden points out, "[w]hen it comes to social security,

49 This happened already in Case 8/74 *Dassonville* [1974] ECLI:EU:C:1974:82, for the free movement of goods, and was in later case law extended to the other fundamental freedoms.

50 Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECLI:EU:C:1993:905.

51 Case C-384/93 *Alpine Investments* [1995] ECLI:EU:C:1995:126, par. 33-38.

52 See also J. Stuyck, 'Is Keck still alive and kicking?', (2012) Revue Européene de Droit de la Consommation (2), par. IV(A).

53 Barnard (2016), note 35, 224.

strikingly, no convergence can be discerned between the EU competition rules and free movement law".[54] In competition law entities engaged in a social security scheme are under certain circumstances not regarded as undertakings, since they do not provide an economic activity.[55] In free movement cases, the Court of Justice has accepted that these entities are providing an economic activity and thus a service.[56] The broad interpretation of an economic activity under the free movement of services means that many activities fall under Article 49 and 56 TFEU and, for example, the Services Directive. An example of the broadening scope of the free movement of services can be found in the *Visser Vastgoed* case.[57] In this case, the Court of Justice considered the retail of goods through brick-and-mortar stores to fall under the free movement of services.[58]

The combination of broadening the scope of the free movement of services, using Union legislation to further deregulate markets, and, when there is no Union legislation, applying the restrictions approach, emphasise the focus on liberalization.

2.3 The interaction between liberalization and regulation

The Union Courts seem to favour liberalization over regulation, although Member States might still regulate when it is in the public interest to do so and when it is proportionate. Overall though, many sectors are subject to liberalization. Liberalization is thus the basic norm in EU law. This has led to problems, which the Union legislator seems to be tackling on a sector specific basis. It does lead to an *ex post* system where the legislator only acts when there are problems. The legislative initiatives of the Commission do show that the Union is not naïve in its liberalization and thus recognises the need to intervene in some sectors when problems arise. The aforementioned discussion, although by far exhaustive, does show the intriguing interplay between regulation and liberalization in the EU.

54 Van de Gronden, 'Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?', (2018) 41 World Competition 2, 208.

55 Ibid, 208-210.

56 Ibid, 208-209.

57 *Visser Vastgoed*, note 5.

58 Ibid, par. 91. For a discussion on this case see also J. van Wolswinkel in Chapter 3 and C.S. Rusu, A. Looijestijn-Clearie & J.M. Veenbrink (2018), note 5, 29-30.

3. Upgrading trade in services outside the EU: diversity in moving ahead

As explained above, the fact that services tends to be subject to varying forms of national regulations complicates its liberalization.[59] With greater diversity, this becomes more difficult. As such, the multilateral negotiations concerning services liberalization are facing severe difficulties.

3.1 Deepening liberalization?

The complexity to address the behind the border issues is nothing new in the field of international trade law. The initial effectiveness of the General Agreement on Tariffs and Trade (GATT) and the achievement of reducing most border tariffs to less than 5% has led to the surfacing of the issue of non-tariff barriers.[60] In the multilateral trading system, these issues are mostly left unaddressed in relation to services. As an example, agreement on the provision in GATS which should deal with the issue of non-discriminatory regulation addressing the quality of the service (qualification requirements, technical standards and licencing) was not reached. The result is a rudimentary provision, ineffectively addressing domestic services regulation, and a mandate to negotiate disciplines intended to reach agreement amongst World Trade Organization (WTO) Members at a later stage.[61] Similarly, government procurement, subsidies and emergency safeguard measures are all matters left unfinished from an international rules perspective due to a lack of agreement. For each of them, the GATS contains a negotiating mandate.[62] Other unresolved matters can be found in the so-called Singapore issues, referring to transparency in government procurement, trade facilitation, trade and investment and trade and competition. Finally, the issue of labour standards, highly relevant in relation to trade in services, is formally left to the ILO, which essentially entails that disagreement on the matter amongst WTO Member States remains without signs of progress.[63] These matters reveal a deep division amongst WTO Members. Very generally phrased, in essence developed states seek to include these matters into the WTO framework

59 M. Krajewski 'Services Liberalization in Regional Trade Agreements: Lessons for GATS "Unfinished Business"?' in: L. Bartels and F. Ortino *Regional Trade Agreements and the WTO Legal System* (OUP 2006), 178. See also Pipidi-Kalogirou, chapter 5, 71-72.

60 Stoll, note 3, p 7.

61 Article VI GATS, see for a detailed account: Delimatsis 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10 Journal of International Economic Law, 8, 36-37.

62 See extensively Krajewski, note 59, 178.

63 S. Turnell 'Core labour standards and the WTO' (2001) 0103 Macquarie Economic Research Paper, 5, see for an overview Tans, note 17, par 1.2.3.

(providing deeper legislation) whereas developing states do not.[64] To this must be added that WTO negotiations are based on a package deal, agreement must be reached on all issues as all Members ultimately must provide their consent to the result of a negotiation round. It is apparent that services are interesting to the EU (and other developed countries). Yet, WTO negotiations concern trade in goods, including sensitive topics such as agricultural and textile products, as well. The topic of intellectual property (IP) is also part of the WTO framework. In other words, one cannot pick and choose that which is most interesting (services) and refuse to contribute to liberalization in other areas (textile, agriculture). And even in relation to service liberalization itself, naturally there is a strong tendency to focus on that which is interesting, to the detriment of the modality of trade in services that is of interest to others. To provide a clear and very relevant example, developed states obviously have an interest in Mode 3 (commercial presence), whereas developing states are demandeurs of Mode 4 (services trade involving movement of persons). Be it disagreement on reaching deeper or wider integration, the end result is the Doha Round negotiations are referred to as having reached a stalemate, being comatose, catatonic or simply dead.

The stalemate at the WTO level has consequences. For the EU, and many other states, the effort to liberalize trade in services has mainly shifted from the multilateral level to pluri- or bilateral negotiations.[65] If we only take services trade liberalization into account, then it is indeed easy to conclude that the lack of movement at the WTO negotiations has led states to focus on negotiations in an easier setting.[66] Yet, as extensively described by Melo Araujo, this shift is not just related to a lack of momentum, as this lack of momentum is the result of the just described fundamental divide between WTO Members.

3.2 MFN, the you are my More Favoured Nation principle?

The liberalization landscape has undergone a major change, as numerous bilateral or plurilateral FTAs are now in force or being negotiated. Regional Trade Agreements (RTA) are nothing new and the adoption of such was already

64 B.A. Melo Araujo, The EU deep trade agenda: law and policy (Oxford University Press, 2016), 1.

65 Stoll, note 3, 4; Keijzer, Martino and Quintavalla, chapter 4, 55.

66 Tans, note 38, 17; Stoll, note 3, 4.

regulated in the GATT 1947.[67] In essence, there is nothing 'wrong' with this form of legitimate deviation from the WTO's Most Favoured Nation (MFN) principle.[68] The evident example here being the EU itself, which, without the exception to WTO MFN for enhanced regional integration, would be in conflict with this principle. However, both the scale and the sheer numbers of RTAs *is* new. For trade specialists, the terms RTAs and proliferation may simply be merged in dictionaries.[69]

Continuing this contribution from a services perspective only, the EU alone is involved in an ever increasing number of such FTAs.[70] Negotiations on Mega-regional FTAs are ongoing as well, for instance the Trade in Services Agreement (TiSA, involving 23 states, counting the EU as one), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPATPP, involving 11 states, predecessor of the TPP from which the US withdrew) and the Regional Comprehensive Economic Partnership (RCEP, involving 16 states). Many states are involved in more than one FTA, for instance Canada and the EU are signatories of the Comprehensive Economic Trade Agreement (CETA) and both involved in the TiSA negotiations.

It is evident that the EU and Canada have found it far easier to negotiate on a bilateral basis. The end result, the Comprehensive Economic and Trade Agreement, or CETA, indeed reduces barriers to trade between these two kindred spirits to a greater extent than reached at the Uruguay Round. Besides increased market access for services, various additional issues, which proved too difficult to resolve at the multilateral level, are included.

67 Stoll, note 3, 16. The terminology used here is Regional Trade Agreement and Free Trade Agreement. Regional Trade Agreement refers in general to a bilateral or plurilateral trade agreement that liberalizes trade in goods or goods and services more extensively in conformity with the WTO rules. Free Trade Agreements is the specific term used for such agreements if they also include liberalization of services trade. Mega-Regional Trade Agreements is a term reserved for Free Trade Agreements which can be said to take liberalization of trade to a new level, both in terms of ambition and trade coverage. As such, the economies involved in such Mega-Regionals, are significant in size (EU, US, China) and, or number (for example involving 16 states), see Stoll, note 3, 4-5.

68 Article XXIV GATT and Article V and V*bis* GATS.

69 This phenomenon, and whether it is 'positive' or 'negative' and from who's perspective has been extensively discussed in the literature, see for a discussion on the question whether regional integration is a 'building block or a 'stumbling block' for multilateral liberalization: B Hoekman and M Kostecki *The Political Economy of the World Trading System* (OUP, 2001), 34-68. That terminology was already used by Bhagwati in 1991, J. Bhagwati *The World Trading System at Risk* (Princeton University Press, 1991), 77.

70 See for a rather complicated overview: European Commission, 'Negotiations and Agreements' available at: http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated (accessed at 9/3/2019) and European Commission, 'Free Trade Agreements', available at: http://trade.ec.europa.eu/tradehelp/free-trade-agreements (accessed at 9/3/2019). The EUs terminology alone is complex, referring to Association Agreements, Free Trade Agreements and Deep and Comprehensive Free Trade Agreements.

3.3 Service trade liberalization in detail, complex is the word

The second part of this book provides an interesting overview, revealing the difficulties in moving ahead at the multilateral level by discussing what is happening at the bilateral and plurilateral level. An overview of several issues that CETA does address, the manner in which deeper liberalization in relation to services trade may develop, is highlighted. This may also be relevant in relation to a future EU-UK agreement. The combined chapters certainly demonstrate just how complex international trade liberalization is becoming.

The chapter written by Keijzer, Martino and Quintavalla aptly shows that the EU may have underestimated the complexity of FTAs in practice. Implementing FTA obligations impacting on corporate law (specifically, the right of establishment for corporations) leads to complications due to the complex web of competences existing between the EU and its Member States. One of the complexities of liberalizing trade in services, and what needs to be done to overcome this complexity is addressed in chapter 5, containing Pipidi-Kalogirou's contribution on the approach adopted in CETA. As stated there, the liberalization of trade in services requires both direct (market access) and indirect (behind the border issues) liberalization. Taking regulatory cooperation as the topic, Pipidi-Kalogirou describes the novel approach adopted in CETA to deal with indirect liberalization, as CETA moves beyond references to international standards and pursues a high level of transparency, participation and ultimately increased regulatory coherence. In chapter 6 of this book, McCormack-George addresses a second of these beyond the border problems, the recognition of professional qualifications. Providing an overview of the rules on this issue in the GATS and in CETA, the chapter is revealing in relation to another of the contemporary international trade issues, as it reflects on a possible post-Brexit UK-EU trade agreement. His case study on medical professions provides fertile ground to explore the issue of qualification recognition. Taking a different perspective, the final chapter by Tans discusses the mobility of service suppliers. Mode 4 complements the here described picture of the difficulties states face when trying to liberalize trade in services, as this form of services trade impacts on the sensitive policy areas of labour regulation and immigration. The chapter on Mode 4, similar to the chapter written by Keijzer, Martino and Quintavalla, suggests that FTAs may in practice prove to have unforeseen impact at the national level, leading to problems when implementing such agreements.

3.4 As complex as it gets

The complexity of liberalizing trade in services is a PhDs dream and a student's nightmare. To say that trade rules which are binding on states are starting to overlap is an understatement. The EU is bound to trade rules at the multilateral level *vis-à-vis* Canada, but also through the CETA. If the TiSA is concluded successfully, their trade relationship will be bound by no less than three trade agreements. Readers are recommended to search for figures online depicting the network of regional trade agreements globally.[71] The overlap between WTO rules and FTAs has already led to problems, for instance in relation to an overlap in dispute settlement.[72] The field of international trade liberalization has already become tremendously complex.[73] FTAs, even those recently signed by the EU, differ to a lesser and greater extent. The CETA and the CARIFORUM agreement are indeed similar when it comes to service trade liberalization, but they are far from the same. Market access varies considerably, and provisions addressing the same obligation (national treatment for example) in the agreements differ considerably.[74] This discussion of the 'fragmentation' of international trade law too is nothing new.[75] However, these slight (and not so slight) variations are arguably getting out of control. The CETA and CARIFORUM agreements are already differing to a remarkable degree, and adding the India – Korea Comprehensive Economic Partnership to the mix underlines the point.[76] A shift in perspective may provide a new viewpoint supporting this statement, a viewpoint that will become apparent from chapter 4 and 7 in this book. It is one thing to study GATS and FTAs at the international level. Yet, the scale of the fragmentation phenomenon, combined with the complexity of the topic becomes truly daunting when one starts looking at the practical implementation of trade obligations at the national level.[77]

What we are witnessing is an increase in the complexity of rules as well as an increase in overlap of these rules. These rules are subject to dispute settlement,

71 See also the slide 'Spaghetti Bowl effect' in Tans presentation, held before the WTO Members during the thematic seminar 'Mode 4 at Work, 10 October 2018, available at: https://www.wto.org/english/tratop_e/serv_e/mode_4_at_work_e/tans.pdf. Note that the fifth picture included is a child's drawing, not an overview of trade agreements.

72 For an overview of examples and solutions offered in the literature (based on the *Softwood Lumber* cases, the Brazil and Argentina poultry dispute and *Mexico-Soft Drinks*), see Stoll, note 3, 12-13.

73 Krajewski, note 59, 175; Stoll, note 3, 3 and 6.

74 S. Tans 'Trade Commitments in GATS, EU – CARIFORUM and CETA, and the Inclusion of Blanket References to Entry, Stay, Work and Social Security Measures' in: S. Carrera, A. Geddes, E. Guild and M. Stefan (eds) *Pathways toward Legal Migration into the EU* (Centre for European Policy Studies 2017), 152-154.

75 Stoll, note 3, par 5.2.

76 Presentation Tans, note 71.

77 See in particular the final conclusion in Tans, note 17, par 7.6.2.

at the multilateral level, and at FTA level as FTAs include dispute settlement as well (provided that no fork in the road clause is included). Each case will find the heart of the FTA rules to be based on the rules adopted within the multilateral framework, but with additions, or variations. This should affect the outcome. Moreover, FTAs often allow the cosignatory states to comment on, or adapt decisions taken by adjudicating bodies as adopted within that FTA. Now add a multinational service provider to the mix. On a less serious note, perhaps that is the reason that direct effect of FTAs is consistently ruled out. It would indeed explain the consistent adoption of new trade rules and the consistent refusal to grant possibilities to rely on these rights for those for whom they are intended, the ones that utilize liberalization in practice.[78]

4. Complexities in trade liberalization

The discussion above, albeit far from exhaustive, shows the complexities in trade liberalization in EU law and international law. EU law is further developed, although is still searching for a way to balance socio-political goals with liberalization of trade. At the international level a greater range of diversity in relation to socio-political goals plays a role, thereby hindering a further going liberalization at the multilateral level. Moreover, as shown above, the lack of progress on a worldwide level has led to the creation of multiple RTAs, which create a 'spaghetti bowl' of agreements. The contributions in this book discuss multiple aspects and problems encountered in trade liberalization within the EU and on the international level, thereby attempting to contribute to deeper services integration without losing sight of socio-political goals.

78 During the conference leading to this book, Elspeth Guild referred to the oddity of FTAs consistently providing rights for private parties while at the same time such agreements frantically prohibit any possibility to rely on such rights.

Chapter 2:

Regulating New Forms of Service Provision in EU law

*Sybe A. de Vries**

1. Introduction

Those who believe that services and more specifically public services are a relatively new phenomenon may well be wrong. The *cursus publicus*, or 'public way', was the state-run courier and transportation service of the Roman Empire, and vital for the functioning of the Empire and the consolidation of its territories. A series of forts and stations was spread out along the major road systems connecting the regions of the Roman world, including the oldest city of the Netherlands, Nijmegen. The relay points (*stationes*) provided horses to dispatch riders and (usually) soldiers as well as vehicles for magistrates or officers of the court. A *diploma*, or certificate, issued by the emperor himself was necessary to use the services supplied by the *cursus publicus*. Abuses of the system existed, which made Pliny the Elder write about the necessity of those who wish to send things via the imperial post to keep up-to-date licences.[1] Without embroidering on the question of whether the *cursus publicus* constituted an infrastructure service or was comparable to our postal services, the example shows that public services, licences, quality standards and enforcement had already been in place, on an unprecedented scale at the time, in a territory without internal borders.

According to Article 26 TFEU, the EU internal market requires that an area without internal borders is established, in which goods, services, persons and capital can move freely across borders. Particularly due to rapid technological developments and the digitalization of our society and economy, the role of services has considerably grown. And an important question is therefore how digitalization affects the free movement of services and vice versa. But these

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1 https://en.wikipedia.org/wiki/Cursus_publicus#cite_note-2 (accessed 3 November 2018); Anne Kolb, Transport und Nachrichtentransfer im Roemischen Reich. Berlin: Akademie Verlag, (Klio. Beitraege zur Alten Geschichte, Beihefte, Neue Folge, 2), 2000, 38.

developments, next to other societal problems, like growing inequality, also raise important challenges to the foundational principles of the European Union, which include the free movement of services, the rule of law, fundamental rights and public values.

Brexit is, of course, the biggest and most immediate challenge that the EU is currently facing. According to the historian Yuval Noah Harari 'Brexit may well initiate the simultaneous unravelling of both the UK and the EU. But in the long run, history's direction is clear-cut. In recent generations the few remaining civilizations have been blending into a single global civilization'. Brexit will not halt human unification.[2]

Meanwhile we must offer history a helping hand by making the European Union in general and the internal market and the free movement of services in particular more robust, less contested, more inclusive and more future proof, so that, similarly to Roman roads, the foundations and infrastructure for services are long-lasting and sustainable.

It is against the background of these challenges that I will revisit the building blocks constituting the free movement of services and test their solidness in the light of a rapidly changing market environment. After having looked into the concept of services, I will assess the regulatory challenges for the provision of services in the internal market and assess how market access can be safeguarded without jeopardizing public interests and fundamental rights. I will then proceed by examining the addressees of the services provisions or, in other words, who can be held accountable for an infringement of the free movement of services, particularly in the light of the growing regulatory role of private actors and the strong market position of a few powerful tech firms. Lastly, I will briefly discuss the territorial scope of application of the services provisions, as in an increasingly digital world and a global economy, borders are of no relevance.

2. The widening concept of 'service'

According to Art. 57 TFEU 'services that are normally provided for remuneration' are considered to be services. Furthermore, Art. 57 TFEU states that 'services shall be considered "services" [...], in so far as they are not governed by the provisions relating to the freedom of movement for goods, capital and persons', which implies that services constitute a rest-category vis-à-vis goods, persons

2 D. Roberts, 'Yuval Noah Harari: Brexit will not halt drive to 'human unification' (*The Guardian* 2018), available at: https://www.theguardian.com/culture/2018/may/21/yuval-noah-harari-brexit-will-not-halt-drive-to-human-unification (accessed 3 November 2018).

and capital. This somewhat 'woolly' formulated provision suggests first that there needs to be an economic connotation for the free movement of services to be applicable and second, that it needs to be assessed first whether not one of the other fundamental freedoms on goods, persons or capital applies.

2.1 Economic connotation

The requirement that an economic connotation or dimension exists is relevant for all freedoms. Goods, for example, are defined as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions',[3] including cultural goods such as paintings or other works of art, narcotic drugs,[4] and waste products (whether recyclable or not).[5] Crucial is whether there is a *market* element, or 'marketising effect' of EU free movement law.[6] The specific or sensitive nature of an activity, like gambling, is not relevant.[7] Ethical considerations also do not play a role in determining whether the fundamental freedoms are applicable. There is also by now well-established case law[8] under which medical activities, including medical termination of pregnancy, are generally considered to be services within the meaning of Articles 56 and 57 TFEU. The *Grogan* case concerned a dispute between the Irish Society for the Protection of Unborn Children (SPUC) and Grogan and other students distributing in Ireland information on abortion clinics in other Member States.[9] One of the questions of the national court was whether medical termination of pregnancy constitutes a service within the meaning of Article 57 TFEU. According to SPUC the provision of abortion could never constitute a service as it is grossly immoral and involves the destruction of the life of a human being.

3 Case C-7/68 *Commission v. Italy* (*Italian Arts Treasures*) [1968] ECLI:EU:C:1968:51, also published in other special editions of the European Court Reports; see also Case C-2/90, *Commission v. Belgium* (*Walloon Waste*). [1992] ECLI:EU:C:1992:310.

4 Case C-324/93 *Evans Medical* [1995] ECLI:EU:C:1995:84.

5 Case C-97/98 *Jagerskiold* [1999] ECLI:EU:C:1999:515; *Walloon Waste* case, note 3; and *Italian Arts Treasures* Case, note 3.

6 S. Weatherill, 'From Economic Rights to Fundamental Rights', in S.A. de Vries, U. Bernitz and S. Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013), 14.

7 Case C-275/92 *Schindler* [1994] ECLI:EU:C:1994:119, para. 34: The CJEU stated that 'like amateur sport, a lottery may provide entertainment for the players who participate. However, that recreational aspect of the lottery does not take it out of the realm of the provision of services. Not only does it give the players, if not always a win, at least the hope of a win, it also yields a gain for the operator [...].'

8 Joined Cases 286/82 and 26/83 *Luisi & Carbone* [1984] ECLI:EU:C:1984:35; Case C-159/90 *Grogan* [1991] ECLI:EU:C:1991:378; and, in particular, Case C-158/96 *Kohll* [1998] ECLI:EU:C:1998:171; Case C-157/99 *Smits & Peerbooms* [2001] ECLI:EU:C:2001:404; Case C-385/99 Müller-*Fauré* [2003] ECLI:EU:C:2003:270; and Case C-372/04 *Watts* [2006] ECLI:EU:C:2006:325.

9 *Grogan* case, note 8.

But the CJEU held that these arguments on the moral plane cannot influence the finding that in the Member States where abortion is provided, it is practiced legally. Hence it constitutes a service within the meaning of EU law.[10]

Furthermore, as long as the recipient or even a third party, as follows from the Dutch media law case, pays for the service, this payment constitutes remuneration.[11] This is particularly relevant for services provided in the collaborative or gig economy, where some services may be free for users and money is made from users' data and the services are paid for through for instance advertising.[12] This view is confirmed by *inter alia* the proposal for a directive on digital content, where it is stated that remuneration can also exist where a consumer actively provides counter performance other than money in the form of personal data or other data.[13]

With regard to the free movement of persons, the requirement of an economic connotation is less apparent, particularly since the introduction of European citizenship. In recent case law and in particular in the cases of *Dano* and *Alimanovic*[14] the Court seems to have sharpened the distinction between economic and non-economically active citizens. As is also enshrined in the Citizenship Directive, non-economically active citizens have *conditional* rights to non-discrimination and residence and should not become a burden on the social security system of the host state.[15] If you are a service provider or service recipient – or in other words a market citizen – you can claim stronger protection of your rights under the current regime.

Of course, there are limits to what constitutes an economic activity. For instance in the field of health care or education, where the state pays for the service,

10 ibid, paras 16-21.

11 Case C-352/85 *Bond van Adverteerders* [1988] ECLI:EU:C:1988:196, para 16.

12 V. Hatzopoulos, *The Collaborative Economy and EU Law* (Bloomsbury Publishing, Hart Publishing 2018), 13.

13 European Commission, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final; See e.g. R. Robert and L. Smit, 'The proposal for a directive on digital content: a complex relationship with data protection law' (2018) 19 ERA Forum, 159, available at: https://doi.org/10.1007/s12027-018-0506-7.

14 Case C-333/13 *Elisabeta Dano* [2014] ECLI:EU:C:2014:2358; See also P. Phoa, 'EU citizens' access to social benefits: reality or fiction? Outlining a law and literature Approach to EU citizenship', in F. Pennings and M. Seeleib-Kaiser (eds), *EU Citizenship and Social Rights – Entitlements and Impediments to Accessing Welfare* (Edward Elgar, 2018), 199; and Case C-67/14 *Alimanovic* [2015] ECLI:EU:C:2015:597.

15 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC/, 90/364/EEC, 90/365/EEC and 93/96/EEC (2004) OJ L 158/77.

the free movement of services provision does not apply.[16] According to Davies the decisive factor is in particular the fact that the service provider is not an autonomous market actor, and thus cannot compete for different purchasers.[17]

2.2 Relationship with the other freedoms

Unlike goods, services are intangible, variable and temporary. This meant, according to the Court in *Schindler,* that lottery tickets and their sale fell within the scope of the free movement of goods, whereas lottery activities and the operation of lotteries and games of chance fell under the free movement of services.[18] One can thus easily imagine that in the field of gambling the free movement of services has gained traction, particularly since the emergence of the Internet and the growing importance of online gambling.[19] Technological developments and digitalization have indeed had a major impact on the scope of the free movement of services and thus on the regulatory regime applying to services for a number of, related, reasons.

First, 'new services' are continuously introduced, which requires the adaptation of existing legislation or the adoption of new laws. For example, recently an agreement was reached between the Council and the European Parliament on the revision of the Audio-visual Media Services Directive. Whereas the current Directive's scope is limited to television broadcasts and on-demand audio-visual media services,[20] the revised Directive will, for example, also apply to user-generated videos shared on platforms, e.g. Facebook, when providing audiovisual content that is an essential functionality of the service.[21]

Second, the growing importance of e-commerce diminishes the sale of goods through traditional retail trade and in stores.[22] For that matter there are even

16 Case C-263/86 *Humbel* [1988] ECLI:EU:C:1988:451.

17 G. Davies, 'Chapter 22 - The Law on the Free Movement of Services – powerful, but not always pursuasive', in A. Arnull and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015), 566.

18 *Schindler* case, note 7, paras 21-25.

19 See for (online) gambling and EU law: European Commission, 'Online gambling in the EU' (2018), available at: https://ec.europa.eu/growth/sectors/gambling_en (accessed 3 November 2018).

20 See Article 1 of Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010, L 95/1.

21 Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final; See for the latest developments: https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd (accessed 3 November 2018).

22 https://www.ecommerce-europe.eu/press-item/european-b2c-ecommerce-still-growing-fast-national-markets-moving-different-speeds/ (accessed 16 October 2018).

initiatives to reduce the purchase and ownership of goods for sustainability reasons, for instance, through the promotion of car sharing and leasing of clothes by means of an App.[23] The importance of services for the sale of goods is also recognized by the Court in its recent judgment in *Visser Vastgoed v Appingedam*.[24] Visser had challenged the decision by the municipality of Appingedam (North) establishing a zoning plan that did not allow for retail outlets for shoes in a particular area in Appingedam. The Court held that the rules of a zoning plan do not concern goods as such, but the conditions governing the geographical area where activities related to the sale of particular goods can be established and, consequently, the conditions of access to those activities. Consequently the Services Directive was held to be applicable here.[25] As observed elsewhere 'the ruling acknowledged the changes brought about by digitalisation, in that brick-and-mortar stores have to compete with internet stores by providing services, which means that retail activities do not only consist of merely selling a product, but also of advising and offering follow-up services.'[26]

Third, technological developments & digitalization also blur the lines between services and workers, and between services and consumers. In the collaborative or gig economy, where platforms like Uber, Airbnb or Deliveroo, have grown in importance the provision of services and the collection and processing of data are key components. But how should we define the services that are being provided by, for instance, Uber? This is a crucial question as it defines the applicable EU regulatory framework, the degree of market access that is guaranteed by EU rules, the protection of public interests and the margin of discretion for Member States to set their own regulatory standards. In the *Uber* case the CJEU qualified Uber's services as transport services, thereby following AG Spzunar. He held that Uber's activities must be viewed as a whole encompassing both the service of connecting passengers and drivers with one another by means of a smartphone application and the supply of transport itself, which constitutes the

23 See, for instance, L. Razavi, 'Regulating the Sharing Economy in Amsterdam' (Building a City 2017), available at: https://medium.com/@LaurenRazavi/building-a-city-regulating-the-sharing-economy-in-amsterdam-faecee8dfbo (accessed 3 November 2018).

24 See also Chapter 3 by Johan Wolswinkel.

25 Joined Cases C-360/15 and C-31/16 *X BV and Visser Vastgoed Beleggingen v. Raad van de gemeente Appingedam* (*Visser Vastgoed*) [2018] ECLI:EU:C:2018:44.

26 C. S. Rusu, A. Looijestijn-Clearie and J.M. Veenbrink, 'Digitalisation of Economic Law in the EU: Which Way Forward?', Radboud Economic Law Blog (2018), available at: https://www.ru.nl/law/research/radboud-economic-law-conference/radboud-economic-law-blog/2018/digitalisation-economic-law-eu-which-way-forward/ (accessed 16 October 2018); and N. Braithwaite, 'The Future of (Sustainable) Fashion is Not About Buying, It's About Renting', (The Fashion Law 2018), available at: http://www.thefashionlaw.com/home/the-future-of-sustainable-fashion-is-not-in-ownership-but-the-sharing-economy (accessed 3 November 2018).

main component.[27] This means that the Services Directive[28] does not apply and that Member States continue to have a large degree of discretion in exercising 'damage control' of the disruptive effects on the taxi market. The question is, of course, for how long?

Furthermore, it is not always clear who are the service provider, the intermediary, the service recipient, the consumer, the self-employed or the worker. In the gig economy the 'micro-entrepreneurs, on-demand workers, freelancers or contractors are typically self-employed', whereas some may even be unemployed.[29] Although the innovative character of the gig economy derives from private initiative and entrepreneurship outside the traditional offline employee-employer relationships,[30] the question is how the rights of the gig economy workers who are in a vulnerable and subordinate position can be protected. The EU and national regulatory framework are mostly designed to protect the rights of 'employees', but do these include the rights of gig economy workers?[31]

And lastly, the datafication of our society will affect the free movement of services as well. Data are inherently indispensable for the very existence and function of new forms of service provision, like provided in the collaborative economy as stated above, by (semi-) public/private organisations, or by big tech firms like Facebook or Google. And the more information is at their disposal, the better they can provide the services the consumer is asking for. Not only does this lead to tensions between for example the freedom to provide services and the protection of personal data & privacy (see hereafter) but also to a call for the introduction of a fifth freedom, in particular for non-personal data. Meanwhile the European Commission adopted a proposal for a Regulation on the Free Flow of Non-Personal Data, which should ensure the free movement of non-personal data within the EU and the removal of unjustified or disproportionate national rules that hamper or restrict companies in choosing a location for storage or

27 Case C-434/15 *Elite Taxi v. Uber* [2017] ECLI:EU:C:2017:981. See also S. Tans, 'Onder de motorkap van Uber blijkt een taxi te zitten; gevolgen van de Europeesrechtelijke kwalificatie van Uber als transportdienstverlener,
Zaak C-434/15, Asociación Profesional Elite Taxi/Uber Systems Spain SL', SEW 2018(5), 229-233.

28 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (2006) OJ L 376/36*Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*.

29 V. Hatzopoulos, note 12, 150.

30 ibid, 158.

31 See for recent developments in this field e.g. European Parliament, 'Gig economy: Employment Committee MEPs want to boost worker rights' (Press Release, 2018), available at: http://www.europarl.europa.eu/news/en/press-room/20181017IPR16398/gig-economy-employment-committee-meps-want-to-boost-workers-rights (accessed 3 November 2018).

processing of their data.[32] The European Parliament has meanwhile approved the proposal.[33] According to a member of the European Parliament, Anna Maria Corazzo Bildt, 'this regulation *de facto* establishes data as the fifth freedom on the EU Single Market. By removing borders, burdens and barriers such as data localisation rules, we enable a level playing field for European companies to compete globally. This legislation is truly a game changer, potentially providing enormous efficiency gains for both companies and public authorities. It will reduce data protectionism, which is threatening the digital economy, and pave the way for artificial intelligence, cloud computing and big data analysis.'

The foregoing shows that the dividing lines between goods and services, and between services and workers become increasingly blurred. A clear distinction between these freedoms within the context of the internal market is not always possible. Technological developments and digitalization may further steer and possibly accelerate a process of convergence between the freedoms, which had already been set in motion by the Court of Justice in its case law a long time ago.[34] Of course, differences between the legal norms continue to exist, as observed by *inter alia* Weatherill and Barnard arguing that the internal market is more heterogeneous than we think. This issue became particularly relevant in the context of Brexit.[35] But the extent to which this is the case, should be put into perspective considering above-mentioned developments.

3. Safeguarding market access and protecting public interests

A second set of challenges for the regulation of new forms of service provision concerns the 'simultaneous' safeguarding of non-discrimination and market access on the one hand, and the protection of public values and fundamental rights on the other.

32 See Estonian presidency; and European Commission, Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union, COM(2017) 495 final.

33 European Parliament, Amendments by the European Parliament to the Commission proposal of Regulation (EU) 2018/... of the European Parliament and of the Council of ... on a framework for the free flow of non-personal data in the European Union (2018), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=AMD&format=PDF&reference=A8-0201/2018&secondRef=047-047&language=EN (accessed 4 November 2018).

34 S.A. de Vries, *Tensions within the Internal Market – The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing, 2006), 332; and P. Oliver and W.-H. Roth, 'The internal market and the four freedoms' (2004) 41 CMLRev, 440.

35 S. Weatherill, 'The Several Internal Markets' (2017) 36 Yearbook of European Law ; and C. Barnard, 'Brexit and the EU Internal Market' in F. Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017).

3.1 Non-discrimination and market access

As is well known the European Court of Justice has provided a broad interpretation of the prohibitive Treaty rules on free movement. Not only discriminatory practices are prohibited, but also restrictions on market access, which has, for instance, been set out in judgments like *Säger* and *Alpine Investments*.[36]

Market access is furthermore guaranteed through different principles, in various forms and often through EU secondary legislation. Examples are, of course, the Services Directive or sector-specific directives, like the Professional Qualifications Directive,[37] the E-commerce directive,[38] or for instance the Audio-visual Services Directive,[39] which incorporate market access clauses, free movement clauses, the principle of mutual recognition or the country of origin principle with a view to safeguarding market access for service providers and recipients. With regard to consumers' access to the digital single market, the recently adopted Geo-Blocking Regulation is highly relevant as this Regulation will remove barriers to e-commerce by avoiding discrimination based on customers' nationality, place of residence or place of establishment.[40] The point of departure of this regulation is that customers should be treated equally, regardless of their nationality, place of residence or place of establishment. The regulation also includes specific discriminatory practices that can never be justified. In this way it specifies the rather vague Article 20(2) of the Services Directive, which also prohibits discrimination of service recipients subject to objective justifications.

So non-discrimination and market access are the key drivers to attain market integration, particularly in a digital environment, but in the field of services these are not always so successful and easily attainable. Davies mentions a number of

36 Case C-76/90 *Säger v Dennemeyer* [1991] ECLI:EU:C:1991:331; and Case C-384/93 *Alpine Investments* [1995] ECLI:EU:C:1995:126.

37 Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (2013) OJ L 354/132.

38 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (2000) OJ L 178/1.

39 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (2010) OJ L 95/1.

40 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (2018) OJ L 60/1.

reasons for this.[41] A large part of the costs of services is labour and labour costs vary a great deal between Member States. The discussion revolving around the Commission's original proposal for a directive on services, the 'Bolkestein Directive', is illustrative in this respect and shows how the legitimacy of certain EU measures may be questioned.

Some services are particularly sensitive and touch upon important questions of identity or morality, as shown by cases that involved abortion or the sale of soft drugs.[42] Other services are more sensitive in nature due to their typically public service character, like health care or educational services.[43] Furthermore, some services are 'highly complex and part of the infrastructure of society or the economy',[44] like telecom or financial services.

And against the background of the datafication of our economies this means personal and non-personal data are the source of various new forms of services, which, of course raises important fundamental rights issues.

In the internal market integration process it has been the European Court of Justice, ever since Dassonville and Cassis de Dijon, which played a fundamental role as 'policy maker'.[45] What about the role of the Court in the digital market place? It seems that the Court shows some reluctance to pursue its traditionally 'neo-functionalist' agenda, particularly where legislation is absent. The *Uber Elite* case may illustrate this very well. Following AG Spzunar's Opinion the Court held that Uber's service qualifies as a transport service, which means that the Services Directive or the E-commerce Directive will not apply. Member States remain free to set their own regulatory standards subject to the provisions of the Treaty, particularly since no EU policy within the context of a common transport policy has been devised so far. Some have criticized this rather rigid approach by the Court as it is unclear within which internal market parameters digital pioneers can be restricted in seeking to open up new markets for which there is consumer demand. [46] But it does allow for the adoption of national (local) regulation to curtail the disruptive effects of the digital market and to protect public values.

41 G. Davies, note 17, 562-563.
42 *Grogan* case, note 8; and Case C-137/09 *Josemans* [2010] ECLI:EU:C:2010:774.
43 Cf. *Watts* case, note 8; and *Humbel* case, note 16.
44 G. Davies, note 17, 563.
45 Case C-8/74 *Dassonville* [1974] ECLI:EU:C:1974:82; and Case C-120/78 *Cassis de Dijon* [1979] ECLI:EU:C:1979:42; and see, for instance, H.-W. Micklitz and S. Weatherill, 'Consumer Policy in the European Community: Before and After Maastricht' (1993) 16 Journal of Consumer Policy 304.
46 D. Adamski, 'Lost on the Digital Platform: Europe's Legal Travails with the Digital Single Market' (2018) 55 CMLRev, 719.

An important additional question is, who wants to get access to the market and who needs to be protected? As stated above, in the collaborative economy it is not always clear who provides the service and what type of service is being provided , who is the consumer and who is the worker, and this eventually determines the regulatory framework and thus the scope of Member States retaining regulatory powers to protect public values.

3.2 What about public values and fundamental rights?

This brings us to another crucial question, which is what kind of services market do we want to attain, now and in the future? According to Articles 3(3) and 2 TEU the EU strives to attain a social market economy with a high level of social protection, a society that is based on the rule of law and human rights. The EU Charter has, since the Treaty of Lisbon entered into force (2009), legally binding effect and plays a major role in the European Court of Justice'scase law. In this respect a number of developments are relevant for the relationship between the free movement of services and the protection of public values and fundamental rights.

First, there is no, or not necessarily, a 'neoliberal' bias in the Treaty provisions on free movement in general and on the free movement of services in particular, or in secondary legislation. The Treaty provision on services may be fundamental, but has, similarly to the other freedoms, no absolute character.[47] According to Article 26(2) TFEU the free movement of *inter alia* services in the internal market is ensured 'in accordance with the provisions of the Treaties'. Safety valves are built into the system, through Treaty exceptions and mandatory requirements developed in the Court's case law, which guarantee that public values continue to be protected within the context of the free movement of services. The Court applies a particular framework of analysis with a view to balancing national restrictions on market access with the protection of public interests or fundamental rights, according to the proportionality principle. This has worked pretty well, at least for most public interests and fundamental rights (see hereafter).[48]

47 The Court has emphasised this in a number of cases where fundamental freedoms clashed with fundamental rights, like Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, para. 78; or Case C-438/05 *Viking Line* [2007] ECLI:EU:C:2007:772; cf. also Case C-271/08 *Commission v Germany* [2010] ECLI:EU:C:2010:183 (Opinion of AG Trstenjak)
48 S. Weatherill, 'Protecting the Internal Market from the Charter', in S.A. de Vries, U. Bernitz & S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing* (Bloomsbury Hart Publishing 2015), 213.

Next to the Treaty provisions, EU secondary legislation must take account of public interests and fundamental rights. If the EU legislator has not (sufficiently) taken fundamental rights into account, the Court will declare the legislation invalid. Where EU secondary legislation violates EU Charter rights and specifically the rights to privacy and protection of personal data, the Court held that the margin of discretion of the EU legislature is reduced and judicial review is strict.[49]

In addition, if the Court is called upon to *interpret* secondary legislation, it may further strengthen the non-market dimension of a directive or regulation, by giving public values and fundamental rights greater weight vis-à-vis market interests. Good examples of cases where the Court reinforced the public interest or fundamental rights' dimension of EU secondary legislation are *Sky* Österreich and *Google Spain*. In the first case the CJEU was asked to rule on the compatibility of the Audiovisual Media Services Directive (AMSD) with the EU Charter,[50] in particular the freedom to conduct a business and the right to property as contained in Articles 16 and 17 of the EU Charter. The question was whether Article 15(6) of the AMSD, which requires the holder of exclusive broadcasting rights to authorize any other broadcaster to make short news reports without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal, infringes the fundamental rights of the holder of exclusive broadcasting rights. According to the CJEU the Directive had been adopted in accordance with the EU Charter. In the light of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the EU legislature was entitled to adopt rules which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.[51]

In *Google Spain* the Court held that the rights to privacy and protection of personal data do, 'as a rule, not only [override] the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name.'[52]

49 Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke GbR and Hartmut Eifert* v. *Land Hessen* (*Volker and Schecke*) [2010] ECLI:EU:C:2010:662, para 48.

50 Audiovisual Media Services Directive, note 39.

51 Case C-283/11 *Sky Österreich GmbH* v. *Österreichischer Rundfunk (Sky Österreich)* [2013] ECLI:EU:C:2013:28, para 66.

52 Case C-131/12 *Google Spain SL and Google Inc.* v. *Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (*Google Spain*) [2013] ECLI:EU:C:2014:317, para 97.

The central question in this case relates to the request by Mr Costeja González to order Google Spain SL and Google Inc. to adopt the measures necessary to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future.[53] In particular he wanted the links to two pages of La Vanguardia's newspaper on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts to be removed. In interpreting the Data Protection Directive, the CJEU held that 'the data subject may [...] request that the information in question no longer be made available to the general public by its inclusion in such a list of results', the so-called right to be forgotten.[54]

Second, we see more attention at EU level for the social dimension of the internal market. The Pillar of Social Rights has been adopted,[55] which is intended to provide a counterbalance to the economic orientation of the EU and give meaning to the concept of social market economy as enshrined in Article 3(3) TEU. It is ambitious in scope and has some political will behind it and some momentum. The first two areas – equal opportunities and access to labour market, and fair working conditions - are more closely linked to traditional labour law. The third limb – social protection and inclusion – is much more ambitious in scope and includes: unemployment benefits, healthcare, housing and assistance for the homeless, areas that are in principle outside the competence of the EU.[56]

The revised Posting of Workers Directive, which is based on the internal market legal basis for services (Articles 53(1) and 62 TFEU), puts greater emphasis on equality between workers and posted workers. The progress on the Posting of Workers Directive was largely driven by the energy and enthusiasm of President Macron, who pushed for equal pay for equal work for posted workers, that is workers temporarily sent to work in another Member State. From a social perspective this is clearly good news for the individual posted workers. From the perspective of the posting companies, mainly from Eastern European states, their competitive advantage is being removed. [57]

53 ibid.

54 ibid, para 97.

55 European Commission, 'Establishing a European Pillar of Social Rights' (Communication) COM(2017) 250 final, available at: https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

56 See also C. Barnard and S.A. de Vries, 'The Social Market Economy in a (heterogeneous) social Europe: can it be delivered?' (2019) Utrecht Law Review (forthcoming).

57 Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (2018) OJ L 173/16.

Furthermore and particularly relevant for the collaborative economy is the proposal to revise the Written Statement Directive, which, if adopted, will be called the Directive on transparent and predictable working conditions. The proposal seeks to improve the position of workers in the platform economy. The Directive would apply to 'workers', as defined by the CJEU,[58] and not just to employees, thereby preventing Member States from excluding workers in certain non-standard forms of employment, e.g. platform workers, from the scope of the Directive.[59] Since the proposed Directive is based on Article 153(2) (b) TFEU, which provides for minimum harmonisation and explicitly refers to 'workers', there has been discussion as to whether this term includes dependent self-employed persons who may be in a similar position to workers and are in need of extra protection.[60] In this respect the Court's judgment in *FNV Kunsten* is interesting. The Court assessed whether the cartel prohibition of Article 101 TFEU applied to a collective labour agreement setting minimum fees for self-employed service providers, in particular musicians substituting for members of an orchestra. It held that where employers' workers are *false* self-employed services providers in a situation comparable to that of workers, they should be considered workers within the meaning of EU law, which entails that provisions of a collective labour agreement on minimum fees fall outside the scope of Article 101 TFEU.[61] Meanwhile, whilst trade unions, calling for a radical overhaul of the Directive to include self-employed persons or gig economy workers,[62] fiercely debate with employers' groups pleading against the revision of the

58 Case C-66/85 *Lawrie Blum* [1986] ECLI:1986:284; Case C-216/15 *Ruhrlandklinik* [2016] ECLI:EU:C:2016:883; and European Commission, Proposal for a Directive of the European Parliament and of the Council on the transparent and predictable working conditions in the European Union, COM(2017) 797 final, Explanatory Memorandum, 3, 11

59 European Commission, Proposal for a Directive of the European Parliament and of the Council on the transparent and predictable working conditions in the European Union, COM(2017) 797 final.

60 M. Risak, 'Fair Working Conditions for Platform Workers – Possible Regulatory Approaches at EU Level' (International Policy Analysis, 2017) available at: https://library.fes.de/pdf-files/id/ipa/14055.pdf (accessed 27 June 2018), 13.

61 Case C-414/13 *FNV Kunsten Informatie en Media* [2014] ECLI:EU:C:2014:2411.

62 ETUC Press Release (7 November 2017), available at: https://www.etuc.org/en/pressrelease/etuc-calls-written-statement-directive-be-overhauled; The trade unions initially welcomed the Commission's proposal to update the Written Statement Directive but expressed its concerns in a position paper, see the Agenda item of ETUC (7-8 March 2018): http://www.cgil.it/admin_nv47t8g34/wp-content/uploads/2018/03/Allegato_2_11_en-etuc_position_on_the_draft_transparent_and_predictable_working_conditions.pdf; they have recently reinforced its stance on the concept of worker in another ETUC Press Release (21 June 2018), https://www.etuc.org/en/pressrelease/progress-worklife-balance-and-working-conditions-directives (accessed 3 November 2018).

current Directive,[63] the European Parliament calls for a boosting of all workers' rights and for an extension of the Directive to new forms of employment, including minimum standards for workers in on-demand, voucher-based or platform employment.[64]

Despite these developments social rights, which have been 'firmly' incorporated in the EU Charter, remain underdeveloped and their status vis-à-vis other fundamental rights is at least unclear.[65] The *Viking* and *Laval* saga has shown that the Court may take a restrictive approach to social rights, where their exercise interferes with the freedom of establishment and the free movement of services.[66] Although the Court acknowledged the fundamental right to strike and to take collective action, the Court said that the trade unions' actions could only be justified if they served a wider aim, i.e. there should be a serious threat to employment.[67] These cases were soon seen through the prism of the conflict between the social versus the economic dimension of the EU,[68] with the social dimension being seen as inferior to the economic dimension of the EU. In a similar vein the Court in *Alemo-Herron* used the freedom to conduct a business, as enshrined in Article 16 of the EU Charter, to challenge and remove the higher protection of employees in national implementing legislation since it was deemed to interfere with the employer's managerial freedom.[69] *Alemo Herron* concerned a reference from the UK courts about the interpretation of the Transfer of Undertakings Directive in the light of the UK's more generous implementation. The Court did not consider the application of any of the provisions in the solidarity title as a counterweight to the employer's Article 16

63 World Employment Confederation Europe, Position Paper on EU Commission proposal on a Directive on transparent and predictable work conditions in the EU – COM(2017) 797, available at: https://www.weceurope.org/fileadmin/templates/eurociett/docs/position_papers/2018_Regulation/WEC-Europe_position_Directive_transparent-predictable_working_conditions_-_March_2018.pdf accessed 3 November 2018).

64 European Parliament Press Release 2018, note 31, available at: http://www.europarl.europa.eu/news/en/press-room/20181017IPR16398/gig-economy-employment-committee-meps-want-to-boost-workers-rights (accessed 3 November 2018).

65 S. Douglas-Scott, 'EU Law and Social Rights', in S. Douglas-Scott and N. Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017), 492.

66 *Viking Line* case, note 47; Case C-341/05 *Laval un Partneri* [2007] ECLI:EU:C:2007:809.

67 E.g. S. Weatherill, note 48; C. Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon – A Question of Conflicts of Interest', in S.A. de Vries, U. Bernitz and S. Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013), 37; and A. Veldman and S.A. de Vries, 'Chapter 4 – Regulation and Enforcement of Economic Freedoms and Social Rights; A Thorny Distribution of Sovereignty', in T. van den Brink, M. Luchtman and M. Scholten (eds), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement* (Intersentia, 2015), 83.

68 S. Prechal & S.A. de Vries, 'Seamless Web of Judicial Protection in the Internal Market?' (2009) 34 ELRev, 5.

69 Case C-426/11 *Alemo-Herron and Others* v. *Parkwood Leisure Ltd* [2013] ECLI:EU:C:2013:521, paras 31-35.

right. The legal effects of these provisions are ambiguous as some of the rights are probably principles, which do not have direct effect, whereas others can be seen as rights.

A glimpse of solidarity in the making, however, may have been offered by a number of recent decisions of the Court in which it recognised the fundamental rights' character of the social right to paid annual leave and reinforced the principle of non-discrimination (on grounds of religion) and effective judicial protection, all held applicable in horizontal disputes between private actors.[70] In *Kreuziger* and *Bauer* the Court held that Article 31(2) of the Charter constitutes a fundamental right to paid annual leave which should be distinguished from Article 27 of the Charter on workers' representation, which was at issue in the *AMS* case and which applies only subject to the conditions provided for by Union law and national laws.[71]

Third, the field of data protection illustrates how a 'fundamental rights rationale' can arise besides the internal market and how a solid legislative framework has been adopted with a view to protect our personal data.[72] It is true that since the Treaty of Lisbon Article 16 TFEU provides a self-standing legal basis for EU data protection rules and the current General Data Protection Regulation. But its predecessor, the Data Protection Directive,[73] was based on the internal market legal basis of Article 114 TFEU and was, as seen above in *Google Spain*, interpreted by the Court very broadly, which already meant that the requirement of free movement had become more or less superfluous. In that sense, Article 16 TFEU is not only related to the internal market legal basis of Article 114 TFEU but also constitutes its natural successor.

The proposal for a new, revised Audiovisual Media Services Directive further illustrates the fundamental rights' rationale of EU internal market law by

70 Case C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257; Joined Cases C-619/16 and C-684/16 *Kreuziger and Max Planck* [2018] ECLI:EU:C:2018:872 and ECLI:EU:C:2018:874; Joined Cases C-569/16 and C-570/16 *Wuppertal* v. *Bauer* [2018] ECLI:EU:C:2018:871; and F. Fontanelli, 'You can teach a new court Mangold tricks – the horizontal effect of the Charter right to paid annual leave', EU Law Analsyis Blog, 11 November 2018, available at: http://eulawanalysis.blogspot.com/2018/11/you-can-teach-new-court-mangold-tricks.html.

71 Case C-176/12 *AMS* [2014] ECLI:EU:C:2014:2; Joined Cases *Kreuziger and Max Planck,* note 70; and Joined *Wuppertal* v. *Bauer,* note 70.

72 E. Muir, 'Drawing Positive Lessons From the Presence of 'the Social' Outside of EU Social Policy *Stricto Sensu*' (2018) 14 EUConst, 89; and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L 119/1.

73 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995) OJ L 281/31.

strengthening the protection of minors, the cultural dimension of audivisual media services and by including a prohibition of hate speech and the obligation to establish independent media authorities.

Finally, the free movement of services provision can also be used as an avenue to strengthen fundamental rights of citizens and the rule of law. In the infringement procedure initiated by the European Commission against Hungary on the law on higher education, the Commission states that the Hungarian law violates *inter alia* the freedom to provide services (Article 56 TFEU), the freedom of establishment (Article 49 TFEU), the Services Directive (2006/123) and *the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union (Articles 13, 14, 16 respectively).*[74]

Hence, looking at the law as it now stands, there are important elements pointing at the direction of a growing inclusive internal services market overall. But due to the extension of the scope of services, the blurring lines between goods, services, consumers and workers, the regulatory framework will need to be updated continuously, which is a challenging task in itself. In new markets and in particular in the collaborative economy, the Commission has had a *laissez-faire* attitude so far. As it gradually realized that time has come to take action, the Digital Single Market[75] should constitute a perfect breeding ground to develop a more inclusive market by, for instance, prohibiting discrimination and guaranteeing market access, by reconsidering the notion of consumer, by strengthening the protection of the weaker party, i.e. the workers or self-employed, and by balancing fundamental rights and free movement of services and the free flow of data. We will have to wait and see how inclusive the (digital) market for services will eventually become. The main challenges lie in the limited legislative competences for the EU in the social policy domain, which make it hard for the EU to deal with increasing inequality and growing cleavages, also in the digital market place; and in the out-dated institutional structure of the EU, which has not substantially altered since the inception of the EEC and which impedes rapid legislative responses to technological developments and digitalization.

74 See European Commission Press Release, Brussels 7 December 2017, available at: http://europa.eu/rapid/press-release_IP-17-5004_en.htm. See also with respect to using internal market in an indirect way to protect fundamental rights: M. Dawson and E. Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' (2013) 14/10 German Law Journal, 1959.

75 European Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM(2015) 192 final.

4. Personal scope: the question of horizontality

Meanwhile, there may be an alternative route to safeguard non-discrimination and market access, as well as to protect fundamental rights and public values in the field of services. After all certain service providers have gained such power in society that they actually provide public services, which brings along a special responsibility for them.

In Dave Eggers' famous book 'The Circle' everything what happens in one's life should be public, is privacy theft and are secrets lies. The main character in the book, Mae Holland, uncovers an agenda of the fictitious tech giant 'The Circle' that will affect the lives of all of humanity.[76]

Some private actors, including the five big tech companies, have growing possibilities to invade and monitor citizens' lives, to influence the democratic process and to impact civic space, and the potential to disrupt society, simply because they are the only company offering certain types of services.

Recently the Dutch fintech company Adyen brought part of its shares to the Amsterdam Stock Exchange.[77] It regulates online payments for banks and tech firms like Facebook, Spotify and Netflix. What if sometimes goes wrong in providing these services? Millions of consumers will be affected. Should there not be an obligation to grant market access to certain aspects of the service provision to other service providers (companies)?

Normally, Article 56 TFEU does not result in obligations for the service provider. But according to the Court's case law, Article 56 has (limited) horizontal direct effect, which for instance entailed that the trade unions in *Viking* and *Laval* and the Dutch Bar Association in *Wouters* have certain responsibilities not to restrict market access disproportionally.[78] The freedom to provide services provision could therefore be used to hold big tech corporations which play a similarly – if not more – important role in society as the state, responsible for safeguarding market access.

They may also be held responsible for the protection of certain fundamental rights. Where economic and fundamental rights 'go and in hand', the Treaty freedoms can be used to hold private parties accountable for civil rights violations

76 D. Eggers, *The Circle* (McSweeney's Books and Alfred A. Knopf 2013).

77 A. Kharpal, 'Ayden IPO: Everything you need to know about the $8 billion fintech company', 2018 *CNBC*, available at: https://www.cnbc.com/2018/06/13/adyen-ipo-everything-you-need-to-know-about-the-8-billion-fintech-company.html (accessed 13 November 2018).

78 *Viking Line* case, note 47; *Laval un Partneri* case, note 66; and Case C-309/99 *Wouters* [2002] ECLI:EU:C:2002:98.

in a similar vein as public authorities can be held accountable. Although decided against the backdrop of EU secondary legislation, the case *Scarlet Extended* could be reconstructed at least partly as a free movement case. Here a private party (SABAM) claims a right to intellectual property, namely the protection of the copyright to musical works, vis-à-vis another private party (the Internet Service Provider Scarlet Extended), which argues that it is severely restricted in its rights, including the freedom to conduct a business - of which the free movement of services is a specific elaboration - and the protection of data and privacy of its users by having to install a filtering system disclosing the names of users who illegally download music.[79]

Where fundamental rights *clash* with the Treaty freedoms, there should be enough room for the protection of civil rights under the EU free movement scheme. Although the case law, particularly *Schmidberger,*[80] suggests that the State is allowed to give private parties, like NGO's, sufficient leeway to exercise their fundamental rights without being hindered by a too severe application of EU free movement law, it is uncertain to what extent private parties themselves can invoke fundamental rights as a justification ground for the restriction on the free movement of services. [81]

Applying the free movement provision could thus trigger the horizontal application and horizontal direct effect of EU Charter rights in these particular cases, which, however, has been contentious as the Charter itself does not include in Article 51(1) private actors as addressees of the Charter provisions. Recently the Court, though, has affirmed in a number of judgments the horizontal direct effect of Charter rights and held that although 'Article 51(1) does not [...] address the question whether [...] individuals may, where appropriate, be directly required to comply with certain provisions of the Charter [it] cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility. [T]he fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals. Next, the Court has, in particular, already held that the prohibition laid down in Article 21(1) of the Charter [principle of

79 Case C-70/10 *Scarlet Extended SA* v. *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM/Scarlet Extended)* [2011] ECLI:EU:C:2011:771.

80 *Schmidberger* case, note 47; See regarding the tension between free movement and fundamental rights e.g. S.A. de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon - An Endeavour for More Harmony', in: S. de Vries, U. Bernitz and S. Weatherill, *The Protection of Fundamental Rights in the EU After Lisbon* (Oxford: Hart Publishing 2013), pp. 59-94.

81 See the interesting Opinion of AG Trstenjak in Case C-171/11 *Fra.bo* [2012] ECLI:EU:C:2012:176 on the horizontal application of the free movement of goods and the consequential possibility for private parties to rely on (public) justification grounds or interests of a private nature.

non-discrimination] is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual, without, therefore, Article 51(1) of the Charter preventing it.'[82]

This is crucial as private parties like the big five tech companies Google (Alphabet), Facebook, Apple, Amazon and Microsoft may severely limit fundamental rights, just as they may protect fundamental rights like privacy, the combat of false news reports or revenge porn.[83] I do realize that there are a number of drawbacks or pitfalls in terms of, for example, the growing role of the judiciary forced to carry out difficult balancing exercises, legitimacy and an all too extensive reading of the horizontal application of the services provision and fundamental rights with detrimental effects on private autonomy.

5. The territorial scope

Technological developments and digitalization make borders rather illusive. The ongoing debate and question of whether the Services Directive, at least where it concerns establishment, applies to internal situations, has finally been resolved in *Visser Vastgoed*. Here the Court unequivocally held that the provisions on establishment in the Directive also apply to a situation where all relevant elements are confined to the territory of a Member State and that the Services Directive may, with a view to the principle of *effet utile,* extend the provisions of services and establishment as laid down in the Treaty.[84]

The breaking down of internal borders has also been an important aim of, for instance, the Geo-Blocking Regulation by tackling geographically based restrictions.[85] The digital market may thus well revitalize the debate on the relevance of the cross-border requirement to the free movement of services. The first pillar upon which the Digital Single Market Strategy is based upon, concerns 'better access for consumers and businesses to online goods and services across Europe'. According to the Commission this requires the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity.[86]

82 Paras 87-89 of the *Bauer* judgment, note 70; See in particular Case *Egenberger*, note 70, paragraph 76.
83 See also S.A. de Vries, 'Securing private actors' respect for civil rights within the EU: actual and potential horizontal effects of instruments', in S.A. de Vries, H. de Waele and M-P. Granger (eds), *Civil Rights and EU Citizenship* (Edward Elgar 2018), 43.
84 *Visser Vastgoed* case, note 25, paras 107-110.
85 Regulation 2018/302, note 40.
86 'A Digital Single Market Strategy for Europe', note 75.

The removal of barriers as a result of the digitalization of the market place also creates further challenges for the Brexit process and the adoption of any future arrangement with the EU, after which borders are supposed to be 'reinstalled'.

6. Conclusion

So what has the revisit to the building blocks constituting the EU's internal market and in particular the freedom to provide services brought us so far? The reference in Article 57 TFEU to services as a mere rest category seems to be pretty archaic. Services have grown in importance, particularly due to technological developments and digitalization.

This raises a number of challenges, like the simultaneous safeguarding of market access and protecting public values and fundamental rights. And this in turn requires more than a *laissez-fair* approach, as the EU needs to further expand 'public roads' for its citizens to prevent that they get lost in uncharted territory, where a small group of service providers dictate the conditions for market access and do not take their responsibility for the protection of fundamental rights. Or where digital pioneers are barred from gaining access to markets for which there is a consumer demand.

With regard to the dominant role of big tech, a solid legal framework combined with a different mindset, and a new approach to and rationale of Article 56 TFEU and fundamental rights could possibly fill the gap between competition law and EU free movement law, challenging big tech firms' behaviour and measures that impact market access and fundamental rights.

Chapter 3:

Economic Law Meets Environmental Law. New Expansion of the Services Directive?

Johan Wolswinkel[*]

1. Introduction

Since its adoption in 2006, the Services Directive[1] has become one of the most important legal instruments for the EU in the regulation of services.[2] The horizontal, trans-sectoral scope of this directive allows for legislation with a high impact on a rich variety of services, thereby creating harmonisation not only between Member States, but also between services.

Recent case-law of the Court of Justice of the European Union (hereinafter: the Court) has solved several open questions on the Services Directive. In *Appingedam,* the Court put beyond doubt that the concept of a 'service' in the Services Directive covers retail trade in goods as well. The Court further confirmed that Chapter III of the Services Directive on the establishment of service providers also applies to purely internal situations.[3] As a result, the scope of the Services Directive has turned out to be much broader than some Member States supposed during the implementation of this directive.

In the same judgment, the Court also acknowledged that under particular circumstances, the Services Directive also applies to restrictions in the area of spatial planning. This aspect of *Appingedam* raises the more general question as to the relationship between economic law and environmental law, in particular in the context of spatial planning. Economic law as shaped by EU internal market law is already familiar with 'principles' of competition and transparency, but the application of these principles in the area of spatial planning is less

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1 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive), OJ 2006, L 376/36.

2 In general, see P. Delimatsis, 'From Sacchi to Uber: 60 Years of Services Liberalization, Ten Years of the Services Directive in the EU' (2018) 43 *Yearbook of European Law*, 188-250.

3 Joined Cases C-360/15 and C-31/16 *X BV and Visser Vastgoed Beleggingen v. Raad van de gemeente Appingedam* [2018] ECLI:EU:C:2018:44 (*Appingedam)*.

evident. This chapter therefore seeks to determine to what extent the legal regime of the Services Directive, in particular the freedom of establishment and the 'principles' of competition and transparency, also apply to spatial planning decisions in the area of environmental law.

To this end, this chapter has been structured as follows. Section 2 describes some relevant legal developments on the establishment of service providers in the Services Directive since its adoption in 2006. Next, section 3 analyses the consequences of *Appingedam* for spatial planning issues. Section 4 discusses parallel developments in domestic law, in particular the Netherlands, on the issue whether and how competition and transparency could be incorporated in spatial planning law. Section 5 aims to draw inspiration from planning issues in the distribution of radio spectrum frequencies, after which Section 6 concludes with some thoughts for future legal development.

2. The Services Directive: a new chapter in services regulation?

2.1 Starting point: the provisions of the Services Directive

The Services Directive aims to facilitate the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.[4] To that end, this directive contains *general* provisions on service provision that apply to *all* services, unless that specific service has been excluded from the scope of the Services Directive.[5]

For the purposes of this article, Chapter III on the establishment of service providers is most relevant. This chapter makes a distinction between authorisations (Section 1) and (other) requirements prohibited or subject to justification (Section 2). The section on authorisation schemes contains provisions on the justification of authorisation schemes as such (Article 9), the granting conditions (Article 10), the duration of authorisation (Article 11), selection in case of a limited number of authorisations (Article 12) and authorisation procedures (Article 13). Within the section on requirements, a distinction is made between prohibited requirements for which no justification ground can be invoked (Article 14) and other requirements that should satisfy the well-known conditions of non-discrimination, justification by overriding reasons relating to the public interest (necessity) and proportionality (Article 15).

4 Article 1 Services Directive, note 1; See also *Appingedam*, note 3, para. 104.
5 Article 2 Services Directive, note 1.

Some of these provisions merely amount to a codification of the Court's case-law on the freedom of establishment (Article 49 TFEU), in particular the Articles 9, 10 and 15,[6] even though the wording of the different provisions in Chapter III on proportionality is not always complete and consistent in comparison with the case-law of the Court.[7] Some other provisions in the chapter on establishment of the Services Directive go one step further. Under Article 49 TFEU, restrictions on the freedom of establishment are *in principle* prohibited, thereby always providing for the (theoretical) possibility for justification. The Services Directive, by contrast, sometimes excludes the possibility of justification in advance. In its section on requirements, this is clear for the prohibited requirements (Article 14). In the section on authorisations, especially Article 12 gives some unconditional obligations for Member States: where the number of authorisations available for a service activity is limited because of the scarcity of available natural resources or technical capacity, Member States *shall* apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure. Although, according to paragraph 3, Member States may take into account, in establishing the rules for the selection procedure, overriding reasons relating to the public interest, this possibility is subject to paragraph 1, hence to the requirement of an impartial and transparent selection procedure. Besides, paragraph 2 stipulates that these 'naturally limited authorisations' *shall* be granted for an appropriate limited period and may not be open to automatic renewal. Hence both the transparency of the selection procedure and the limited duration of these authorisations are unconditional obligations that should be met.

Finally, the Services Directive introduces some elements that are not an immediate consequence of restrictions on the freedom of establishment and the Court's justification scheme of non-discrimination, necessity and proportionality. This holds for example for the introduction of the *lex silencio* in case of an application for authorisation: failing a response to the application within the time period set, authorisation shall be deemed to have been granted.[8] To a lesser extent, this is also the case with the requirement of a transparent selection procedure in Article 12: this transparency requirement does not fit the three conditions of non-discrimination, necessity and proportionality easily, even though some case-law of the Court suggests that this transparency requirement can be

6 See already Case C-55/94 *Gebhard* [1995] ECLI:EU:C:1995:411, para. 37; and Case C-205/99 *Analir* [2001] ECLI:EU:C:2001:107, para. 25, 38.
7 C. Barnard, 'Unravelling the Services Directive' (2008) 45 CMLRev, 323, 324.
8 Article 13(4) Services Directive, note 1.

considered part of the proportionality test of a limited authorisation scheme.[9] Usually, however, the transparency requirement is considered as a separate obligation that should be met,[10] despite its construction as a corollary obligation of Article 49 TFEU.

2.2 Evolution in substance

In the last decade, the Services Directive has turned out to be a living instrument. For the purposes of this chapter, it is not necessary to give a complete overview of the Court's case-law on the Services Directive. Nonetheless, the Court's case-law shows a gradual 'expansion' of the Services Directive, both in substance and in scope, although the Court would present this case-law as an interpretation rather than an expansion of the Services Directive.

First, as for substance, the Services Directive has been further aligned with the Court's justification scheme under primary EU law.[11] For instance, in *Hiebler*, while acknowledging that the wording of Article 10(4) simply requires an 'overriding reason relating to the public interest' to justify restricting an authorisation to a specific area of national territory, the Court also required such a restriction to adhere to the principles of non-discrimination and proportionality, as general principles of EU law.[12] In particular, it held with regard to proportionality, referring to Article 15(3) of the Services Directive, that such a restriction should be suitable for securing the attainment of the objective pursued, should not go beyond what is necessary to attain that objective and may not be replaced by other, less restrictive measures which attain the same result.[13] A similar reasoning is to be expected for the restriction of the duration of an authorisation (Article 11): such a limitation in time should not only be justified by overriding reasons relating to the public interest,[14] but also be proportionate. In addition, where Article 9(1) on the justification of authorisation schemes only refers to

9 Case C-203/08 *Sporting Exchange* [2010] ECLI:EU:C:2010:307, para. 60.

10 E.g. Case C-64/08 *Engelmann* [2007] ECLI:EU:C:2010:506, para. 43; Since the first case-law on the obligation of transparency (Case C-324/98 *Telaustria* [2000] ECLI:EU:C:2000:669, para. 60-62) predates the first draft of the Services Directive in 2004 (COM (2004) 2 final), that case-law may have inspired this draft.

11 This is in conformity with Article 3(3) Services Directive (note 1), according to which Member States shall apply the provisions of the Services Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

12 Case C-293/14 *Hiebler* [2015] ECLI:EU:C:2015:843, para. 53.

13 The Court did not include an element of proportionality *stricto sensu* in its judgment, but this element is hardly used separately in the Court's case-law. See S.A. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9(1) Utrecht Law Review, 169, 173.

14 Article 11(1)(a) Services Directive, note 1.

the proportionality element that the objective pursued cannot be attained by means of a less restrictive measure, it is very well conceivable that the Court will also pay attention to the other proportionality elements in the justification of a restrictive measure, thereby requiring this measure to be suitable as well.[15]

Secondly, the Court has converted some provisions from justifiable restrictions into prohibited restrictions. An illustrative example thereof is the judgment of the Court in *Trijber and Harmsen* on the duration of authorisations: while the literal wording of Article 11 seemed to suggest that authorisations *may* be granted for a limited period in cases where the number of available authorisations is limited by an overriding reason relating to the public interest, the Court ruled that such authorisation *must* be granted for a limited period: no discretion may be conceded, in that regard, to the competent national authorities, without undermining the objective pursued by Article 11 of Directive 2006/123 of securing service providers' access to the market in question.[16] Thus, unlimited duration of these 'artificially limited authorisations' is a prohibited restriction from now onwards.

A related issue concerns the interpretation of Article 12 on the selection procedure in case of 'naturally limited authorisations'. In *Promoimpresa*, the Court confirmed that Article 12 does not allow for exceptions to this requirement of a transparent selection procedure, which would be the case if authorisations were to be extended automatically.[17] What is more, the Court developed a parallel transparency regime for 'artificially limited authorisations' under Article 49 TFEU. Although this does not amount to an extension of Article 12 Services Directive as such, the selection procedure for artificially limited authorisation schemes is subject to a similar obligation of transparency, requiring a degree of advertising sufficient to enable the service authorisation to be opened up to competition and the impartiality of the selection procedure to be reviewed.[18] This extension seemed not to be foreseen in the drafting process of the Services Directive (2004-2006). According to recital 62, where the number of authorisations available for a service activity is limited because of scarcity of natural resources or technical capacity, a procedure for selection from among several potential candidates should be adopted with the aim of developing through *open competition* the quality and conditions for supply of

15 See in the case-law already the *Analir* case, note 6, para. 25. See also European Commission, *Handbook on the Implementation of the Services Directive* (Publications Office of the European Union 2007), 25, referring explicitly to the suitability requirement.

16 Joined Cases C-340/14 and C-341/14 *Trijber and Harmsen* [2015] ECLI:EU:C:2015:641, para. 62-63.

17 Joined Cases C-458/14 and C-67/15 *Promoimpresa and Marco Melis* [2016] ECLI:EU:C:2016:558, para. 49-55.

18 Cf. *Sporting Exchange* case, note 9, para. 41.

services available to users. This recital further adds that Article 12 should not prevent Member States from limiting the number of authorisations for reasons other than scarcity of natural resources or technical capacity. These 'other' limited authorisations should remain in any case subject to the other provisions of this Directive relating to authorisation schemes. While other provisions in the Services Directive do not refer to transparency of the selection procedure, this *Promoimpresa* judgment introduces competition and transparency across the full range of limited authorisation schemes. The only remaining difference between both transparency regimes is that exceptions to the obligation of transparency in case of artificially limited authorisations can be justified – at least theoretically – under Article 49 TFEU,[19] while such exceptions are not allowed anymore under the Services Directive for naturally limited authorisations.

In sum, the Court's case law does not only show a process of streamlining primary and secondary EU law on services regulation, but also a process of tightening the reins: on the one hand, initially justifiable restrictions in the Services Directive are converted into prohibited restrictions, while, on the other hand, requirements in the Services Directive are transposed to areas where the directive does not apply directly.

2.3 Evolution in scope

The *Promoimpresa* judgment can be considered an extension *de facto* of the scope of the Services Directive: although the application of the transparency requirement to artificially limited authorisations is presented as a straightforward application of Article 49 TFEU, this application can also be seen as an extension of Article 12 Services Directive, which limits the transparency requirement to naturally limited authorisations. More than other judgments, however, the recent *Appingedam* judgment has been very impactful for the scope of the Services Directive.

First, the Court ruled that that the activity of retail trade in goods constitutes a 'service' for the purposes of the Services Directive. While under primary EU law, economic activities fall within the scope of either the free movement of goods or the free movement of services, the applicability of the Services Directive does not depend on such a prior analysis of the importance of the perspective of freedom to provide services in the light of the particular circumstances of each case. Any such analysis would cause particular difficulties with regard to the retail trade in goods, given that this trade nowadays encompasses not only the

19 See explicitly *Promoimpresa* case, note 17, para. 71.

legal act of sale/purchase but also an increasing range of activities or services that are inter-related. In addition, if a national measure were to be examined simultaneously in the light of the provisions of the Services Directive and those of the TFEU, in circumstances where it would prove impossible to determine whether the perspective of freedom to provide services prevails over that of other fundamental freedoms, that would be tantamount to introducing case-by-case examination, as a matter of primary law, and would thereby undermine the targeted harmonisation effected by the Services Directive.[20]

Next, the Court confirmed explicitly that the provisions of Chapter III of the Services Directive also apply to a situation where all the relevant elements are confined to a single Member State, *i.e.* to purely internal situations. While previous case-law hinted already at this conclusion,[21] the Court put this broad applicability of the Services Directive beyond doubt in *Appingedam*.[22]

Taking these two outcomes together, the scope of the Services Directive has been extended not merely gradually, but even significantly. The resulting regime is somewhat similar to the EU public procurement regime,[23] with the important exception that there is no monetary threshold value involved under the Services Directive. Despite its broadened scope, the existence of an economic activity, *i.e.* any activity consisting in offering goods or services on a given market,[24] remains a prerequisite condition for the applicability of the Services Directive (and the TFEU market freedoms in general). The next question therefore is to what extent the existence of an economic activity is still an indispensable outer boundary for the applicability of the Services Directive. This question has been raised in the *Appingedam* judgment with regard to spatial planning rules. Although these spatial planning rules may affect the access to or the exercise of a service activity, they may also effect individuals who do not pursue an economic activity.

20 *Appingedam* case, note 3, para. 94-96

21 See in particular *Trijber and Harmsen* case, note 16, para. 41-42, where the Court circumvented the issue by adopting a very light standard for cross-border interest, and *Promoimpresa* case, note 17, para. 68, where the Court refrained from giving a preliminary ruling on Article 49 TFEU because a lack of cross-border interest, while it gave a ruling on the Services Directive.

22 *Appingedam* case, note 3, para. 110.

23 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (2004) (2014) OJ L 94/65.

24 See among other judgments: Case C-118/85 *Commission* v. *Italy* [1987] ECLI:EU:C:1987:283, para. 7; Case C-35/96 *Commission* v. *Italy* [1998] ECLI:EU:C:1998:303, para. 36; and Case C-237/04 *Enirisorse* [2006] ECLI:EU:C:2006:197, para. 29.

3. Next chapter: economic law and environmental (planning) law

3.1 Services Directive

Economic law is that part of public law regulating economic activities, while environmental law addresses the effects of human activity on the natural environment. These two legal areas are neither identical nor mutually exclusive. Legal rules on the physical environment may restrict the opportunities for exercising economic activities, even though their primary objective is not the regulation of these activities.

The Services Directive is certainly not immune to environmental considerations in the regulation of services. The protection of the environment and the urban environment, including town and country planning, has been recognised explicitly as an overriding reason relating to the public interest.[25] The Services Directive even states that environmental protection may justify the requirement to obtain an individual authorisation for each installation on the national territory despite the general rule that the authorisation should allow the provider to have access to the service activity, or to exercise that activity, throughout the national territory.[26] By contrast, grounds of a (purely) economic nature do not classify as overriding reasons relating to the public interest.[27]

The distinction between economic and environmental considerations is not always easy to make, as indicated by the classification of an economic test as a prohibited requirement in Article 14(1)(5). In as far as a prior examination is not an economic test as such, but takes into account economic considerations to assess physical impact, such an examination is still open for justification. According to recital 66:

> *Access to or the exercise of a service activity in the territory of a Member State should not be subject to an economic test. The prohibition of economic tests as a prerequisite for the grant of authorisation should cover economic tests as such, but not requirements which are objectively justified by overriding reasons relating to the public interest, such as the protection of the urban environment* [...].[28]

Whereas the Services Directive deals with the freedom of service provision and therefore the exercise of an economic activity, environmental legislation is not restricted to economic activities *per se*. Thus, the relevant issue becomes whether the Services Directive applies to environmental requirements, in particular those in the area of spatial planning, when these requirements affect service providers. Recital 9 of the Services Directive appears to be very relevant for this issue:

> *This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.*

In *Libert*, the Court referred to this recital 9 as well as to Article 2(2)(j) Services Directive to support its reading that the Services Directive does not apply to social housing services.[29] This reference to recital 9 in *Libert* triggered the Dutch Council of State (*Raad van State*) to ask for a preliminary ruling in *Appingedam* on the question whether Article 9, Article 10 and Article 14(5) of the Services Directive, read together with Article 4(6) and (7), and in the light of recital 9 of that directive, must be interpreted as precluding rules contained in a municipal zoning plan from prohibiting the activity of retail trade in goods other than bulky goods in geographical zones, thereby restricting the exercise of certain activities to certain parts of the municipal territory.

25 Recital 40 and Article 4(8) Services Directive, note 1.
26 Recital 59 Services Directive, note 1.
27 Case C-260/04 *Commission* v. *Italy* [2007] ECLI:EU:C:2007:508, para. 35; Case C-384/08 *Attanasio Group* [2010] ECLI:EU:C:2010:133, para. 53-56; and Joined Cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECLI:EU:C:2012:80, para. 59
28 Recital 66 of the Services Directive, note 1. This addition 'as such' reminds of recital 76 of the Services Directive, stressing that the provisions of the Services Directive do not apply to 'goods as such'. In *Appingedam* case, note 3, para. 90, the Court considered that the rules of the zoning plan do not concern goods as such, but the conditions governing the geographical area where activities related to the sale of particular goods can be established and, consequently, the conditions of access to those activities.
29 Joined Cases C-197/11 and C-203/11 *Libert* [2013] ECLI:EU:C:2013:288, para. 103-106.

3.2 Authorisation scheme or (other) requirement?

The first issue addressed by the Court in *Appingedam* is the distinction between authorisation schemes and (other) requirements. According to Article 4(6) of the Services Directive, an 'authorisation scheme' means any procedure under which a service provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof. Article 4(7) defines a 'requirement' as any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States. As said before, the Services Directive contains a more elaborated framework on authorisation schemes (Articles 9-13) as compared to other requirements (Articles 14 and 15). The latter section merely distinguishes between prohibited requirements and requirements that need to be evaluated on the basis of the well-known conditions of non-discrimination, necessity and proportionality.[30]

The definition of a 'requirement' in the Services Directive implies that an authorisation scheme should be considered a *species* of the *genus* 'requirement':[31] an authorisation scheme introduces the *obligation* for service providers to request for permission before the service activity can be lawfully exercised. In other words: an authorisation scheme is a specific requirement that is subject to a more detailed legal regime. However, similarities between both regimes exist, which explains why the Court does not always distinguish strictly between authorisation schemes and (other) requirements. For example, in *Hiebler*, the Court considered that Articles 10(4) and 15(3) of the Services Directive both provide for the possibility of justifying a restriction on freedom of establishment, such as a territorial restriction, and require, for that purpose, compliance with the same conditions, designed to ensure that the restriction (i) does not discriminate on grounds of nationality, (ii) is justified by an overriding reason relating to the public interest and (iii) is suitable for securing the attainment of the objective pursued, does not go beyond what is necessary to attain that objective and may not be replaced by other, less restrictive measures which attain the same result.[32]

In *Appingedam*, however, the Court has reason to distinguish more strictly between authorisation schemes and (other) requirements.[33] According to the Court, a municipal zoning plan is not covered by the concept of an authorisation

30 Article 15(3) Services Directive, note 1.
31 See also C. Barnard, note 7, 356, referring to 'other requirements' than authorisation schemes.
32 *Hiebler* case, note 12, para. 55.
33 *Appingedam* case, note 3, para. 113.

scheme: while a municipal zoning plan offers to service providers the opportunity of developing certain retail trade activities in specific geographical areas, that opportunity is derived not from an expressly worded document obtained by those providers following a procedure that they were required to undertake for that purpose, but from the approval by the municipal council of *rules of general application* to be found in that plan. The Courts adds to this that the possibility to request for a derogation from that plan in the form of a so-called 'environmental permit',[34] does not alter the conclusion that the zoning plan as such is not an 'authorisation scheme' under section 1 of Chapter III.[35] Instead, the Court classifies the municipal zoning plan at stake as a 'requirement' under section 2 of Chapter III, since the effect of a municipal zoning plan that designates an area exclusively for the retail trade in bulky goods, is the *prohibition* of retail trade in other goods in that same area.[36]

3.3 Restrictions for service providers or all individuals?

By considering that the Services Directive 'does not apply to requirements, such as [...] rules concerning the development or use of land, town and country planning, which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity', recital 9 of the Services Directive gives rise to the question whether rules on spatial planning are exempted from the scope of the Services Directive. As said, this doubt had been further strengthened by the *Libert* judgment, where the Court referred to this recital to support its reading that the Services Directive did not apply to social housing services,[37] thereby suggesting that recital 9 might create an exception additional to the services listed in Article 2(2).

In *Appingedam*, however, the Court refuses to consider spatial planning rules as a categorical exception from the scope of the Services Directive. Instead, it proclaims a case-by-case examination of spatial planning rules. According to the Court, recital 9 clarifies that the Services Directive is not applicable to requirements that do not regulate or do not specifically affect the taking up or the pursuit of a service activity, but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals

34 *Appingedam* case, note 3, para. 35.
35 *Appingedam* case, note 3, para. 115.
36 *Appingedam* case, note 3, para. 120.
37 *Libert* case, note 29, para. 103-106.

acting in their private capacity.[38] The Court continues by emphasizing that the specific subject matter of the rules in the municipal zoning plan at stake, even if their objective is to maintain the viability of the city centre of the municipality and to avoid there being vacant premises within the city as part of a town and county planning policy, *remains that* of determining the geographical zones where certain retail trade activities can be established. Those rules are therefore addressed only to persons who are contemplating the development of those activities in those geographical zones, and not to individuals acting in their private capacity.[39] The Court further explains its reference to recital 9 in *Libert* by emphasizing that irrespective of this reference, social housing services were covered expressly by the exclusion of Article 2(2)(j) of the Services Directive, for which reason the Court had held that the Services Directive was not applicable to the measure at stake.[40]

Consequently, a spatial planning rule in a municipal zoning plan that determines the geographical zones where certain retail trade activities can be established, is a requirement that either is prohibited (Article 14) or should be justified (Article 15). Since the zoning plan at stake does not involve the case-by-case application of an economic test, but amounts to a territorial restriction, it needs to be justified and should therefore be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.[41]

3.4 Analysis

With regard to spatial planning rules, the *Appingedam* judgment makes clear that two issues need to be distinguished: the individual or general character of the rule and the specific subject matter of the rule.

The individual or general character of the rule seems decisive for the Court to distinguish authorisations schemes from other requirements: the opportunity to offer services is either derived from an expressly worded document obtained by those providers following a procedure that they were required to undertake for that purpose (authorisation) or from the approval by the municipal council of rules of *general* application to be found in a municipal zoning plan (requirement). It is worth mentioning that advocate general Szpunar identified three characteristics of authorisations: the service provider (1) needs to request a decision from an authority, (2) receives a decision addressed to it *in concreto*

38 *Appingedam* case, note 3, para. 123.
39 *Appingedam* case, note 3, para 124.
40 *Appingedam* case, note 3, para. 125.
41 *Appingedam* case, note 3, para. 127-132.

and (3) that decision and the compliance therewith is a prerequisite for the service provider to commence its activity.[42] Although this distinction between decisions *ex ante* and *in abstracto* (zoning plan) and at request and *in concreto* (authorisation) is not followed explicitly by the Court, the line of reasoning is roughly similar.

The Court considers explicitly that the possibility to request a derogation from the zoning plan does not alter the conclusion that a zoning plan as such is not an authorisation scheme. This remark, although understandable, directly raises a new question: how should such an individual derogation from a zoning plan be classified? On the one hand, following the three characteristics identified by advocate general Szpunar, it can be argued that such an 'environmental permit', derogating from general rules in a zoning plan, meets these three characteristics: (i) the service provider needs to request for derogation from the zoning plan, (ii) the derogation decision allows for an individual exception to the general rule in the zoning plan and (iii) this derogation decision and compliance therewith is a prerequisite for the service provider to commence its activity, at least within that particular area. On the other hand, it has been suggested that such a derogation from a zoning plan does not intend to regulate a specific (economic) activity, but to protect the interest of good regional planning.[43] It can be doubted whether this intention is sufficient to warrant the conclusion that an environmental permit for derogation from the zoning plan is not an authorisation within the meaning of the Services Directive. In this regard, it is worth repeating the Court's argument that even if the *objective* of the rules is to maintain the viability of the city centre of the municipality as part of a town and county planning policy, the specific *subject matter* of the rules remains that of determining the geographical zones where certain retail trade activities can be established. Following the same line of reasoning, it can be argued that even if the objective of a derogation is to be found in the interest of good regional planning, the effect of such a derogation is to allow for a specific economic activity for which the derogation is requested.

Thus, when it comes to the specific subject matter of the rule, an individual derogation - just like a general zoning plan - needs to be assessed on a case-by-case basis as to whether it specifically affects the access to or the exercise of a service activity. This specific effect for service providers might be absent in cases where the zoning plan contains a general rule on, e.g., the maximum

42 Joined Cases C-360/15 and C-31/16 *X BV and Visser Vastgoed Beleggingen BV* v. *Raad van de gemeente Appingedam* [2018] ECLI:EU:C:2017:397 (Opinion of AG Szpunar), para. 126.
43 A.G.A. Nijmeijer, 'Dienstenrichtlijn en bestemminsplan. Over een 'goede ruimtelijke ordening' en de 'twijfel aan de juistheid'-toets' (2018) 1 Tijdschrift voor Omgevingsrecht, 33.

height of buildings: everyone who builds a work, needs to comply with this rule on maximum height. By contrast, in cases where a zoning plan excludes retail trade of certain goods in specific geographical areas, any individual derogation from that zoning plan also specifically affects the access to or the exercise of a service activity and might therefore classify as an authorisation.

4. Concurring national developments

4.1 Need for economic activity?

While not all questions have been answered yet by the Court in *Appingedam*, the actual impact of this judgment for national jurisdictions depends on the implementation strategy adopted by the respective Member State. In as far as Member States have already adopted a broad interpretation of 'services', covering 'trade in goods' as well, the impact of this judgment is limited. Likewise, if Member States have already applied the provisions of Chapter III of the Services Directive to purely internal situations as well, this judgment will not heavily impact their administrative practices.

At the same time, the *Appingedam* judgment also makes clear that there is an area to which the Services Directive does *not* apply. Apart from excluded services,[44] the Services Directive does not cover requirements which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity. The *Appingedam* judgment shows that this can be – but not necessarily is – the case with rules of spatial planning. National case-law shows that this may also hold, e.g., for the authorisation of mooring a vessel[45] or for a parking permit, since the activity of mooring a vessel or parking a car can be exercised equally by both service providers and (other) citizens. Thus, despite the broad applicability of the Services Directive after *Appingedam*, the overarching concept of an economic activity still acts as an outer boundary beyond which the Services Directive does not apply. The resulting question is which (domestic) legal regime applies to the assessment of a zoning plan or the grant of an individual derogation thereof if the Services Directive does not apply. This question has been debated quite intensely in Dutch case-law recently.

44 These excluded services are covered by either sector-specific EU legislation (e.g. telecommunications) or the primary market freedoms of the TFEU (e.g. gambling).

45 Administrative Jurisdiction Division of the Council of State 1 February 2017, ECLI:NL:RVS:2017:235.

4.2 Limited authorisations under domestic law

In 2016, the Dutch Council of State developed a general legal framework on the issuing of a limited number of authorisations in its landmark judgment *Arcade hall Vlaardingen*.[46] This legal framework was derived from the general principle of equality, which in this context requires equal opportunities to be offered. Because of this legal basis in a national principle, the resulting allocation framework applies irrespective whether the authorisation at stake has (certain) cross-border interest or not. First, the Council of State confirmed the existence of a legal obligation in domestic law for public authorities to create opportunity for competition to potential applicants to compete for the available licence(s). Secondly, limited-issued authorisations can, in principle, only be granted temporarily to avoid giving licensees a disproportionate advantage and deprive newcomers of the possibility to enter the market. Next, the Council of State made clear that the obligation to offer room for competition can be restricted, either by legislation with respect to the limited authorisation scheme itself or by other legislation, e.g. spatial planning legislation, applying to the exercise of the activity at stake. Nevertheless, according to the Council of State, such a restriction cannot go as far as to entirely exclude any competition opportunity. In any case, the legislation itself or its legislative history should make clear that the interest of creating competition has been weighed against other interests. Finally, the Council of State made clear that in order to realise equal opportunities, public authorities should ensure a sufficient degree of advertising regarding the availability of the licence, the allocation procedure, the application period and the applicable criteria. Timely before the start of the application procedure, the authorities should create clarity by disclosing information on these aspects through a medium which enables potential applicants to take notice thereof.

It is worth mentioning that the Council of State, although using the familiar EU law phrase of 'a sufficient degree of advertising', did not refer to the EU 'obligation of transparency' or Article 12 Services Directive when formulating its general legal regime on limited authorisations.[47] However, in one of its first subsequent judgments on limited authorisations, the Council of State admitted that its 'national' requirement of a sufficient degree of advertising as developed in *Arcade hall Vlaardingen* was based on the obligation of transparency in the Court's case-law, thereby connecting its national regime with its EU law equivalent. What is more, the Council of State stated explicitly that this domestic allocation regime applies both to economic and non-economic

46 Administrative Jurisdiction Division of the Council of State 2 November 2016, ECLI:NL:RVS:2016:2927 (*Arcade hall Vlaardingen*).

47 *Arcade hall Vlaardingen*, note 46, para. 8.

activities.[48] This 'extension' of the national allocation regime to non-economic activities was possible since the general principle of equality - instead of the TFEU market freedoms - had been chosen as the overarching principle from which the obligation of transparency and the requirement of a sufficient degree of advertising derive in a domestic context.

4.3 Competition and transparency in spatial planning?

While this domestic allocation regime introduced the need for 'competition' and 'transparency' in the context of limited authorisations, irrespective whether the activity at stake is economic or not, *Arcade hall Vlaardingen* left unanswered the question to what extent this domestic allocation regime did also apply to spatial planning decisions. There were already some indications that spatial planning decisions should not be exempted from this allocation regime in advance. For example, the Council of State had already been willing to subject an environmental permit for deviating use to its allocation regime in cases where there is a strong connection between an operating licence limited in number and an environmental permit.[49] However, the general relationship between limited authorisations, competition, transparency and spatial planning decisions remained unclear. Therefore, the Council of State asked its Advocate General to give an opinion on the question whether limited rights occur in spatial planning law, and, if so, which allocation rules apply to these limited rights. In particular, the Council of State asked whether the *Appingedam* judgment of the Court on the Services Directive makes a difference in answering these questions.

Advocate General Widdershoven concluded in his opinion[50] that a zoning plan does not involve the allocation of limited rights. A zoning plan, according to Article 3.1 of the Law on Spatial Planning (*Wet ruimtelijke ordening*), designates how land concerned is to be used and lays down rules for that purpose in the interests of good regional planning. At most, such a zoning plan can involve a territorial or quantitative restriction when limiting the area or the number of locations where a certain activity can take place. What is more, the Advocate General concluded that an individual environmental permit for use of a certain location deviating from the applicable zoning plan, does, as a rule, neither involve the allocation of limited rights, since usually there will be only one candidate for this environmental permit of deviating use of a certain location:

48 Administrative Jurisdiction Division of the Council of State 12 April 2017, ECLI:NL:RVS:2017:994.
49 Administrative Jurisdiction Division of the Council of State 27 September 2017, ECLI:NL:RVS:2017:2611 (*Arcade hall Helmond*).
50 Opinion of AG Widdershoven, 6 June 2018, ECLI:NL:RVS:2018:1847 (*Windpark Zeewolde*).

the person who has the possession of this location. Therefore, a situation where the number of applicants exceeds the number of available rights cannot occur. Only in some well-defined, very particular circumstances, such as when there is a strong connection between this environmental permit and an operating licence that is available in limited number only, the environmental permit for deviating use can be considered a limited right, according to the Advocate General. Consequently, only in those particular circumstances, the granting of environmental permits is subject to the domestic allocation regime as developed in *Arcade hall Vlaardingen*, including the obligation of limited duration and the requirement of a sufficient degree of advertising.[51]

The foregoing conclusions do solely relate to the domestic allocation regime. Considering the relevance of the Services Directive for these spatial planning rules, the Advocate General adopts a rather cautious approach. With reference to *Appingedam*, he adopts the view that a zoning plan does not classify as an authorisation scheme within the meaning of the Services Directive. Hence, there is no need to answer the question whether the number of authorisations is limited and whether Article 11 or 12 applies. Instead, a zoning plan that limits the number of locations for an economic activity, is a quantitative restriction that specifically affects service providers and should be evaluated under Article 15 of the Services Directive.[52]

Admittedly, even if a zoning plan limits the number of locations where a particular (economic) activity can take place, the number of authorisations is not limited, since there is no authorisation to be granted: the service provider does not need to request for individual derogation from the zoning plan, whereas an explicit derogation decision and compliance therewith is not a prerequisite for the service provider to commence its activity. Instead, as long as the intended use of the location is in conformity with the zoning plan, the service provider is free to exercise his activity. However, if the number of locations for a certain economic activity, e.g. the exploitation of an arcade hall, is limited to a maximum in this zoning plan, this limitation amounts to the allocation of a limited number of *rights*, even if these rights have not been requested for in the form of an

51 In his opinion, Advocate General Widdershoven further explores whether these rules on limited authorisations can be applied one-to-one to environmental permits. Into more detail, see C.J. Wolswinkel, 'Schaarse rechten in het omgevingsrecht? Een tegenconclusie voor de rechtsontwikkeling' (2018) 3 *Tijdschrift voor Omgevingsrecht*, 109-121.
52 *Windpark Zeewolde* Opinion, note 50, para. 4.4. In its judgment in this case, the Council of State did not discuss these general findings of the Advocate General, but merely concluded that the award of limited public rights in the specific sense of exclusive public rights was not at stake in this particular case (Administrative Jurisdiction Division of the Council of State 19 December 2018, ECLI:NL:RVS:2018:4198).

authorisation. If in addition to the limited number of locations, these locations have been specified already in the zoning plan, only the services providers whose location has been designated for the particular economic activity, can commence this activity, whereas other service providers are excluded from commencing this activity.

Thus, when following the distinction between authorisations and other requirements as introduced in the Services Directive, zoning plans with general rules of application fall within the scope of 'requirements'. However, this does not mean that the establishment of a zoning plan cannot be subject to specific allocation rules if this plan limits the exercise of certain economic activities to a limited number of locations, thereby creating limited rights. What is necessary, therefore, is an 'extension' of the allocation rules in Article 11 and 12 Services Directive from limited authorisations, issued at request, to limited rights in general, either requested for or granted *ex officio*. These allocation rules could imply the obligation for administrative authorities to create a sufficient degree of advertising prior to the establishment of a zoning plan, such that interested parties can show their interest in the limited number of locations that will be designated, or even to the duration of such a zoning plan. Since these allocation rules cannot be derived directly from Articles 11 and 12 Services Directive because of the lack of an authorisation scheme, their legal basis can be found in the general justification criteria of non-discrimination, necessity and proportionality in Article 15 Services Directive. For example, if a zoning plan has been established without providing for sufficient opportunities in advance for interested parties to compete for or at least comment on the intended designation of a limited number of locations for a certain economic activity, this zoning plan is a disproportionate requirement within the meaning of Article 15.

Unlike zoning plans, authorisation schemes form a separate category in the Services Directive with a specific set of rules that takes into account the characteristics of authorisation, e.g. its duration. Whereas a zoning plan that specifically affects service providers might classify as a 'requirement', an individual permission to deviate from a general zoning plan, might classify as a service authorisation. Even if it is argued that the subject-matter of an environmental permit is not the regulation of an economic activity, but the interest of a 'good regional planning', the *effect* of granting an environmental permit for deviating use to a service provider would be facilitating an economic activity at a specific location. Thus, these environmental permits might classify as service authorisations. What is more, once it is accepted that these individual derogations from a zoning plan constitute authorisations, these authorisations, if limited in number from the perspective of a 'good regional planning', can fall within the scope of Article 12 of the Services Directive: while most limited authorisations for economic activities have been considered 'artificially limited authorisations' until now, such environmental permits dealing with the use of limited land might perfectly classify as limited authorisations because of scarcity of available natural resources.[53] However, Advocate General Widdershoven has adopted the view that the number of these environmental permits is, as a rule not limited, since only one potential candidate, i.e. the person who possesses the location at stake, can apply for this permit successfully.[54]

This being said, it is clear that the Services Directive cannot provide for an all-inclusive legal framework on spatial decisions that involve the allocation of a limited number of rights. Spatial decisions that do not affect specifically the freedom of establishment of service providers, will remain outside the scope of the Services Directive.

5. Looking at the neighbours: frequency planning

While exploring the legal regime applicable to spatial planning, it can be useful to analyse planning regulation in other areas. One fruitful area in this respect is frequency management in telecommunications law. There is an elaborated system of frequency planning, at both the international and national level, which finally accumulates in a (national) frequency plan. The Radio Regulations of the International Telecommunications Union (ITU) make a consistent distinction between allocation, allotment and assignment.[55] Allocation is the distribution of frequency bands over services, allotment is the distribution of frequency bands over countries or geographical areas and assignment is the distribution of frequency bands over radio stations. Thus, assignment amounts to individual authorisation given by an administration for a specific radio station to use a radio frequency under specified conditions. In the national frequency plan, functions (broadcasting, mobile communications, etc.) are finally allocated to the different frequency bands. What is more, the Dutch frequency plan also has to specify the assignment method (auction, beauty contest, etc.) to be followed for a specific frequency band.[56] These requirements to specify both function and distribution method contribute to transparency in advance on the possible use of frequencies.

53 Strikingly, environmental law is sometimes referred to as 'environmental and natural resources law'. See for example E. Pearson, *Environmental and Natural Resources Law* (LexisNexis, 2012).
54 *Windpark Zeewolde* Opinion, note 50, para. 4.4.
55 Articles 1.16 – 1.18 ITU Radio Regulations (2016).
56 See Article 3.1 Telecommunications Act.

What could transparency look like in the process of allocating functions (services) to locations (space) instead of individual spectrum rights to individual applicants? In this respect, it may be useful to consider the Framework Directive in the area of telecommunications law.[57] Article 6 on 'Consultation and transparency mechanism' requires Member States to ensure that where national regulatory authorities intend to take measures in accordance with the Framework Directive or other telecommunications directives (including the Authorisation Directive) which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period. Article 7 of the Authorisation Directive[58] puts beyond doubt that such significant impact exists in cases where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies. In those cases, a Member State must give all interested parties, including users and consumers, the opportunity to express their views on any limitation in accordance with Article 6 of the Framework Directive.

In spatial planning, the situation is a bit different. Whereas the radio spectrum is not owned by private parties, land can be owned by private parties. If a limitation to the number of radio spectrum rights needs to be consulted explicitly according to the Authorisation and Framework Directive, this obligation should apply *a fortiori* to a limitation of an economic activity to a maximum in a zoning plan. What is more, if the zoning plan does not only limit the number of locations, but also designates these locations, then the establishment of a zoning plan should even be subject to stricter rules than those applying to a frequency plan, in particular by an obligation to create competition opportunities for candidates who are willing to exercise the economic activity at stake. While the establishment of the frequency plan still allows for competition in the next stage where the individual authorisations (spectrum rights) for that specific designation are granted, there is no next stage when the establishment of the zoning plan includes already the designation of the 'winners', *i.e.* those who can profit from the designation in the zoning plan.

57 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002) OJ L 108/33.

58 Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (2002) OJ L 108/21.

6. Concluding remarks

Economic law and environmental law are more intertwined than would be expected at first sight, since economic activities can also have a (significant) impact on the natural environment. Because both legal areas are neither coinciding completely nor mutually exclusive, a case-by-case approach is necessary to assess which spatial planning rules are within the scope of the Services Directive and the TFEU market freedoms in general.

In as far as (spatial) planning is concerned, there is a need for better understanding of the dividing line in the Services Directive between authorisations and other requirements. The functioning of general rules of application in a zoning plan cannot be understood completely if the possibility to derogate from these general rules is neglected. Thus, the dynamics between authorisations and other requirements should be recognized.

Next, while all other requirements than authorisation schemes are currently subject to a similar set of (general) conditions, this article suggests the need to further differentiate between categories of requirements. In particular, a relevant issue is to what extent principles of 'competition' and 'transparency', which are recognized explicitly in the context of authorisation schemes, can also play a role in the adoption of planning rules (or other requirements). The EU telecommunications framework gives some suggestions on the possibilities to incorporate transparency in the adoption of planning rules. Especially if the allocation of functions to locations implies the assignment of locations to individual parties, there is a need to further incorporate competition opportunities in the adoption of spatial planning rules.

Chapter 4:

Free Trade Agreements Have Bitten Off More than They Can Chew - Analysing the Problematic Allocation of Competences between the EU and the Member States and Suggesting a Way Forward

Titiaan Keijzer,[*] Edoardo Martino[**] and Alberto Quintavalla[***]

1. Introduction

Trade relationships have gained abundant political momentum and media coverage in the last decade. This holds true particularly for the European Union (EU), which occupies a prominent role in terms of volume of inflowing and outflowing goods and cross-border services.[1] In maintaining and increasing its position of strength, the EU has recently been executing on a rather active strategy, especially when it comes to third countries.[2] However, the complicated multi-level governance structure of the EU and the resulting allocation of competences between EU institutions and Member States (MSs) makes the conclusion of these trade agreements increasingly difficult. Indeed, in negotiating such agreements, the EU seeks to foster a common strategy while respecting the division of competences as established by the Treaties.

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1 Arguably, the prominence of the EU has increased further as a result of the reserved attitude of the US in concluding trade agreements in recent years. See note 8.

2 See note 13.

Unsurprisingly, some mutual tensions have arisen, endangering the EU position vis-à-vis not only MSs and citizens, but also third parties. Indeed, because of EU multilevel governance, the Free Trade Agreement (FTA) counterparty might fear a certain degree of uncertainty in the implementation and enforcement of negotiated terms.[3]

In this chapter, we revisit the EU trade strategy with a particular focus on Free Trade Agreements, highlighting the expansive nature of the EU with regard to the allocation of competences between the EU itself and the MSs in the area of corporate law.[4] Our argument is supported by the recent EU-Singapore agreement,[5] of which the implementation would require MSs implementing corporate law reforms transcending EU competences.

In explaining the reasons for such a situation we employ the so-called "capability-expectation gap" theoretical framework, developed by Christopher Hill.[6] Following Hill, we highlight a gap between the expectations and the actual capabilities of EU trade policy in corporate law. As our analysis will show, such a gap is mainly rooted in two factors. On the one hand, this concerns the difficulty to agree between MSs; on the other, it relates to the limited legislative competences at the disposal of the EU to sign and implement comprehensive FTAs and effectively ensure a level playing field between MS.

The paper is structured as follows. Section 2 reviews EU trade policy in general, setting the stage for the subsequent analysis by drawing a picture of the policy-making playing field, the actors and the interests involved. The section also discusses how this study can contribute to a better understanding of EU trade policy. Section 3 conducts an in-depth analysis on the right of establishment under European and Dutch corporate law and studies (in)consistencies of some of these provisions with the recently concluded EU-Singapore FTA. Corporate law is particularly relevant in this respect, as it reflects, to a considerable degree,

3 Although we acknowledge that implementation and enforceability are not exclusively EU-issues.

4 This tendency is not limited to trade policy, as the literature on covert integration encompasses a wider range of policies, see A. Héritier, 'Covert integration in the European Union', in J. Richardson and S. Mazey (eds), *European Union: Power and policy-making* (4th edn, Routledge 2015), 351; Specifically on trade, see S. Meunier and K. Nicolaïdis. 'The European Union as a conflicted trade power' (2006) 13 Journal of European Public Policy, 906.

5 Free Trade Agreement between the European Union and the Republic of Singapore, April 2018 (EU-Singapore FTA).

6 C. Hill, 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role' (1993) 31 Journal of Common Market Studies, 305; and C. Hill 'Closing the Capability-Expectations Gap?' in J. Peterson and H. Sjursen (eds), *A Common Foreign Policy for Europe? Competing Visions of the CFSP* (Routledge 2005), 19. The capability-expectations gap has been – originally – employed to explain the status of EU Foreign Policy.

national socio-economic preferences.[7] In fact, Section 3 aims to show that MSs may feel pressured to make legal changes to implement the signed FTAs, even without being strictly required to do so according to the EU-MSs division of competences. Section 4 employs the seminal capability-expectation gap theory as the lense through which our problematic state of affairs is analysed. This framework suggests that the current limited EU competences can scarcely serve the EU's international behaviour, leading to a lack of coherence between internal and external actions. Thus, FTAs go further than their literal texts suggest and require more actions than the EU can mandate to MSs. In this sense, the EU, through FTAs, has bitten of more than it can chew. Additionally, Hill's framework indicates what steps could be useful for reducing the capability-expectation gap. These measures may also serve as a reference for the improvement of EU free trade policy in the eyes of EU citizens and third parties. An option for the long run would be to grant the EU additional powers for concluding FTAs, as to prevent competition between MSs. Finally, Section 5 concludes.

2. The EU international trade relations negotiating position

2.1. The merchant and the vicar

The EU represents one of the most important players on the current international trade scene, accounting for over €2000 billion in both imports and exports.[8] In maintaining and fostering such leadership, it is no coincidence that the EU has started playing a prominent role in large-scale negotiations at the WTO, as well as in inter-regional negotiations such as, for example, the Mercosur Free Trade Agreement.[9]

7 More background on this specific matter is discussed in Section 3.1.

8 Data retrieved at European Commission, 'EU position in world trade', available at: http://ec.europa.eu/trade/policy/eu-position-in-world-trade/ (accessed 15 May 2018).

9 M. Smith, 'The European Union's commercial policy: between coherence and fragmentation' (2001) 8 Journal of European Public Policy, 787, 788.

Trade in goods and commercial services 2013, € billions		
Country or region	**Imports**	**Exports**
EU	2188	2415
United States	2079	1688
China	1716	1817
Japan	750	648
South Korea	468	506

Source: Eurostats WTO

Figure 1

Bilateral negotiations, in particular, have recently become the core of EU trade policy. This shift has been linked to several factors, both structural and conjunctural. For instance, the inherent complexities of multilateral negotiations make it easier to conclude Preferential Trade Agreements (PTAs) with single jurisdictions.[10] In parallel, the termination of the 'Lamy doctrine' – a *de facto* moratorium on new PTAs in favour of a multilateral strategy – has led to new momentum in negotiating PTAs.[11] In so doing, in recent years, the EU has started actively pursuing a somewhat newer kind of PTAs – which are the focal point of the present contribution, the so-called Free Trade Agreements (FTAs). Since the announcement of the 'Global Europe' Strategy in 2006,[12] EU FTAs have been negotiated with Canada (CETA), South Korea, Singapore and Vietnam, while others are still being drafted.[13] The increasing number of FTAs shows the necessity felt by the EU not to limit itself to multilateral trading systems. Subsequently pursuing bilateral and regional agreements would allow – from an economic perspective – for the promotion of openness and integration in a smaller, more closely connected area.[14]

However, merely highlighting the economic aspects of FTAs would account only for a partial narrative of the overall EU strategy. Indeed, the economic significance of FTAs goes hand in hand with a further element of the EU political agenda that broadens their scope. The newly concluded EU FTAs seek in fact

10 S. Woolcock, 'EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims' (2014) 20 European Law Journal, 718, 721.

11 S. Gstöhl and D. Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20 European Law Journal, 733, 744.

12 European Commission, 'Global Europe: competing in the world. A contribution to the EU's Growth and Jobs Strategy' (Communication) COM(2006) 567 final.

13 European Commission, Overview of FTA and other trade negotiations (October 2018), available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 25 June 2018).

14 See K. Holzinger and F. Schimmelfennig, 'Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data' (2012) 19 Journal of European Public Policy, 292.

to combine, unlike US FTAs, economic benefits with diverse interests not directly linked with trade.[15] In this vein, the EU approach consists of using trade agreements as leverage to promote European fundamental values around the world.[16] Apparently, the EU has a vested interest in harmonizing external trade relationships while promoting "the respect of human rights, labour standards, the environment, and good governance, including in tax matters".[17] Enhancing minimum standards in the political and social realm – starting from the somewhat proud assumption that EU standards are generally of a higher level than those of its trade partners –impacts the EU's external and internal dimension. With regard to the former, the EU seeks to provide non-EU citizens with the ability to monitor compliance with the regulations in force, ultimately ameliorating their rights.[18] As to the latter, while exporting standards, the EU also intends to protect European producers and citizens.[19] These standards, which are of an allegedly higher level and thus more costly, in other words act as a guarantee to equalize regulatory burdens between EU and non-EU actors, thus leading to a (better) level playing field for all economically involved.

2.2 A complex web of competences

An additional element of trade policy concerns the EU competence versus the competences of the MSs to negotiate and conclude FTAs. Since its inception, the EU has acted with a single external voice in international trade negotiations.[20] This was certainly due to the limited scope of the matters initially covered and the inherent features of a Common Market, namely its supranational character and the unity of external representation. However, current commercial policy-making hinges on a wide array of subjects, each provoking tensions concerning competence and accountability.[21] It is no coincidence that the Treaty on the Functioning of the European Union (TFEU) – and particularly Article 21 – has subordinated trade policy to a vast array of EU objectives, thus making various

15 H. Horn, P.C. Mavroidis and A. Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33 The World Economy, 1565.

16 European Commission, 'Trade for all. Towards a more responsible trade and investment policy' (Publications Office of the European Union, 2015), available at: https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (accessed 15 May 2018).

17 European Commission, 'Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy' (Communication) COM(2010) 612 final, 15.

18 S. Gstöhl and D. Hanf, note 11, 746.

19 M. Garcia, 'From Idealism to Realism? EU Preferential Trade Agreements Policy' (2013) 9 Journal of Contemporary European Research, 521, 530.

20 S. Meunier and K. Nicholaïdis, 'EU Trade Policy: The Exclusive versus Shared Competence Debate' in M. Green Cowles and M. Smith (eds), *The State of the European Union: Risks, Reform, Resistance, and Revival* (OUP 2000), 326.

21 M. Smith, note 9, 789.

amendments as to the competences for the conclusion and implementation of FTAs. Additionally, new FTAs might be too ambitious in terms of economic integration compared to the current legislative framework of individual MSs. These MSs have to support the EU trade policy through structural and political reforms, but may fear to partially lose their grip on national laws.[22] Consequently, in recent years, MSs have not always welcomed this transfer of sovereignty. The institutional setup has then resulted in a precarious equilibrium between the EU institutions and the MSs.

To address this issue, the European Court of Justice (ECJ) has been requested to deliver a preliminary ruling, formally in relation to the EU-Singapore FTA, that might impact pending and future FTA negotiations as well. On December 21, 2016, Attorney-General (AG) Sharpston concluded that the EU-Singapore FTA was a "mixed agreement", which could only be concluded by the EU and the MSs acting jointly.[23] According to the AG, the hybrid character of the FTA related to matters of non-Foreign Direct Investment (non-FDI) and dispute resolution. The latter includes the Investor-State Dispute Settlement (ISDS) mechanism, entailing ad-hoc arbitrage, or a more permanent Investment Court System (ICS) mechanism.[24] The ECJ later upheld the view of the AG.[25] Somewhat more cynically, one might observe that ISDS and especially ICS mechanisms could circumvent the jurisdiction of the monopolistic ECJ in interpreting law on the flow of capital, goods and services between economically integrating countries or regions, and that the ECJ would thus be using legal arguments as countermeasures to safeguard its position. Although some scholars suggest that, given current EU and WTO law, the legal effects of FTAs are necessarily limited,[26] our contribution claims that indirectly, these may yield relevant consequences and therefore, have to be take into consideration.

Under these circumstances, one may acknowledge that EU external trade policy is a rather complicated area in terms of the institutions involved in the decision-making process, FTAs not being an exception.[27] As a result, EU international economic relations should be considered a complex and dynamic web of competences, in line with the well-known institutional model of multi-level

22 See Section 3.
23 Opinion 2/15 *Singapore FTA* [2016] ECLI:EU:C:2016:992 (Opinion of AG Sharpston).
24 See e.g. Chapter 14 of the EU-Singapore FTA, note 5.
25 Opinion 2/15 *Singapore FTA* [2017] ECLI:EU:C:2017:376 (Opinion of AG Sharpston).
26 A. Semertzi, 'The Preclusion of Direct Effect in the recently concluded EU Free Trade Agreements' (2014) 51 CMLRev, 1125.
27 M.S. Reichert and B.M.E. Jungblut, 'European Union external trade policy: Multilevel principal-agent relationships' (2007) 35 The Policy Studies Journal, 395, 396.

governance.[28] These political dynamics can only be understood by taking into account the complex web of relationships among EU institutions and the MSs.

2.3 The focus of interest

In parallel, the current EU approach of integrating moral interests with mere economic ones has placed FTAs at the centre of public attention.[29] The conclusion of new trade agreements has indeed become an area of contentious politics where anti-globalisation claims and a push towards more transparency are put forward.[30] Besides, the Lisbon Treaty, altering the distribution of competences, may have caused confusion and consequently, problems of inconsistency. In other words, broadening the scope of trade agreements has made the process of negotiating and approving FTAs more cumbersome and more susceptible to inconsistencies.[31] Against this background, we are witnessing a scenario where the capabilities of the EU vis-à-vis the competences of MSs cannot well serve the ambitions of the EU's international trade strategy.

Apart from some generally formulated exceptions,[32] such lack of coherence between the external and internal EU sphere (vis-à-vis third parties and amongst MS, respectively) seems at least partially overlooked by the current literature. On the one hand, the bulk of the (economic) research has mainly focused on the welfare effects of FTAs.[33] For instance, Jean *et al*. evaluate the impact on the Chilean economy of the EU-Chile Free Trade Agreement.[34] Similarly, Magrini *et al*. assess the causal impact of EU trade preferences in southern Mediterranean countries.[35] On the other hand, a (legally-based) strand of the scholarship has aimed at assessing the impact of FTAs on the legal system of developing countries.[36]

28 G. Marks, L. Hooghe and K. Blank, 'European integration from the 1980s: State-centric v. Multi-level Governance' (1996) 34 Journal of Common Market Studies, 341.
29 J. Beyers and B. Kerremans, 'The press coverage of trade issues: a comparative analysis of public agenda-setting and trade politics' (2007) 14 Journal of European Public Policy, 269.
30 M.S. Reichert and B.M.E. Jungblut, note 27.
31 S. Gstöhl and D. Hanf, note 11, 745.
32 M. Smith, note 9.
33 J-J. Hallaert, 'Proliferation of preferential trade agreements: Quantifying its welfare impact and preference erosion' (2008) 42 Journal of World Trade, 813.
34 S. Jean, N. Mulder and M.P. Ramos, 'A general equilibrium, ex-post evaluation of the EU-Chile Free Trade Agreement' (2014) 41 Economic Modelling, 33.
35 E. Magrini, P. Montalbano and S. Nenci, 'Are EU trade preferences really effective? An impact evaluation assessment of the Southern Mediterranean Countries' case' (2017) 31(1) International Review of Applied Economics, 126.
36 K. Baltzer, 'Institutional and policy adjustments to implement Free Trade Agreements with the European Union: A developing country perspective' (2015) No. 2015/127 WIDER Working Paper, available at: http://www.econstor.eu/handle/10419/129458 (accessed 27 October 2018).

This chapter, instead, seeks to investigate the new FTAs from an internal perspective, namely that of a MS. More precisely, it intends to demonstrate that some aspects of FTAs concluded by the EU are, on closer review, too ambitious in terms of economic integration compared to the current legislative framework. In fact, the implementation of FTA norms in MSs might imply a level of legal harmonization which falls beyond the level mandated by the Treaties. To prove this point, in the next section, we critically analyse the norms addressing the right of establishment in relation to cross-border mergers & acquisitions (M&A) under the EU-Singapore FTA vis-à-vis the relative competences of EU and Dutch law. In so doing, it will be possible to provide a clearer understanding of what can (and shall) actually be the role of the EU in international economic law.

Besides, the internal division of competences between the EU and its MSs is not negligible in the external sphere. Third states as well as outside parties – say, EU citizens – may be rather interested in clearly identifying the responsibilities of those involved at the EU and national level. Third states could determine what concessions might be obtained when it comes to negotiating FTAs, whereas EU citizens gain a deeper understanding of whom to hold accountable for the specific decisions adopted. In so doing, although the EU may speak with one single voice, it would also be possible to identify the institutional ownership of specific policy issues.

3. FTAs in practice: the right of establishment for corporations

3.1 Introduction

The expanding nature of FTAs is not only external, e.g. targeted at enhancing (*latu sensu*) the implementation of human rights in the legal framework of trade partners. FTA law can have expanding effects even at intra-EU level, pushing MSs to harmonize their legislation beyond the level required by the Treaties. A paradigmatic example of this argument is offered by juxtaposing the right of establishment, as granted by FTAs, with a corporate law perspective.[37] Corporate law is particularly relevant concerning global developments such as FTAs, as it reflects to a considerable degree – apart from provisions inspired by EU law – national socio-economic preferences. Indeed, even though the "anatomical elements" of corporate form are to a large extent uniform, a considerable degree of heterogeneity (and even divergence) has been highlighted by recent

37 In this chapter, and for length-constraint purposes, we take adopt the perspective of Dutch corporate law. For the sake of a more in-depth analysis, it would be nonetheless feasible to broaden the argument to different corporate law regimes or other fields of socio-economic law affected by FTA requirements.

scholarship.[38] In other words, the path of convergence forecasted at the beginning of the new millennium[39] has not come to fruition, primarily because of social preferences of specific jurisdictions.[40] To illustrate the FTA effects, we analyse the right of establishment under FTA law and subsequently focus on two specific issues: (a) cross-border mergers and conversions and (b) schemes protecting the national systems of corporate law of the MSs. These two aspects, if examined together, show the extent to which national authorities shall become more proactive and adapt domestic legislation to the newly concluded FTAs.

3.2 Right of establishment under FTA law

Chapter 8 of EU-Singapore FTA deals with the right of establishment of legal entities. Although the right of establishment usually concerns only juridical persons, the newly concluded FTAs also consider self-employed natural persons.

Juridical persons, as defined in Article 8.2 (b) and (c) of the EU-Singapore Agreement, encompass a wide range of entities, including corporations, trusts, partnerships, joint ventures and sole proprietorships.[41] For such entities to be able to invoke provisions of an FTA (i.e. the right of establishment), several conditions must be met. First, it is necessary to be validly incorporated under the national laws of either of the Party States, including the EU MSs. Secondly, entities are required to have their registered office, central administration or principal place of business in one of the Party States.[42] When the juridical person merely maintains a registered office or central administration in one of the Party States, it shall not be considered a qualified juridical person, unless it also engages in substantive business operations.[43] This is the (optional) third

38 L. Enriques, 'A Harmonized European Company Law: Are We There Already?' (2017) 66 International and Comparative Law Quarterly, 763.

39 H. Hansmann and R. Kraakman, 'The end of history for corporate law' (2001) 89(2) Georgetown Law Journal, 439.

40 H. Hansmann, 'How Close is The End of History?' (2006) 32 The Journal of Corporation Law, 745, 747. This can e.g. be said of national schemes on employee co-determination, insofar these influence the composition of the company board. For example, German co-determination law mandates that for (sufficiently) large corporations (see § 7 Mitbestimmungsgesetz), half of the members of the supervisory board should consist of worker representatives, whereas concerning e.g. England and Italy, such schemes are entirely absent. For an analysis of the development of these differences, see e.g. E. McGaughey, 'The Codetermination Bargains: The History of German Corporate and Labour Law' (2016) 23 Columbia Journal of European Law, 135.

41 See similarly art. 7.2 (e) EU-South Korea FTA. The Canada and Vietnam FTAs (also) apply the concept of "enterprise", which includes corporations, trusts, partnerships, joint ventures and sole proprietorships.

42 See e.g. art. 8.2 (c) EU-Singapore FTA; art. 7.2 (f) EU-South Korea FTA.

43 ibid.

requirement under the Singapore FTA. A particularly relevant aspect is that the actual nationality of the owner(s) of an entity meeting these requirements (which is thus 'covered' by the FTA) is irrelevant. Conversely, according to Article 8.2 (c)(iii) of EU-Singapore Agreement, FTAs may also be applied in relation to entities not incorporated under the laws of one of the Party States, if Party State nationals are owning more than 50% of their share capital, or if these are allowed to nominate more than half of the directors.[44] It has been argued that such mechanisms may prove rather useful for fiscal purposes, as it allows for the use of corporations domiciled in countries with low effective tax rates.[45]

Entities that are, according to the requirements outlined above, 'covered' by the FTA, are granted the right to establish themselves in the Party States, through (i) the constitution, acquisition or maintenance of a juridical person or (ii) the creation or maintenance of a branch or representative office.[46] Party States, as provided by Article 8(10) of EU-Singapore Agreement, are obliged to treat foreign and national juridical persons equally when these exercise their right of establishment.[47] Importantly, it is not uncommon for FTAs to state expressly that the right of establishment should be applied substantively (not: formally). These wordings can be found in Article 8(11) of the EU-Singapore FTA and, again, in the EU South-Korea FTA, where it is clearly stated that, no matter the formality of the establishment, the treatment of established companies ought to be substantially identical to national ones.[48]

However, FTAs generally lack direct effect.[49] Thus, investors cannot set aside conflicting provisions of national law, merely by claiming applicability of the FTA. Usually, this absence of direct effect follows from the wording

44 The English version of the EU-Singapore FTA applies the term "director", which may cover both executive and non-executive directors. We understand that, concerning two-tier board systems, where the executive board and the supervisory board are constituted as separate organs, both should be taken into account for FTA purposes. See also art. 7.2(f) (ii) EU-South Korea FTA.

45 See K.E. Sørensen, 'Free Movement of Companies under the New EU Free Trade Agreements' (2016) 13 European Company Law, 46.

46 See Chapter 8 – Section C of EU-Singapore FTA.

47 Here, it should be noted that some economic sectors fall outside the scope of FTAs. This can e.g. be said of the nuclear and the weapons industry. See also art. 7.10 EU-South Korea FTA; art. 8.2 EU-Canada FTA.

48 Art. 7.12(1), (2) and (3) EU-South-Korea FTA. See also (albeit slightly differently) art. 8.6 EU-Canada FTA.

49 See e.g. art. 17.15 EU-Singapore FTA; art. 30.6 EU-Canada FTA; on the legal consequences of this situation, see A. Semertzi, note 26.

of the FTA itself.[50] Despite the lack of direct effect, FTAs granting a right of establishment have some rather interesting consequences from a corporate law point of view. It seems that Party-States (and MSs in particular, as these are familiar with the concept of equal treatment) are implicitly encouraged, if not to say competitively pressured, to go further than what is strictly required by grammatical interpretation of the FTA. In fact, corporate law is an area of the law that has been harmonized only through a number of Directives of which the merits have been disputed, with considerable room left to national legislators. Therefore, for achieving the requirement of substantial equal treatment provided by Article 8(11) and attracting foreign companies, national legislators might need to adapt their corporate law provisions, *de facto* harmonizing them, without the EU being in the legal position to dictate MSs such changes. For instance, take the case of a corporation incorporated in Singapore that seeks to operate within the EU and enjoy the benefits of the newly signed FTA. Even though the right to substantial equitable treatment is not enforceable vis-à-vis MSs, recognizing such right in the FTA opens up the competition among MSs to offer lenient and favourable legislation and attract the investment of the corporation from Singapore. This competitive effect, of which the desirability is to be proven in this specific instance, has the likely medium-term effect of harmonizing national legislations at EU level, even though the EU formally lacks the competence to do so. Section 3.3 and 3.4 will provide with specific examples of this mechanism.

In a nutshell, promising corporations of third-party States substantial equal treatment even in areas where MSs maintain considerable discretion, such as corporate law, is the main legal channel through which the EU pressures MSs to achieve a deeper level of harmonization than the one established by the EU Treaties.

50 The EU-South Korea FTA is an exception in this regard, as it does not specifically exclude direct effect. However, Article 5 of the Council Decision 2016/839 explicitly provides that "The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals". See Council Decision 2016/839 of 23 May 2016 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (2016) OJ L 141/28. A. Semertzi, note 26, notes that strictly speaking, such a unilateral declaration should carry little weight, but also argues that the ECJ will not easily deliver a ruling to the contrary.

3.3 Cross-border M&A

Following the line of reasoning set down in Section 3.1 and Section 3.2, guaranteeing a substantially identical right of establishment might clash with a national provision concerning cross-border M&A. Indeed, such transactions have been a long lasting and delicate issue in the process of harmonizing corporate law within the EU. EU Company Law Directives carry some weight for aligning the structural rules of corporations. The Third[51] and Sixth[52] Company Law Directives of 1978 and 1982 govern mergers between and divisions of Public Limited Companies within a single MS. Intra- and extraterritorial structural changes have proven to be a different thing, however. Here, it should be noted that 10th Company Law Directive[53] on cross-border mergers was only agreed upon in 2005, effectively ending a 40-year process of negotiations. Because of this directive, a German AG could e.g. merge with (into) an Italian SpA, after which the former may cease to exist. These lengthy negotiations resulted notably from the large differences between MSs concerning employee co-determination rights.[54] Additionally, MSs have effectively succeeded in blocking a directive on cross-border conversions for an even longer period. Cross-border conversions allow for the more direct transition of a German AG into an Italian SpA. Despite years of efforts, the (informally) proposed 14th Company Law Directive on the cross-border transfer of a company's registered office never entered into effect.[55] In fact, cross-border conversions in the EU only became possible in 2012, because of enabling case law of the European Court of Justice (ECJ, cases Cartesio[56] and Vale[57]). There, it was essentially ruled that, barring the public interest providing otherwise, a MS should allow

51 Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3) (g) of the Treaty concerning mergers of public limited liability companies (1978) OJ 295/36. Note that whereas the Company Law Directives referred to in this paper have been superseded by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (2017) OJ L 169/46, this concerns primarily a codification, so that historical references are maintained for the sake of completeness.

52 Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3) (g) of the Treaty, concerning the division of public limited liability companies (1982) OJ L 378/47.

53 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (2005) OJ L 310/1.

54 See J. Wouters, 'European Company Law: *quo vadis*?' (2000) 37 CMLRev, 257.

55 On this (informal) proposal, see S. Rammeloo, *Corporations in private international law* (OUP 2001), 297-300.

56 Case C-210/06 *Cartesio* [2008] ECLI:EU:C:2008:723. On this, see e.g. M. Szydło, 'Case C–210/06, CARTESIO Oktató és Szolgáltató bt, Judgment of the Grand Chamber of the Court of Justice of 16 December 2008' (2009) 46 CMLRev, 703.

57 Case C–378/10 *VALE Építési* [2012] ECLI:EU:C:2012:440. On this, see e.g. T. Biermeyer, 'Shaping the space of cross-border conversions in the EU. Between right and autonomy: VALE Építési kft' (2013) 50 CMLRev, 571. Recently, the *Polbud* judgement more or less finalized this discussion; See Case C-106/16 *Polbud – Wykonawstwo* [2017] ECLI:EU:C:2017:804.

such outbound conversions without the loss of legal personality (which would entail a liquidation and the sale of assets) in case the corporation could convert into a corporate form recognized under the national laws of the receiving MS. For inbound purposes, provisions concerning national conversions should be applied analogously as much as possible. Only after the *Polbud*-ruling of the ECJ,[58] which effectively finalized the discussion on cross-border conversions, the EU presented a proposal for a Directive.[59]

The protracted character of the European policy-making process for cross-border initiatives also relates to the fact that, in relation to the law governing corporations, two doctrinal approaches strive for political dominance amongst MSs. These are the incorporation doctrine and the real seat doctrine. According to the former, a corporation is governed by the MS law of incorporation (i.e. where it has its registered office). Based on the latter, the applicable legal regime is determined by the place where the corporation has its headquarters or its principal place of business. The co-existence of these approaches gives rise to political sensitivities regarding sovereignty, as to solve the issue, one side must ultimately give in to the other.[60] In the Netherlands, it has therefore traditionally been considered that the ECJ has not voiced a preference for either approach, although the views on this matter might differ along scholars in various MSs.[61] The relative disorder in the EU may be contrasted with the straightforwardness of the situation in the US. There, in principle, the same issue could have arisen (i.e. states applying different theories concerning the law governing corporations). However, the internal affairs doctrine – comparable with incorporation doctrine – is predominant in the US entire, so that a homogeneous system is in place.[62]

58 See *Polbud – Wykonawstwo* case, note 57.

59 European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions' COM(2018) 241 final.

60 For an overview of the dominant approaches in respective EU MSs, see the Research Paper by London Economics, 'European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th Company Law Directive)', Annex II (March 2013), available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460(ANN02)_EN.pdf (accessed 20 August 2018).

61 See e.g. for the German position A. Schall, 'Kapitalaufbringung nach dem MoMiG' (2009) 38 Zeitschrift für Unternehmens- und Gesellschaftsrecht, 129.

62 See e.g. *Restatement (Second) of Conflict of Laws* § 296-312 (1971); see also F. Tung, 'Before Competition: Origins of the Internal Affairs Doctrine' (2006) 32 Journal of Corporation Law, 33. Here, it should be noted that both New York and California deviate partially from the internal affairs doctrine concerning out-of-state corporations not traded on a national securities exchange, in a way similar to the Dutch PFFCA (see § 3.3). The incorporation doctrine (and the internal affairs doctrine, for that matter) allow for (efficiency-based) competition between systems of corporate law. We abstain from discussing whether this causes a 'race to the bottom' or a 'race to the top'.

Returning to FTAs, it may be argued that a cross-border conversion concerning a non-EU entity should be considered a constitution or acquisition, although this is not evident from a grammatical point of view.[63] In the absence of enabling regulation, it currently does not seem possible to conclude a cross-border merger or conversion from or to a third country (i.e. non-EU) Party State, solely based on an FTA. National laws that have confined themselves to merely implementing the EU Directive currently only allows such transactions intra-EU and FTAs lack direct effect.[64] The resulting situation is that, on the one hand, MSs are not legally mandated by EU Directives nor by the FTA to allow for non-EU cross-border M&A but, on the other hand, the requirement of substantial instead of formal treatment[65], set down by the FTA, cannot be guaranteed without enabling non-EU cross-border M&A. Take, for instance, the case where Company A, incorporated in Germany, and Company B, incorporated in the Netherlands want to merge. As discussed above, this is legally possible thanks to the 10th Company law Directive, which provides for intra-EU M&A. On the contrary, if Company C, incorporated in Singapore wants to merge with Company B, that Directive does not apply, and neither can the FTA be invoked, hampering the principle of substantial equal treatment.

However, this approach seems at odds with the overall goal of the FTAs of providing substantive equal treatment. Additionally, the situation of being able to execute cross-border conversions in relation to third countries differs between MSs. Luxembourg is a relevant case of a jurisdiction that has embraced a highly flexible approach with the aim of structuring a "competitive" corporate law and attracting foreign companies.[66] Other MSs have followed suit or, in case of the Netherlands, are considering to do so.[67] Therefore, FTAs could act as a catalyst for increased competition between MSs. Thus, it may be argued that the *status quo* in fact puts some pressure on governments to facilitate cross-

63 See e.g. K.E. Sørensen, note 45.

64 ibid.

65 In this regard, the old discussion concerning measures of equivalent effect springs to mind; Case C–8/74 *Dassonville* [1874] ECLI:EU:C:1974:82.

66 One prominent example is the Luxembourg 'Corporate Law Reform Bill', no. 5730 of 2016. For further explanation on how this reform facilitates incorporation under Luxembourg law, see Allen & Overy, 'Luxembourg Company Law Reform: The Essential Changes' (August 2016), available at http://www.allenovery.com/SiteCollectionDocuments/Luxembourg_Company_Law_Reform_August_2016.PDF (accessed 17 October 2018).

67 The Dutch Draft Bill on Cross-border Conversions of Companies with a Capital Divided into Shares' (*Voorontwerp grensoverschrijdende omzetting kapitaalvennootschappen*) can be retrieved at http://www.internetconsultatie.nl/grensoverschrijdende_omzetting/details (accessed 27 October 2018).

border mergers and conversions in a broader sense, and to go further than strictly required by the FTA.[68]

3.4 Protecting national systems of corporate law

As was already discussed, the harmonization of EU corporate law has constantly been a bumpy ride.[69] MSs indeed have been reluctant to give up their sovereignty, so that harmonization has mainly followed a bottom-up, competitive pattern.[70] Competition has been more intense during some periods than in others. At the end of the 1990s and at the beginning of the 2000s, England acted as the 'Delaware of Europe', attracting many out-of-state incorporations.[71] In response, Germany modernized its corporate statute through the MoMiG Act of 2008, which created a mini-version (*Unternehmergesellschaft* (*haftungsbeschränkt*)) of the Private Limited Company (*Gesellschaft mit beschränkter Haftung*) featuring lower capital requirements.[72] In the Netherlands, the situation seems to have stabilized following the 2012 revision of the statute concerning Private Limited Company (*Besloten Vennootschap*).[73] Importantly, this encompassed the abolition of the minimum legal capital requirement of € 18,000. A similar path has been followed, for instance, by Italy, whose corporate law was deeply

68 We do not take a stand on whether harmonization is desirable in abstract terms. In the short run however, this pressure further aggravates the capabilities-expectations gap (see Section 4). Indeed, it should be noted that given the complex legal issues arising from cross-border M&A, letting MSs compete in this respect is likely to substantially increase legal uncertainty. From the standpoint of MSs, the long lasting reluctance toward supra-national company law is also at odds with the harmonizing approach. Thus, with the EU Treaties and allocation of competences as they are, it seems non-proportionate to trigger harmonization through competition in this particular field at the present time.

69 See Section 3.3.

70 On this trend, see globally H. Hansmann and R. Kraakman, note 39; for the EU perspective with a somehow sceptical view on EU Delaware, see L. Enriques and M. Gatti, 'The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union' (2006) 27 University of Pennsylvania Journal of International Law, 939.

71 This situation would bear some resemblance to that of the second half of the 19th century. See e.g. M.G. Dore, 'Deja Vu All over Again - the Internal Affairs Rule and Entity Law Convergence Patterns in Europe and the United States' (2014) 8 Brooklyn Journal of Corporate, Financial & Commercial Law, 3. The position of England as 'legal innovator' in the EU may suffer, at the longer term, following the 'Brexit', causing the (bottom-up) competitive effect to disappear. See P. Böckli, P.L. Davies, E. Ferran, G. Ferrarini, J.M. Garrido Garcia, K.J. Hopt, A. Opalski et al., 'The Consequences of Brexit for Companies and Company Law' (2017) Rivista della società, 455. EUtablished by the Treatieshrough which the EU pressures MSs to achieve deeper harmonizaion e to attract foreign companies forc

72 See e.g. M. Beurskens and U. Noack, 'The Reform of the German Private Limited Company: Is the GmbH Ready for the 21st Century?' (2008) 9 German Law Journal, 1069; M.A. Verbrugh, 'De herziening van het GmbH-recht in een concurrerende omgeving. Het wetsvoorstel MoMiG' (2008) 10 Ondernemingsrecht, 401.

73 On this revision, see e.g. B. Verkerk, 'Modernizing of Dutch Company Law: Reform of Law Applicable to the BV and a New Legal Framework for the One-Tier Board within NVs and BVs' (2010) 7 European Company Law, 113.

revised and modernized by a comprehensive reform in 2003, followed by numerous subsequent adjustments creating, among other, something close to a Limited Corporation with no minimum capital.[74]

One peculiar and somewhat exotic mechanism enacted with the intention of disrupting the competition among corporate laws and attract foreign companies is the Dutch Pro Forma Foreign Companies Act (PFFCA, *Wet op de formeel buitenlandse vennootschappen* or Wfbv). Its specific aim was to impose obligations on entities founded abroad while merely active domestically. To that end, it mandates that Pro Forma Foreign Companies are to identify themselves as such when registering at the Dutch Chamber of Commerce and on stationary. Subsequently, it contains director liability provisions and, in case of non-compliance, penal sanctions.[75] The *Centros*[76] and (especially) *Inspire Art*[77] rulings by the ECJ found such provisions in principle discriminatory, insofar these could not be considered compatible with the 11th Company Law Directive.[78] Consequently, the PFFCA was amended. Currently, it no longer applies to entities incorporated under the laws of other MSs.[79] However, the PFFCA is still relevant for entities incorporated under the laws of third countries, and thus also for FTA Party States.

Again, this distinction between MSs and FTA third countries seems at odds with the overall goal of promoting ever-stronger economic ties and, more specifically, the legal requirement of substantive equal treatment. Given the experience that has been gained previously on the effects of competition, we consider it quite likely that FTAs put pressure on governments (here, the Dutch, which may start considering repealing the PFFCA)[80] to stimulate trade, thus however going further than what is strictly required by FTAs.

74 On the Italian case, and more generally on EU MSs corporate law reforms, see L. Enriques and P. Volpin, 'Corporate governance reforms in continental Europe' (2007) 21 Journal of Economic Perspectives, 117.

75 Art. 2, 3 and 7 *Wet van 17 december 1997 op de formeel buitenlandse vennootschappen,* respectively.

76 Case C-212/97 *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] ECLI:EU:C:1999:126. On this, see e.g. W-H. Roth, 'Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, Judgment of 9 March 1999' (2000) 37 CMLRev, 147.

77 Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd* [2003] ECLI:EU:C:2003:512. On this, see e.g. D. Zimmer, 'Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd' (2004) 41 CMLRev, 1127. This case is especially important as the relevant company directly concerned the PFFCA, as opposed to the *Centros*-ruling (note 76).

78 Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (1989) OJ L 395/36.

79 Art. 1 (2), note 75.

80 On desirability and legal problems of such competitive pressure, see note 68.

4. Mind the gap: EU expectations versus capabilities

The previous analysis shows that, in the realm of corporate law, competitive forces might push national authorities to become more proactive and adapt domestic legislation to the newly concluded FTAs, thus acting according to what they perceive as the underlying rationale of an FTA. In so doing, FTAs are not only more ambitious than the bilateral trade agreements (BITs) concluded before, but also more ambitious than their texts seem to suggest. Meanwhile, most of the discussion about the conclusion of FTAs by the EU in fact revolves around the distribution of competences as well as the degree of convergence of national and EU political agendas. In other words, a tug-of-war between a maintenance policy for domestic laws versus the promotion of European values occurs.

However, our analysis indicates that the current capabilities of the EU cannot well serve the ambitions of the EU's international behaviour. To put it differently, it seems that the instruments at the disposal of the EU are not sufficient to achieve its set objectives: the MSs have not provided the EU with enough legislative competences to act as it deems desirable to achieve its goals, which would here be to curb intra-MS competition. Indeed, MSs have different views as to what extent the EU shall be responsible for legislation. In this regard, Meunier and Nicolaïdis argue that the EU is a conflicted trade power whereby "Member States governments, influenced by a host of domestic actors, hold very different views on how to wield such power through trade".[81]

All this leads to a lack of coherence between internal and external action, which in turn negatively impacts the EU's reputation as well as its functioning.[82] However, an appropriate functioning of EU trade policy is "crucial for the credibility and survival of the EU as a world actor".[83] In fact, trade has always been central in the EU policies, being one of the main tools to achieve a genuine and functioning internal market.[84] It is no coincidence that trade policy has been a – if not the – subject where MSs were more likely to transfer their sovereignty.[85]

Against this background, EU FTAs may be read through the lens of the "capability-expectations gap", a theoretical framework developed by Christopher Hill and

81 S. Meunier and K. Nicolaïdis, note 4.

82 J. Bain and A. Masselot, 'Gender equality law and identity building for Europe' (2013) 18 Canterbury Law Review, 97.

83 S. Meunier and K. Nicholaïdis, note 20, 326.

84 J. Orbie, H. Vos and L. Taverniers, 'EU Trade Policy and a Social Clause: A Question of Competences?' (2005) 17 Politique europeenne, 159, 174.

85 S. Meunier and K. Nicholaïdis, note 20, 326.

already applied to EU foreign policy more than twenty-five years ago.[86] In his seminal articles, Hill in fact argues that there is an apparent gap between the capabilities of and expectations surrounding European foreign policy due to three main features: (1) difficulties to agree between MSs, (2) the (un)availability of resources and (3) the instruments at the disposal of the EU.

Interestingly, these features seem also applicable to the current situation of EU trade policy. Indeed, the conclusion of FTAs by the EU suffers from the shortfalls (1) and (3) identified by Hill. As a result, and given the current state of the art, we may start asking ourselves what would exactly be the proper role in free trade for the EU. This question is not trivial and would help to delineate more precisely the role and competences of the involved institutions vis-à-vis the EU legal framework as designed by the current Treaties.

In line with our previous claim, the insights derived from this conceptualization would allow for a reflection on how the EU could improve the drafting process of FTAs. This would involve lowering the high expectations towards FTAs in the short term. European decision-makers shall craft a dialogue with European citizens, clearly signalling what the EU cannot, and what it can do. Instead, in the long term, the European decision-makers ought to be particularly careful in drawing a clear line between the specific competences of the EU and the ones of the MSs, adopting a broad conception of the scope of FTAs. In other words, the first step that needs to be taken – if we wish to close the capability-expectations gap – is to identify the specific functions of the EU. Once having carried out this 'mapping exercise', it would be possible to check whether the involved institutions fully make use of their pre-existing powers to meet the set objectives, and whether perhaps additional powers should be granted.

It is fairly unsurprising, in fact, that the MSs and third parties are inclined to have great expectations about what the EU can deliver. This type of behaviour partly stems from the fact that states have less 'moral duties' to fulfil, having transferred more expectations to a supra-national organisation. Yet, as we have noticed, a transfer of expectations from the MSs to the EU has not corresponded to an equal transfer of competences. Under these circumstances, it is of utmost importance that the EU would be capable of communicating what its precise role is. If this dialogue does not take place, the credibility of political statements and aspirations of the EU may be in jeopardy. Notably, the lack of credibility of the EU vis-à-vis MSs citizens is not the only cause of concern. Indeed, a parallel argument can be drawn for those third states that have negotiated or are willing to negotiate FTAs with the EU. The fact that the contractual clauses negotiated

86 See C. Hill, note 6.

at FTA level might not be (fully) implemented because of factors falling outside the domain of control of the contracting counterparty might lower their willingness to enter in FTA in the first place or, more fundamentally, impair EU contractual power.

In summary, in order to safeguard the room for manoeuvre necessary for concluding future FTAs – the need for which is evident from an economic point of view – it is advisable that the EU would act in a more prudent fashion. This would mean that the EU shall commit itself to clarifying what its precise functions are and act accordingly. In so doing, the EU would protect its reputation, taking well-defined decisions and holding to them.

5. Conclusion

In this paper, we analysed the tension surrounding EU free trade agreements from an internal perspective. More precisely, a complex web of competences, leading to an involvement of various European and national institutions in both the decision-making process and consequent implementation, is apparent. We show that, from the perspective of intra-EU governance, the EU-Singapore FTA may push MSs to harmonize their legislation beyond what the actual wording of the FTA suggests. Thus, the issue at hand is not that MSs, which are involved in the process of negotiating FTAs – through being represented in various institutions, and by themselves as well – are required to change their national laws, but rather that the element of competitive pressure introduces a degree of uncertainty concerning the latitude that MSs possess in adapting further-reaching changes than mandated by the FTA. We argue that this latitude is in fact rather small and substantiate our argument by juxtaposing the right of establishment, as granted by FTAs, with a corporate law perspective. Corporate law provides a useful proxy for MSs preferences, as it reflects to a considerable degree national socio-economic habits. Specifically, we focus on two aspects: cross-border M&A and protection of national corporate law.

Currently, it does not seem possible to conclude a cross-border merger from or to a third country (i.e. non-EU) State Party, solely based on a FTA. However, this approach seems at odds with the overall goal of the FTAs of substantive equal treatment. Indeed, the situation of being able to execute cross-border conversions in relation to third countries differs between MSs. Therefore, FTAs could act as a catalyst for increased competition. With regards to the protection of national corporate law as well, the distinction between MSs and FTA third countries seems at odds with the overall goal of promoting ever-stronger

economic ties and the requirement of substantive equal treatment. Given previous experience, we consider it quite likely that FTAs will contribute to the eventual repeal of the PFFCA.

Within this framework, our analysis tentatively suggests a way forward. In the short term, the applicable Treaties staying equal, European decision-makers shall craft a dialogue with European citizens, clearly signalling what the EU can and cannot achieve. Instead, in the long term, the European decision-makers ought to draw a clear line between the specific competences of the EU and the ones of the MSs. In this line of reasoning, a potentially desirable option could be to grant additional competences to the EU[87], so to clarify rights and duties of all the parties involved and minimize the uncertainty in FTA implementation.

87 Another approach could be to give (certain) FTA provisions direct effect. Although this can only be a long-term strategy – reaching a common position for the parties involved would be even more complex – it eliminates the threat of competition between MSs.

Chapter 5:

Services Liberalization within the CETA through Regulatory Approximation: Prospects and Limits

*Kornilia Pipidi-Kalogirou**

1. Introduction

'The supply of services has never been more global', writes Delimatsis, when examining services liberalization, connecting temporal circumstances and market imperatives with the apparition of liberalization efforts.[1] Indeed, services have grown to become the backbone of trade activities, from the little brother of goods that they once were. Being a subject of interest in and of themselves, the indispensability of service industries such as postal, logistics, and information and communication technology services, functioning as carriers of Global Value Chains (of goods and services that form part of a value chain) has added to their value, and the subsequent interest for their liberalization.[2]

Coming maybe as a paradox, it is the very nature of services that has undermined the demands for further liberalization that have followed the trade facilitating character that the former have acquired. The slow liberalization progress within GATS has been grounded on a number of reasons, which I argue, are connected to services' special characteristics. Before proceeding to analyzing how the nature of the services has impeded their liberalization, it is necessary to make a necessary distinction. The notion of liberalization is for the purpose

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1 P. Delimatsis, 'Trade in Services and Regulatory Flexibility: 20 Years of GATS, 20 Years of Critique' in M. Bungenberg, C. Herrmann, M. Krajewski and J. Terhechte (eds), *European Yearbook of International Economic Law* (vol 7. Springer 2016), 4.

2 For the relation of services and global value chains seen from an economic point of view see C. Heuser and A. Matoo, 'Services Trade and Global Value Chains' in the *Global Value Chain Development Report 2017: Measuring and Analyzing the Impact of GVCs on Economic Development, International Bank for Reconstruction and Development* (The World Bank 2017), available at: https://www.wto.org/english/res_e/booksp_e/gvcs_report_2017_chapter6.pdf, (accessed 10 May 2018).

of this argument understood as two different processes, the first being the initial liberalization of different sectors and the second being the further/deeper liberalization of already open sectors.

Regarding liberalization as the initial phase of exposure of new sectors, the blame has been given to their intangible character. This particular characteristic is referred into literature as the reason behind their multi-modality, which distinguishes them from goods.[3] However, it is also the reason behind their difficulty to fit fixed categories. It is not rare, for example for a service to fall under two different sectors.[4] Given this reality, the system followed within the GATS for the categorization of services, the Services Sectoral Classification list, cannot be described as helpful, and not only because the established sectors (and sub-sectors) are mutually exclusive.[5] On the contrary, it has proved to be inefficient to adapt to the rapidly changing reality of services that are all the more affected by technology, and evolving into new forms that do not fit within a list that has avoided update and renewal.[6] The shortcomings of the Services Classification List services are further mirrored into the Schedules of the GATS Members, who fearing to use a different nomenclature, stick to the one provided, despite its flaws.[7]

On the other hand, services liberalization has not been impeded only from the inability of the Classification List to accommodate new types of services. Equally, even more disturbing are the most frequently found barriers, which, for services, often are non-discriminatory, in the form of domestic regulation.[8] The multilateral system till today has proved unsuccessful addressing them. This is partly due to the fact that one of the chosen ways for services liberalization within the GATS, the GATT inspired non-discrimination provisions, even though guiding, tackle discriminatory measures and are thus not designed to properly address non-discriminatory ones.[9] That is why, given the indispensable relationship between domestic regulation and

3 See M. Steinicke, 'Trade in Services' in B. Egelund Olsen, M. Steinicke and K.E. Sørensen (eds*), WTO Law from a European Perspective* (Wolters Kluwer Law & Business 2016), 321, 326.

4 See Delimatsis, note 1, who gives an example from health services: 'Take the case of health-related services whereby the relevant sector in the List 'health and social services' does not exhaust the categories of activities associate with healthcare. Whereas hospital and ambulance services form part of the health and social services sector, medical and dental services, veterinary services or those offered by midwives are listed under professional services, a sub-sector of business services.'

5 GATT, 'Services Sectoral Classification List', MTN.GNS/W/120, 10 July 1991.

6 See Delimatsis note 1, 7.

7 ibid, 8.

8 M. Krajewski, 'Services Trade Liberalisation and Regulation: New Developments and Old Problems' in C. Herrmann and J. Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2010), 162.

9 ibid.

services, and how the line between protectionism of domestic service providers and protection of legitimate interests is hard to draw Member States felt the need to include a provision that would discipline accordingly domestic *non-discriminatory* regulation.[10] However, agreement on the substance of that provision was never reached during the Uruguay Round. Article VI:4 therefore provides, a mandate to create disciplines on the matter. Such disciplines should tackle non-discriminatory provisions by ensuring that measures addressing the quality and safety of service provision - qualification requirements and procedures, licensing requirements and procedures, and technical standards - do not constitute unnecessary barriers to trade. In the absence of the successful negotiation of such disciplines, Article VI:5 provides a rudimentary provision addressing the issue. As such, it constitutes the first provision that introduces segments of positive integration, by setting minimum standards that these types of regulations have to meet.[11] The mandate of Provision VI:4 led to a first Working Party on Professional Qualifications, which indeed developed Disciplines specific to the accountancy sector. Currently, negotiations on the basis of the mandate are ongoing in relation to horizontally applicable Disciplines addressing regulations on qualification requirements and procedures, licensing requirements and procedures, and technical standards.[12] Thus, so far Article VI:4 has brought limited substantial results.

The reasons described above illustrate why Services Liberalization has always been for trade policy makers a blessing and a curse. And it its exactly that frustration that has kept the matter as high on the bilateral negotiating agenda as on the multilateral one. Following the shift of the trade relations in general towards bilateralism,[13] one can also observe a shift towards services regulation and liberalization. This contribution will examine how this phenomenon is addressed in the context of CETA. More specifically, this Article will focus on how CETA serves services liberalization through Regulatory Approximation, and how this approach finds its limits within CETA itself and within the EU Legal order. In the notion of Regulatory Approximation, I include commitments of regulatory nature that serve mostly indirectly services liberalization. Hence, at the following section I examine Articles 11 and 21 of CETA (also referred to as

10 For a holistic analysis see S. Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules*, (Nijhoff Brill 2017), 24-138

11 P. Delimatsis, 'Due process and 'good' regulation embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10 Journal of International Economic Law, 36.

12 ibid, 39

13 For a detailed analysis of the reasons and the circumstances that led the EU to lean towards bilateralism, see B.A. Melo Araujo, *The EU deep trade agenda: law and policy* (1st edn, Oxford University Press, 2016), 33ff.

"the Agreement"), on the Mutual Recognition of Professional Qualifications and Regulatory Cooperation respectively, analysing the advancements. In the final Section, I explore the imposed limits posed either by the Agreement itself or by the interaction with the EU legal order. The Conclusion revises the main points and highlights the need for compatibility.

2. Services liberalization through regulatory alignment accounts within the CETA: The cases of regulatory cooperation and mutual recognition of professional qualifications

Services liberalization is served multiply within the new FTAs concluded by the EU, with CETA being a benchmark for the trade agreements to follow. I understand services liberalization as a double-edged concept, distinguishing between direct and indirect liberalization. Direct liberalization is materialized when a certain market opens for new services, to which access was restricted before. Access may be restricted as a result of structural shortcomings (as is for example the rigid Services Classifications List), or it may be a negotiator's choice. Negotiators have three choices when it comes to services liberalization. There is the "positive list technique" (as in the GATS), the "negative list technique" (as in CETA) and the "hybrid technique" (as in the TiSA Agreement).[14] These are methods according to which the commitments are made by each party. Usually, the approach to be followed depends on the negotiating parties, the power of their service economy and their level of development in general; for example, the positive list approach is preferred in trade agreements either between developing countries or between developing and developed countries.[15]

Many authors argue that each approach serves a different level of services liberalization, with the negative list approach being used when the parties seek deep liberalization.[16] This is the case for the CETA. In fact, it is a NAFTA type-based FTA, meaning that it uses the negative list technique. In FTAs that use this typology, every sector is presumed to be liberalized, except if the contracting

14 See the PowerPoint of S. Stephenson, 'Overview of Various Approaches to Services Liberalization. Training Workshop on Trade in Services. Negotiations for AU-CFTA Negotiators' (24-28 August 2015, Nairobi, Kenya) available at: http://unctad.org/meetings/en/Presentation/ditc-ted-Nairobi-24082015-USAID-stephenson.pdf (accessed 23 March 2017).

15 P. Latrille and J. Lee, 'Services Rules in Regional Trade Agreements - How Diverse and How Creative compared to the GATS Multilateral Rules?', Staff Working Paper ERSD-2012-19 (World Trade Organization, Economic Research and Statistics Division, 2012), 8, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171698 (accessed 24 March 2017).

16 European Commission, 'Services and investment in EU trade deals. Using 'positive' and 'negative' lists' (April 2016), available at: http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf (accessed 25 March 2017).

parties have excluded some sectors by registering them in the respective Annexes.[17] Historically, services liberalization has been mainly identified as the exposure of new sectors to various commitments, in other words, market access, coinciding with what is referred here as direct liberalization.[18] On the contrary, practice and literature have been limited to what I refer to here as indirect liberalization, the so-called behind the border issues.

Indeed, should one examine the recent history of European Trade Relations, not only in the multilateral but also in the bilateral spectrum, one will easily identify the issue of regulatory cooperation, as a matter which figures extensively, revealing both its importance, but also its inherent difficulty to be handled. One will also see how this issue kept returning on the basis of goods negotiations, and rarely regarding services. Within the transatlantic arena, which offers a rich background to work upon, the rich but troubling experience -the advancements of which every time mirrored a topical issue of the time- reveal how all efforts which centred around regulatory cooperation hid a mini transatlantic trade war on goods.[19] Moreover, the multilateral concentration on regulatory cooperation in goods with the Technical Barriers to Trade (hereinafter TBT) and Sanitary and Phytosanitary Measures (hereinafter SPS) agreements comes as no surprise, as with the gradual abolition of tariffs on goods, initiated by the GATT, the so-called behind the border obstacles started posing a considerable threat to trade in goods. Let us also not forget that services regulation with the GATS was a sibling agreement to the TBT and SPS, as both were born out of the Uruguay round.

These political and legal structures, however, have not evolved, and new ones have not occurred, so as to keep up with the developing utility of services as carriers of world trade. Moreover, as mentioned above, the in-built GATS agenda on domestic regulation has not advanced further. It is exactly this void, that the new generation of Free Trade Agreements (hereinafter FTAs)have come to fill. Throughout the analysis that follows, I explain which characteristic of the

17 See A. Giødesen Thystrup and G. Unuvar, 'A Waiver for Europe? CETA's Trade in Services, and Investment Protection Provisions and Their Legal-Political Implications on Regulatory Competence' in G. Adinofli, F. Baetens, J. Caiaso, A. Lupone and A. G. Micara (eds), *International Economic Law: Contemporary Issues* (Springer 2017), 42, 48.

18 B.A. Melo Araujo, note 10, 81.

19 Bilateral transatlantic trade dialogues, administered by the EU-US summits, functioned as extinguishers to mini trade wars that occasionally arose. For example, the Early Warning and Prevention Mechanism, a forum, which supported dialogue between the regulators, already at the initial phase of the rule-making, came as a solution after the bitter adventure of the hush-kits dispute. In the same vain, the Transatlantic Economic Council, the last effort to revitalize regulatory cooperation, had as its main target the long-standing difference on chlorine washed poultry; See R. Steffenson, *Managing EU-US relations: actors, institutions and the new transatlantic agenda* (Manchester University Press, 2005), 61ff.

accounts on Regulatory Cooperation and Mutual Recognition of Professional Qualifications introduce a new era on services liberalization.

2.1. Chapter 21 of the CETA: A double extension

Regulatory Cooperation Chapters, as seen in CETA's 21st Chapter, constitute a topical issue, ever since the negotiation papers of the New Generation FTAs saw the light of day.[20] Forming the epicentre of the negotiations and being a matter of discussion in both societal and academic trade dialogues, some parts of it have been subject to some sceptical thoughts, focusing upon questions of constitutional compatibility.[21] This vulnerability lies within its ground-breaking approach to regulatory cooperation. And it is exactly through this innovative approach that services liberalization is served. The suggested innovation can be examined under two distinctive facets, which constitute what I call, the double extension.

The first extension is the material one. It concerns the application of regulatory cooperation commitments to disciplines other than goods. Indeed, this was the reason behind the establishment of a separate chapter on Regulatory Cooperation in the CETA alone, next to the existing in the Agreement TBT and SPS ones, which cover goods. The former with the latter are connected firstly on a general to a specific, and secondly on a complementary basis. Whenever the specialized Chapters of TBT and SPS do not regulate a matter, the general rules of chapter 21 apply. Thus, the provisions of Chapter 21 on Regulatory Cooperation apply to their entirety to the scope stated in Article 21.1. Among others, of interest to the specific case is the inclusion of the production of regulatory measures that fall under the GATS Agreement and chapter 9 on Services.[22] This means that the rules that deal with the modes of supply of the liberalized areas become automatically an object of this cooperation.

The second extension refers to the shift in quality and intensity of the commitments taken thereof, which apply to the covered rules on services' regulation. There are several ways in which these Chapters on Regulatory Cooperation differentiate from existing practices and mark the beginning of the era of institutionalization of regulatory cooperation. Institutionalization, as a noun, at least is defined by Oxford Dictionary as "the action of establishing

20 See e.g. J.B. Wiener and A. Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process Towards a Global Policy Factory' (2015) 78 Law & Contemporary Problems, 103.

21 See e.g. A. Meuwese, 'Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective' (2015) 78 Law & Contemporary Problems, 153.

22 Article 21.1 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (2017) OJ L 11/23.

something as a convention or norm in an organization or culture".[23] Institutionalization has been a concept used mostly by social scientists, and only recently has been used by lawyers and governance theorists, placed onto the meta-national arena, in an effort to describe, explain, and possibly justify the centralization and concentration of public power into political structures that do not obey blindly to the traditional state organizational structure.[24] For the purposes of this Chapter, I understand Institutionalization of Regulatory Cooperation as the process of contributing towards the establishment of the latter as an institution. To support this, I am searching for landmarks that build upon its consolidation as a practice between regulators. The three points that to my opinion start painting the image of Institutionalization are the inclusion of Regulatory Cooperation within an FTA, the nature of the commitments and the creation of a separate body, to guide the whole procedure.

First of all, comes the inclusion of commitments within CETA, an FTAs. We observe a change of environment which is indicative of the change of perspective.[25] Unlike EU-US efforts, Regulatory Cooperation is no longer viewed as a matter left upon administrative agreements and political declarations, which may be unstable from time to time, and of questionable value, but rather as a legal commitment implemented to address important barriers to trade. Secondly, several novelties of these chapters highlight the differentiation from established modes of cooperation. One could argue that the Chapters constitute a unique amalgam of regulatory cooperation, on the one hand being a form of regulatory cooperation themselves, and on the other hand holding within them forms of regulatory cooperation of varying intensity, according to the categorization of regulatory cooperation activities provided by OECD.[26] For example Article 21.4(r) mandates the consideration and utilization of international standards as a solution to minimize divergences[27], which stands alone as a form of regulatory cooperation, while the whole Chapter favours regulatory processes that meet high transparency and participation requirements, which constitute elements

23 Oxford Living Dictionary, definition of 'institutionalisation', available at: https://en.oxforddictionaries.com/definition/institutionalization (accessed 2 May 2018).

24 E. Fahey, 'Introduction: Institutionalisation beyond the nation state: new paradigms? Transatlantic relations: data, privacy and trade law' in E. Fahey (ed), *Institutionalisation beyond the Nation State* (Springer International 2018), 1.

25 Bilateral Regulatory Cooperation (especially between the EU and the US) has been so far treated via political and/or administrative agreements. See J.R. Paul, 'Implementing regulatory cooperation through executive agreements and the problem of democratic accountability' in G.A. Bermann, M. Herdegen and P.L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospect* (OUP 2000), 385.

26 C. Kauffmann and N. Malyshev, 'International Regulatory Co-operation: The Menu of Approaches', E15Initiative Geneva (ICTSD, 2015), available at: www.e15initiative.org/ (accessed 2 May 2018).

27 Article 21.4 (r) CETA.

of the greater idea of regulatory coherence.[28] In general, the undertaken commitments go beyond existing bilateral and multilateral ones, so that it has been argued that they introduce what has been called in literature regulatory integration.[29] Last but not least, the provision of a joint body, the Regulatory Cooperation Forum, established under Article 21.6 of the CETA, is indicative of the intention of the parties to monitor and follow the Regulatory Cooperation activities, assist the regulators and guide them towards the completion of their tasks, and in general, provide a forum for discussion, where decisions regarding the most promising cooperation activities can be suggested.

2.2. Mutual recognition of professional qualifications: A dynamic step forward

Chapter 11 of the CETA on the Mutual Recognition of Professional Qualifications is the complementary chapter on indirect service trade liberalization. Mutual Recognition of Professional Qualifications has been a priority of the negotiating parties,[30] a priority that is sketched out not only from the advanced substantial provisions of Chapter 10 on the Temporary Entry, but also, from the creation of this framework of cooperation exclusively dedicated to the mutual recognition of professional qualifications.

The aim of this Chapter is facilitated exclusively by the negotiation and approval of various Mutual Recognition Agreements. Article 11.3 sketches out the skeleton of the procedure to be followed, in which two key actors participate: the authorities of professional bodies, which determine the content of the MRA under discussion on the basis of various criteria mentioned in Article 11.3.2 and the MRA Committee, which has the final word on the compatibility of the content and the final approval. A positive outcome, sealed by the successful completion of an MRA, shall allow service suppliers to practice according to the conditions of the MRA their profession in the contracting jurisdiction, thus freeing them from the burden they once bore.[31]

28 J. Nakagawa, 'Regulatory Co-operation and Regulatory Coherence through Mega-FTAs: Possibilities and Challenges' in J. Chaisse and T. Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (OUP 2016), 392.

29 S.S. Krstic, 'Regulatory Cooperation to Remove Non-tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement' (2012) 39(1) Legal Issues of Economic Integration, 3, 14.

30 A. Elijah, 'Is the CETA a Road Map for Australia and the EU?' in A. Elijah, D. Kenyon, K. Hussey and P. van der Eng (eds), *Australia, the European Union and the New Trade Agenda* (ANU Press 2017), 61, available at: http://press-files.anu.edu.au/downloads/press/n2494/pdf/ch04.pdf (accessed 7 June 2018).

31 Article 11.4.1 CETA.

During the procedure, the negotiating parties are advised to follow the procedure suggested by Annex 11A, enjoying however the freedom to act otherwise. However, should one examine the provisions of the Annex, but also the spirit of the provisions of the Chapter, one will realize that the extent of cooperation introduced is indeed far reaching. The steps described reveal how the negotiating entities are advised to examine and determine the equivalency based on the very content of the profession, and may be asked to take decisions that actually touch the core of the profession's regulation.[32] Apart from that, MRAs are of and by themselves, an effective and tight form of regulatory cooperation, especially when recognition extents to the substance of the regulations under negotiation, and does not, as practice stands right now, limit itself to a recognition of the compliance mechanisms. Given this reality, it seems very strange that this Chapter has not known the criticism that the Chapter on Regulatory Cooperation has had, which, in the very end, refers to lighter forms of regulatory cooperation, and not as intense and formal as is a Mutual Recognition Agreement.

3. Proceed with caution: Limits to services' indirect liberalization

3.1. A not-so-ready Agreement

The first extension introduced by the Regulatory Cooperation Chapter, as analyzed above, concerned the extension of the material application of Regulatory Cooperation to rules that fall under the ambit of two services agreements: GATS and Chapter 9 of CETA. It is undoubtable that the inclusion of the rules touching services regulation under the Regulatory Cooperation Chapter has been a major step towards their indirect liberalization. A careful look, however, underlines that it remains incomplete, and its limits are posed by the Agreement itself. Under the GATS, all four modes of supply are subject to regulatory cooperation. The same cannot be said about CETA, which leaves its regulation on commercial presence and presence of natural persons outside the scope of Regulatory Cooperation.

Indeed, services falling under modes of supply 3 and 4 of the GATS are regulated separately in CETA, and are not to be found under the provisions of chapter 9, which covers only modes 1 and 2.[33] Regarding commercial presence, this

32 See Annex 11A CETA.

33 Article 9.1 defines cross border trade in services/ cross border supply of services as "the supply of a service: (a) from the territory of a Party into the territory of the other Party; or (b) in the territory of a Party to the service consumer of the other Party, but does not include the supply of a service in the territory of a Party by a person of the other Party".

mode of supply is not regulated as such in the Agreement,[34] but is partially incorporated in the Investment chapter, chapter 8 of the CETA.[35] As a result, there is an overlap between the notions of establishment/commercial presence and investment.[36] As for the presence of natural persons for business purposes or mode of supply 4 of the GATS, it is one of the categories to which chapter 10 on refers.[37] While an individual regulation of these modes of supply may enhance their direct liberalization, due to the dedication of separate and more elaborate commitments, tailor made to their needs, it sure keeps them out of the scope of indirect liberalization. Given the exclusion of Chapters 8 and 10 from the scope of chapter 21, rules on Establishment/Commercial Presence and Presence of Natural Persons for Service Supplying Purposes, that otherwise constitute an important part of the rules on services, do not qualify as an object of Regulatory Cooperation.[38]

3.2. An Ambiguous Impact on the EU legal order

Regulatory cooperation commitments have dominated academic and public discourse on trade, initiated by TTIP and moved further by CETA. The general assumption that seems to transcend the majority of the arguments reveals

34 The non-separate regulation, does not mean that it is not foreseen though. Article 12.2.1 b explicitly refers to "the supply of a service or pursuit of any other economic activity, *through commercial presence* in the territory of the other Party, including the establishment of such commercial presence".

35 One very important remark that should be mentioned at this point is the fact that this way of regulating the Third Mode of Supply is incomplete. It was mentioned before that the 3rd Mode of Supply falls partially under the Investment Chapter. Indeed, the Investment Chapter does not cover all the services that are provided via commercial presence, but only the ones that fulfill the criteria set out in Article 8.1. Consequently, services that do not qualify as investment, even though they are supplied via commercial presence, do not fall within the scope of Chapter Eight. The regulatory regime for these remains uncertain, and the doctrine has given two possible answers: The first is that for these services, the GATS commitments will continue to apply; the second solution depends on the interpretation given to the notion of establishment; the more flexible the interpretation, the more services will fall under Chapter Eight; See S. Descheemaeker, 'Ubiquitous Uncertainty: The Overlap between Trade in Services and Foreign Investment in the GATS and EU RTAs' (2016) 43(3) Legal Issues of Economic Integration, 265–293, 284.

36 This overlap is indeed foreseen, as the "Committee on Services and Investment" created by Article 8.44 shows, and by the presence of a Chapter on Investment and Services in previous versions of the Agreement, ibid p. 283

37 Indeed, Chapter 10 encompasses not only service suppliers, Mode of Supply 4 of the GATS, but extends generally to the Temporary Entry and Stay of Natural Persons for Business Purposes, catching thus professionals that don't' necessarily qualify as service suppliers.

38 Nevertheless, it must be mentioned that although the making of the rules that concern Modes of Supply 3 and 4 are not subject to Regulatory Cooperation in the sense of Chapter 21, they are caught by the rules of Chapter 12 on the requirements on Domestic Regulation. Although Domestic Regulation requirements concern some quality and transparency standards that rules and procedures have to fulfill, it does not introduce a schedule on cooperation regarding the substance of the regulations, that Chapter 21 does.

concerns about the interaction of regulatory cooperation with the existing legislative and rule-making procedures[39] and the role of the actors, especially of the Joint Committees implicated therein.[40] The criticism is made against the benchmark of the Treaties. The idea of democracy and legitimacy which is embraced in order to defend their position is no other than the constitutional functional environment created by the foundational Treaties of the EU. In other words, throughout their arguments they seek to protect the constitutional framework of the Treaties, against which they judge the legitimacy of new concepts. The following section, based on a decision of the Court of Justice of the EU, will try to provide a preliminary answer on the legal value of the commitments, as a first indicator to their possible impact.

As mentioned, literature considers and examines impact under two different viewpoints: on the one hand the interaction with the EU legislative and executive rule-making procedures, and on the other hand the role of the joint bodies and the nature of their competences. As far as the first limb is concerned, the constitutional questions posed, mainly depend, according to the literature, on the different ways that the undertaken commitments will influence existing procedures. However, the first limb cannot be examined without a simultaneous examination of the second limb, on the Committee's competences and its decisions' positioning within the EU legal order. And this is because of the complementarity of the commitments. A decision which reflects the outcome of the negotiations will be the tool to penetrate the EU legal order, and finally, influence it as it will.

Given the novelty of the subject-matter and the provisional application of the CETA, one cannot speak with certainty about the interaction of the two procedures. However, there are some points that can be mentioned with certainty, which give hints on the extent of the cooperation. Specifically, the Regulatory Cooperation Chapter of the CETA will apply, at least theoretically, to both EU and national regulators. Absent a different provision in the Chapter, as the one in the EU-Japan FTA and some versions of the TTIP, one can derive this result. The participation of both national regulators, which was of course expected due to the extensive participation and the voice given to provinces during negotiations, has a major implication on the objects-matter of cooperation, which, as far as the EU is concerned, do not only cover areas where the EU has competence, and where the Commission enjoys the legislative initiative. Moreover, as mentioned above, some of the commitments

39 On this argument, see generally Meuwese, note 18.

40 On this argument see generally W. Weiss, 'Joint Organs in EU FTAs as a Threat to Democracy: Non-Delegation in External Action', European Constitutional Law Review (forthcoming 2018).

themselves, no matter the number of their addresses, are far-reaching as well. Within Chapter 21, one can find encouragement to even reach a harmonized approach and to consider the different party's approach when regulating an issue.[41] The Chapter has not been very clear on the handling of the outcome of the regulator's dialogue. It has been argued that, most probably, it will form part of a decision of the Joint Committee, taken on the basis of a recommendation of the Regulatory Cooperation Forum, given the inability of the latter, at least for now, to take any decisions itself.[42]

Yet, in order for one to approximate better a possible outcome, one has to wonder on the degree that the EU is bound by those commitments, and thus, reflect on their probability. Despite the provisions on the voluntary character of the Regulatory Cooperation, and the non-submission to dispute settlement provisions, frequently brought to the front by trade officials, it is still difficult to address completely the question, and answer with a degree of certainty, given also the uncertainty that stems from the new approach and the lack of clarity that surrounds its implementation. Even in the presence of these guarantees, it is actually the legal value of the commitments which will in the end be decisive on the impact of those commitments in the EU legal order.

On the legal value of the commitments, one could work upon the legal value of soft law, and how it is still relevant, decisive and influencing despite its non-qualification as hard law. However, a previous decision of the Court of Justice on Regulatory Cooperation between the EU and the US, in particular the thoughts of Advocate General Alber in his Opinion on the case, provide an excellent guide to the assessment of the legal value of the commitments.

The case under consideration is C-233/02, *France v Commission* on the qualification of the Guidelines on Regulatory Cooperation, undertaken by the EU and the US during one of the many EU-US Summits as an international agreement and their interaction with the EU legislative making. These guidelines, whose presentation and building resembled the contemporary Chapters on Regulatory Cooperation, laid down certain procedures, according to which regulatory cooperation between the two parties would take place. France brought an action against the Commission before the Court of Justice on two grounds. The first argument concerned the actual qualification of the Guidelines as an International Agreement under disguise, outside the scope of the Commission's competences. The second argument highlighted the incompatibility of the

41 See Article 21.4 g and 21.4 r CETA.

42 J. Mendes, 'The External Administrative Layer of EU law-making: International Decisions in EU Law and the Case of CETA' (2017) 2 European Papers, 489.

content of the guidelines with the Commission's right to initiate legislation. Even though the Advocate General and the Court of Justice reached a negative conclusion, on its alleged nature as an international agreement, it is nevertheless interesting to see the criteria used to assess the legal nature. The decision of the Court being relatively short, I will use the arguments of the Advocate General, upon which the Court of Justice relied and apply them to the present case, in order to proceed to a first assessment of the legal value of the commitments.

The Advocate General, also inspired by the arguments that each side presented used four criteria to assess the legal quality of the Guidelines: a) the intention of the parties b) the use of the language c) the objectives pursued and d) the content that placed the Guidelines. Answering to the Commission's argument about the absence of liability provisions and dispute settlement provisions, which according to the Commission were sufficient evidence to exclude any legal value, the Advocate General found the absence of such provisions irrelevant.[43] In particular, he argued that "the absence of an express provision governing penalties must be irrelevant for the simple reason that an international agreement is subject to the rule '*pacta sunt servanda*'. Moreover, in so far as it concerns an agreement binding under international law, the general principles of international law governing liability of subjects of international law are applicable in the absence of express rules in the Guidelines."[44] This argument of the Advocate General shows how the same criterion on the absence of dispute settlement provisions, provided by the Commission on the occasion of Regulatory Cooperation in the FTAs, remains irrelevant for the final assessment of the legal value of the commitments.

Regarding the criteria which he took into consideration, he first of all, commented upon the use of language. In particular, he argued that the use of the word 'should' emphasised the non-obligatory character of the Guidelines, and mentioned that in international treaties, it is usually the word 'shall' which is used for binding obligations. Coming to today, one can observe that the word 'shall' is actually used in the Chapters on Regulatory Cooperation.

Furthermore, the Advocate General took into consideration the objectives pursued. He argued that the objectives as described in the Guidelines, also militated in favour of the non-binding nature of the commitments. However, one can see that the objectives as described in the Regulatory Cooperation Chapters of modern FTAs, go much further than the objectives pursued with

43 Case C-233/02, *France* v. *Commission of the European Communities* [2004] ECLI:EU:C:2003:503 (Opinion of AG Alber), par. 54.

44 ibid.

the Guidelines. While the objectives of the Guidelines qualify more as process-orientated, the objects of the Regulatory Cooperation Chapter of the CETA is more result-orientated. The main objective of the Guidelines was to facilitate the dialogue between regulators'.[45] This objective is of course present in the new Chapters on Regulatory Cooperation in the FTAs, which however, go even further, by actually setting an objective to the process of regulatory cooperation, that being the elimination of unnecessary regulatory barriers, the advancement of the quality of the regulation and the concomitant invigoration of the business sector.[46] Thus, the aim is not solely to initiate a dialogue and to build trust between the regulators, but goes further, to the actual elimination of duplicative, unnecessary trade barriers.

Moreover, the Advocate General paid particular attention to the context in which the Guidelines were adopted. He found that the fact that the Guidelines were negotiated within the TEP, a political arrangement, in the context of the 1998 EU-US Summit, enhanced even further their non-binding character.[47] In our case however, we are in the presence of a legally binding agreement, which changes the negotiating and decision-making environment, and this influences the character of the Agreement as a whole.

Last but not least, the Advocate General paid justice to the intention of the parties which is considered an important- but not decisive factor to assess the legal value. He recognised the intention of the parties to give voluntary character to the Guidelines, however, also noted that this should be read in conjunction with other elements as well.[48] In our case, the intention of the parties is again clear, with the voluntary character being celebrated. The only difference is that, in contrast to the case of Guidelines, where all the factors pointed towards the non-binding nature of the commitments, in our case, the facts point to the different direction.

Thus, given the application of this case law to today's Regulatory Cooperation, one must be cautious when assessing the voluntary character, or the legally binding nature of the commitments, face it with a critical view and judge holistically, thus being ready to better understand the interaction of this external administrative regime with the legal order of the Union.

45 Guidelines on Regulatory Cooperation and Transparency (April 2002), 2-3, available at: https://obamawhitehouse.archives.gov/sites/default/files/omb/oira/irc/2002-guidelines-on-reg-coop-and-transparency.pdf (accessed 23 October 2018).

46 Article 21.3 CETA and Article 18.1 of the EU-Japan FTA.

47 See Opinion of AG Alber in *France v. Commission of the European Communities,* note 40, par. 59.

48 ibid, par. 57.

4. Conclusion

After a short analysis, one thing becomes clear: Services liberalization is still in the making, and as with anything novel, does come at a cost. Indeed, the EU is making considerable progress in this field, primarily by opening its market to new services with the adoption of the negative list approach. Another important structural step is taken by the agreement to enhance regulatory cooperation on areas implicating most modes of services' supply. The inclusion of the 1st and 2nd modes of supply in regulatory cooperation and the willingness to initiate MRAs on professional qualifications highlight the importance that the parties give to the matters and serves as a recognition to the inherent difficulty of combating regulatory barriers. These steps notwithstanding, one cannot argue though, that services' liberalization is a delicate issue, which has to be progressed one step at a time. The process of services' liberalization in the multilateral sphere has confirmed its complexity, and also bilateral trade negotiators set their limits, despite the whole progress. This reluctance is mirrored in CETA mostly in the ambiguous language that accompanies certain regulatory commitments. Because of the innovative character, giving teeth to these commitments may come at a cost. And that cost may not be the lowering of standards themselves, a fear that kept services liberalization from occurring at the diverse multilateral level, but it may flow from the numbness of certain legal systems to incorporate and coexist complex procedures that might interact in a different way and upset the sequence of may come from within. However, the aim set is high, and the gains seem promising. That is why negotiators and scholars need to work upon convergence mechanisms that will allow regulatory alignment and subsequent services trade liberalization to grow within a legal system, and not the other way around.

Chapter 6:

Trade in Services, Migration and Recognition of Professional Qualifications post-Brexit

Dáire McCormack-George[*]

1. Introduction

The importance of services trade in domestic, regional and international economies is increasingly being recognised. The UK, in contrast with many other countries—particularly other EU member states—has a high external services trade surplus, a high level of intra-EU trade in services and is a member state to which many EU and third-country nationals migrate for the purposes of work.[1] The foundation stones in services trade are the rules governing the mobility of the factors of production associated therewith, namely the free movement of services and persons. This paper considers one cross-cutting element of those freedoms—the recognition of professional qualifications—in relation to any post-Brexit deal which might be struck between the UK and the EU. Consideration of this issue in relation to the UK invites a discussion of qualification recognition in the EU's external trade policy in services. If the UK currently stands out as having an external services trade surplus and a high level of migration, then perhaps the EU and the other member states should consider what the UK is doing right and what they could do better.

The paper is structured in three parts. I first outline, as a background, the role that professional qualifications play in trade in services and the link between qualification recognition and migration. I also note the GATS rules on the recognition of qualifications as the default rules applicable in the absence of any agreement between the UK and the EU. I then examine existing qualification

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1 Eurostat, 'Statistics Explained: International Trade in Services' (January 2018), available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/International_trade_in_services (accessed 15 May 2018).

recognition arrangements that the EU has with certain third-countries in its association and trade agreements, framing this analysis in the light of the EU's external trade policy, to determine which model might be the best 'fit' for a post-Brexit UK-EU trade agreement. It is suggested that the approach adopted in CETA may provide an appropriate model for a post-Brexit deal. Finally, a case study is conducted on the Irish and UK medical professions. Ireland and the UK stand out amongst EU member states in primarily relying on third-country nationals for a substantial proportion of their labour supply to satisfy domestic service demand in the medical profession. This section considers why this situation obtains. It then extrapolates the lessons from this section and applies them to the EU's external relations, particularly its work on promoting qualification recognition between the EU and its international partners. These lessons offer future directions in policy formation for the improved recognition of professional qualifications of third-country nationals in the EU and, consequently, increased trade in services and better managed migration.

2. Trade in services, migration and recognition of professional qualifications

2.1 The role of professional qualifications in trade in services

Professional qualifications play a subtle but important market-constituting role in services trade, domestically and internationally, by setting minimum quality standards in the provision of services through the certification of prior education and training. In this way, they operate as a compliance cost to access to and participation in a given service market by traders. The role that professional qualifications play in services markets can therefore be expressed, more simply, as part of the following market norm:

> If *A* seeks to enter market *x*, which is constituted by Rules (1, 2, 3…*n*), then failure to comply with one or more of those Rules entails Costs (1c,2c,3c…*nc*) for *A*.

How can traders best comply with such Rules and avoid (unnecessary) Costs? One (partial) solution offered by international trade theory and practice is the mutual recognition of qualifications (amongst other costs) between two or more trading partners. If the institutions which govern a given service market in two or more states agree to recognise the qualifications necessary to participate in their markets as equal or equivalent, then service providers should be able to move between markets in those states more freely, resulting in increased competition, reduced costs to consumers and an aggregate increase in welfare in those two

states.[2] However, three issues outstanding merit noting. First, the success of this policy depends on the *degree* to which mutual recognition is actually afforded. If mutual recognition of qualifications is afforded *in principle* but not *in practice*, then it is unlikely to provide the expected benefits.[3] Second, service provision often entails (at least temporary) migration. For service providers to make their services available to persons in another jurisdiction, they often need to be present to do so. This may result in the temporary or permanent migration of service providers from one state to another to improve service provision or for other reasons, eg, to benefit from a relatively higher welfare increase in the host state than in the state of origin.[4] Third, service providers need not be legal persons or self-employed persons as such: workers provide services, albeit in an *institutionalised* environment. That is—to take the helpful heuristic definition in *Lawrie-Blum*—they provide services *for and under the direction of another*.[5] To do so, workers employed by service providers may need to avail of qualification recognition in order to contribute to a foreign labour market, a labour market which is often itself constitutive of a service market. Indeed, we can say that labour markets are constitutive of service markets when the satisfaction of demand in a labour market at the same time satisfies, at least in part, service market demand.

Recent empirical data has confirmed the significance of qualification recognition in intra-EU professional services trade. In general, this research concludes that there is a positive correlation between trade in professional services and the recognition of qualifications. Furthermore, the more one member state recognises the qualifications of another, the greater the chance of increased labour migration and service provision to that same member state.[6] Mutual

2 K. Nicolaïdis and M. Egan, 'Transnational Market Governance and Regional Policy Externality: Why Recognise Foreign Standards?' (2001) 8 JEPP, 454; J. Pelkmans, 'Mutual Recognition in Goods and Services' in F. Kostoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005); and W. Kerber and R. Van den Bergh, 'Mutual Recognition in the Global Trade Regime: Lessons from the EU Experience' in I. Lianos and O. Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (CUP 2012), 121.

3 J. Pelkmans, note 2.

4 S. Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules* ***(Brill Nijhoff 2017) and my review thereof in D. McCormack-George, 'Book Review: Service Provision and Migration: EU and WTO Service Trade Liberalisation and Their Impact on Dutch and UK Immigration Rules' (2018) 9(2) ELLJ, 218.***

5 Case C-66/85 *Lawrie Blum* [1986] ECLI:EU:C:1986:284.

6 H.K. Nordås, 'Does Mutual Recognition of Professional Qualifications Stimulate Service Trade? The Case of the European Union' (2016) 48 Applied Economics, 1852; and S. Capuano and S. Migali, 'The Migration of Professionals within the EU: Any Barriers Left?' (2017) 25 Review of International Economics, 760.

recognition of qualifications thus appears to provide at least two benefits within the Single Market for trade in services and migration: one facilitative; the other stimulative. While there has been little empirical research conducted on the role of recognition of qualifications in international trade, in principle the same should, *mutatis mutandis*, hold true.

2.2 International trade: GATS rules on qualification recognition[7]

Article VII GATS constitutes the primary acknowledgement of the role that qualifications in general—not merely *professional* qualifications—play in international trade in services. According to art VII, WTO members are entitled to recognise the licences or certifications of service providers of other members for the purposes of satisfying their own market standards. Recognition of foreign qualifications may be provided through agreement or independently of any prior agreement. Importantly, WTO members are not obliged to treat each other equally or on the basis of the most favoured nation principle in this area. Rather, WTO members *may* recognise foreign standards but *must* offer all WTO members the opportunity to negotiate an agreement, or accession to an existing agreement, covering the recognition of professional qualifications. However, members must not grant recognition in a discriminatory manner nor in a way which would constitute a disguised restriction on trade in services. According to art VI.6, if WTO members have made a commitment to service liberalisation in a given sector, then they must implement a procedure by which to review the professional qualifications of foreign service providers. Article VI.1 provides that, in sectors where specific undertakings have been made, all measures affecting service trade are applied in a 'reasonable, objective and impartial manner'. Specific disciplines have also been developed for the accountancy professions, but these do not expressly endorse the recognition of professional qualifications as such. Rather, they require member states to 'take account of' accountancy qualifications.[8] In the absence of a post-Brexit agreement between the UK and the EU, these are the (stark) default rules which the UK may need to rely on in forging new trading relationships and agreements for the recognition of professional qualifications.

Two further points merit our attention. First, in the event of a post-Brexit agreement between the EU and the UK, it is likely that other issues concerning service liberalisation would be covered first and so the extent to which any liberalisation or agreement is reached on the issue of professional qualification recognition would be couched and understood in the light of agreement in those other areas. Second, as noted in section 2.1 above, service provision often entails temporary or permanent migration. It is therefore often the case that the recognition of professional qualifications forms part of an express or implied equal treatment guarantee in national work permit of (roughly) the following type or kind, which apply to service providers and workers, namely:

- self-employed persons;
- business visitors;
- highly-skilled workers;
- intra-corporate transferees; and
- posted workers.[9]

In the case of self-employed service providers availing of work permits under default GATS rules in the Annex on Movement of Natural Persons supplying Services under the Agreement, the rights provided for in those work permits are often practically unenforceable. This is due both to the nature of the rules as deriving from an international economic order, which is difficult to enforce in practice,[10] and the failure of WTO member states to properly implement these rules in domestic law. Thus, in the absence of an agreement between the UK and the EU and where equal treatment is required under GATS Mode 4 service provision rules, much will rest on the good faith of the domestic authorities in designing and implementing these rules.[11]

3. EU external trade, migration & post-Brexit alternatives

3.1 EU External Trade and Migration Policy: An Overview

Recent statistics confirm the view that external trade in services continues to provide reciprocal economic benefits to the EU and its international trading partners and that trade in services constitutes an increasingly larger proportion of total EU external trade in goods and services.[12] These statistics differentiate reasonably clearly between trade in different types of services which is helpful

7 This section draws on J. Nielson, 'Trade Agreements and Recognition' in *Quality and Recognition in Higher Education. The Cross-Border Challenge* (OECD 2004); and W. Kerber and R. Van den Bergh (note 2), S. Tans (note 4) and F. Baetens, '"No Deal is Better than a Bad Deal?" The Fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net' (2018) 55 CMLRev, 133.

8 J. Nielson, note 7, 161.

9 S. Tans note 4, chs 5-6.

10 For more information, see S. Tans, chapter 7.

11 ibid, chapter 7.

12 Eurostat, 'Statistics Explained: International Trade in Services', note 1.

for the purposes of assessing the link between service trade and migration. Specifically, Eurostat distinguishes between several categories of services trade including financial services, insurance and pension services, professional services, agricultural services and other technical services. While the statistics do not give details of the numbers of service suppliers involved, in practice these areas generally involve the (temporary) migration of persons for the supply of services. As the Eurostat report notes:

> "The provision of services contributes a substantial share of the EU's economic wealth and accounts for more than 50% of GDP in each of the EU Member States. Nevertheless, the value of exports and imports of goods is generally two to three times higher than that of services. *Part of this imbalance may be due to the nature of some services, for example, professional services that are bound by distinct national legislation*. Another difference between goods and services concerns the immediacy of the relationship between supplier and consumer: many services are non-transportable, in other words they require the physical proximity of the service provider and consumer, which implies that many services transactions involve factor mobility. *For international trade in non-transportable services to take place, either the consumer must go to the service provider or the service provider must go to the consumer*."[13] (my emphasis)

The failure to further liberalise service regulation is therefore acknowledged as an obstacle to an increase in trade in services. The impact that this has on migration, temporary or otherwise, is also acknowledged. The link between service provision and migration has also been recognised and emphasised in a recent Communication of the European Commission, *A European Agenda on Migration*.[14] According to the Commission, not only does the EU need to devise an attractive legal migration scheme for highly-skilled *workers*, '[t]he services sector includes *well-trained, highly-skilled foreign professionals who need to travel to the EU for short periods in order to provide services*'.[15] Evidence of the need to better achieve the goals of improved trade in services and satisfy European labour market demands is not only to be found in this and other communications of the European Commission.[16] The conclusions of the European Council in

13 ibid.
14 European Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final; See also S. Tans, note 3.
15 ibid, 15 (my emphasis).
16 Other relevant communications are European Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication) COM(2010) 2020; and European Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final, 4.

2010,[17] 2011,[18] 2014[19] & 2015[20] also evince a concern for the need to improve migration management in the EU's external relations and thereby contribute to meeting European labour market demands and domestic service market demands. Furthermore, the on-going reform of the Blue Card Directive to better attract global talent to the EU provides further consistency with this view. What thus emerges from this briefest of sketches of the EU's external trade and migration policy is the need to further advance the achievement of the twin goals of improved trade in services, on the one hand, and designing a better labour migration system to meet the demands of European labour markets, on the other. These goals are complementary insofar as a labour market is constitutive of a service market; that is, where labour market demand satisfies, at least in part, service market demand. Thus, in sectors where labour and service market demand overlap, the goals of improved services trade and improved labour migration will coalesce.

What role might the recognition of professional qualifications play in this? In light of section 2.1, the improved recognition of qualifications between the EU and its international trading partners should improve trade in services and lead to greater reciprocal migration. So, to what extent does the recognition of professional qualifications already figure in the EU's external relations and what lessons might we draw from its current role for any post-Brexit deal between the EU and the UK? And what lessons might the UK offer the EU and the member states in improving external trade in services? I address these questions in turn; the first here and the second in section 4.

17 European Council Conclusions (16 September 2010), 9.
18 European Council Conclusions (11 March 2011), 4; and European Council Conclusions (23-24 June 2011), 10-11.
19 European Council Conclusions (26-27 June 2014), 19.
20 European Council Conclusions (25-26 June 2015), 1.

3.2 Models of qualification recognition in association and trade agreements[21]

In its Communication, *Trade for All: Towards a more responsible trade and investment policy*, the Commission noted the need to improve synergies between EU trade and migration policies, referring in particular to the *European Agenda on Migration* in this respect. Specifically, the Commission concluded that it would promote the recognition of qualifications in trade agreements negotiated with third-countries so as to reduce market access costs for service providers and improve external migration flows.[22] In this section, the EU's current association and trade agreements are considered in this vein to assess (i) what the current role of qualification recognition in the EU's external relations is, and (ii) what an agreement between the EU and the UK might look like on this issue. It is important to bear in mind that if third-country nationals do not have a right of entry to or residence in the EU, then a right to equal treatment or mutual recognition of qualifications will be of little, if any, value.[23] Thus much of the discussion which follows is contingent on agreement being reached on the general reciprocal free movement rights of UK & EU nationals.

21 See E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004); K. Eisele, *The External Dimensions of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill Nijhoff 2014); D. Thym and M. Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015); S. Peers, *EU Justice and Home Affairs Law Volume I: EU Immigration and Asylum Law* (4th edn, OUP 2016); F. Hendrickx, A. Marx, G. Rayp and J. Wouters, 'The architecture of global labour governance' (2016) 155(3) Int'l Lab Rev, 339; L. Campling, J. Harrison, B. Richardson and A. Smith, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements', (2016) 155(3) Int'l Lab Rev, 357; R.C. Brown, 'Promoting labour rights in the global economy: Could the United States' new model trade and investment frameworks advance international labour standards in Bangladesh?' (2016) 155(3) Int'l Lab Rev, 383; F.C. Ebert, 'Labour provisions in EU trade agreements: What potential for channelling labour standards-related capacity building?' (2016) 155(3) Int'l Lab Rev, 407; A. Marx and J. Wouters, 'Redesigning enforcement in private labour regulation: Will it work?' (2016) 155(3) Int'l Lab Rev, 435; G. Filipi, 'Labour statistics in south-east Europe: Similarities and differences across national definitions' (2016) 155(3) Int'l Lab Rev, 461; and N. Otobe, 'Economics as If All People Mattered: Book Reviews' (2016) 155(3) Int'L Lab Rev, 471.

22 European Commission, 'Trade for All: Towards a more responsible trade and investment policy' (Communication) COM (2015) 497 final, 7-8, 11.

23 E. Guild, note 21, 153-159; and K. Eisele, note 21, 338.

3.2.1 (Almost) Full Mutual Recognition: EEA States and Switzerland

Part III of the EEA Agreement guarantees the free movement of persons, services and capital between the EU and EEA member states.[24] Article 30 of the agreement provides that the contracting parties to the agreement shall ensure, in accordance with measures contained in an annex to the agreement, the mutual recognition of qualifications of workers and self-employed persons moving between jurisdictions. The relevant annex has been updated to incorporate the Recognition Directive[25] but no measure incorporating the Administrative Cooperation Directive[26] has yet been adopted. Thus, the terms of the un-amended Recognition Directive apply to EEA nationals. Their professional qualifications are recognised in (roughly) the same way as those of EU nationals. The EC-Swiss Confederation Free Movement of Persons Agreement similarly guarantees the free movement of persons, services and capital between the EU and Switzerland.[27] Specifically, Part I guarantees the right to equal treatment with nationals in respect of access to, and the pursuit of, an economic activity, and living, employment and working conditions[28] and imposes an obligation on the contracting parties to take all necessary measures to ensure the mutual recognition of qualifications.[29] Annex III to the Agreement, which has been amended on numerous occasions,[30] applies the Recognition Directive to Switzerland but the Administrative Cooperation Directive has not yet been applied. Swiss nationals are therefore in the same position as EEA nationals in respect of their professional qualifications.

24 Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (1994) OJ L1/3.

25 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (2005) OJ L 255/22; EEA Joint Committee, 'Annual Report of the Joint Committee 2007: Functioning of the EEA Agreement' (22 February 2008), para 47.

26 Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (2013) OJ L 354/132.

27 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (2002) OJ L 114/6.

28 EC-Swiss Confederation Free Movement of Persons Agreement, art 7(a).

29 ibid, art 9.

30 Decision No. 2/2011 of the EU-Swiss Joint Committee established by Article 14 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 30 September 2011 replacing Annex III (Mutual recognition of professional qualifications) thereto (2011) OJ L 277/20.

3.2.2 CETA and MRAs

CETA provides for the free movement of professionals between the EU and Canada for the purposes of temporary service provision.[31] Chapter 11 thereof provides for the mutual recognition of qualifications which is designed to facilitate a 'fair, transparent and consistent regime for the mutual recognition of professional qualifications' by the parties and sets out the conditions for the negotiation of MRAs between the competent authorities of the parties. Article 11.2.3 provides that the parties will not adopt mutual recognition practises which are either discriminatory or disguised restrictions on trade in services. Furthermore, art 11.4.3 provides that a MRA cannot require recognition to be conditional upon the ability of a service supplier to meet any citizenship or residency requirement, nor the necessity to have completed or obtained education, training or professional qualifications in the party's jurisdiction.

Annex 11-A provides non-binding guidance on the negotiation of MRAs. Of particular interest is the four-step recognition process contained therein. According to this process, the following four steps should be adopted in every MRA to simplify the recognition process:

a) Verification of Equivalency;

b) Evaluation of Substantial Differences;

c) Compensatory Measures; and

d) Identification of the Conditions for Recognition.

MRAs should also include, inter alia, certain requirements beyond professional qualifications, such as:

- having an office address, maintaining an establishment or being a resident;
- language skills;
- proof of good character;
- professional indemnity insurance;
- compliance with the host jurisdiction's requirements for use of trade or firm names; and

31 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (2017) OJ L 11/23, ch 9-10.

- compliance with the host jurisdiction ethics, for example, independence and good conduct.[32]

As of yet, no MRAs have been negotiated, although the Architects' Council of Europe has expressed a desire to develop a MRA with its equivalent Canadian body in the coming years.[33]

3.2.3 'CETA-minus' arrangements

A number of other association and trade agreements provide potential avenues for the recognition of qualifications of certain third-country nationals. Specifically, the following agreements make provision for the establishment of mutual recognition agreements:

- EU-Andean Trade Agreement,[34]
- Bosnia and Herzegovina Stabilisation and Association Agreement,[35]
- Economic Partnership Agreement with CARIFORUM states,[36]
- Central America-EU Association Agreement,[37]
- EU-Chile Association Agreement,[38]
- EC-Georgia Association Agreement,[39]
- Euro-Mediterranean Agreement with Jordan,[40]

32 CETA, note 19, Annex 11A(6).

33 ACE Policy Position 2016, *Support for the Negotiation of Binding Mutual Recognition Agreements (MRAs)*, available at: https://www.ace-cae.eu/fileadmin/New_Upload/7._Publications/Manifesto/EN/ACE_MANIFESTO_8_SUPPORT_FOR_THE_NEGOCIATION_2016_EN.pdf (accessed 21 December 2017).

34 Trade Agreement between the European Union and its Member States, of the one part, and Columbia and Peru, of the other part (2012) OJ L 354/3, art 129.

35 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (2015) OJ L 164/2, art 55.

36 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (2008) OJ L 289/I, arts 85, 114.

37 Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ 15 December 2012, art 177.

38 Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002) OJ L 352, art 103.

39 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014) OJ L 261/4, art 96.

40 Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part (2002) OJ L 129, art 35.

- EU-Korea Free Trade Agreement,[41]
- EC-Kosovo Stabilisation and Association Agreement,[42]
- EC-Moldova Association Agreement,[43]
- EC-Montenegro Stabilisation and Association Agreement,[44]
- EC-Singapore Agreement,[45]
- EC-South Africa Trade, Development and Cooperation Agreement,[46] and
- EU-Ukraine Association Agreement[47]

Many of the above-mentioned agreements require national authorities to encourage professional regulatory authorities to enter into discussion with their counterparts in the other contracting party and consider the possibility of mutual recognition. This is, however, a weak obligation.

3.2.4 Equal treatment clauses in association and trade agreements

A final potential avenue for recognition may be the guarantee of equality and non-discrimination made in many such agreements. This issue was first raised in *Razanatsimba*, in which the applicant, a Madagascan national, sought admission to the Lille Bar having met all other qualification requirements except that of nationality.[48] The applicant relied on art 62 of the EEC-ACP Convention (now art 13, annex II of the Cotonou Agreement), which provided that the respective parties to the Convention must treat nationals and firms on a non-discriminatory basis in matters of establishment and the provision of services. According to the Court of Justice, art 62 did not require of member states or ACP states to treat nationals of the other group equally. The Court went on to consider whether

41 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011) OJ L 127/6, art 7.21.
42 Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part (2016) OJ L 71/3, art 56.
43 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (2014) OJ L 260/4, art 222.
44 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (2010) OJ L 108, art 57.
45 EC-Singapore Free Trade Agreement, art 8.16.
46 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 (1999) OJ L 311/3, art 89.
47 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014) OJ L 161/3, art 106.
48 Case C-65/77 *Razanatsimba* [1977] ECLI:EU:C:1977:193.

ACP nationals may be entitled to equality of treatment in respect of particular advantages accorded by member states to nationals of ACP states. The Court concluded that it was acceptable for member states to provide preferential treatment to nationals of certain ACP states which did not benefit nationals of all ACP states equally.

Compare the result in *Razantsimba*, however, with the more recent decision in *Simutenkov*, wherein the applicant, a Russian national and football player resident and working in Spain, was required to hold a 'non-Community' football licence.[49] The applicant applied for a Community licence and was refused. Relying on the equal treatment guarantee in the EC-Russia Partnership and Cooperation Agreement,[50] the applicant challenged this decision. According to the Court of Justice, the equal treatment guarantee contained therein was directly effective. The rule concerning the non-Community licence was consequently found to be invalid. However, in *Pavlov*, the Court held that equal treatment in working conditions does not include access to a profession itself.[51] Non-discrimination clauses concerning the treatment of workers are contained in the:

- Ankara Agreement;[52]
- EU-Andean Trade Agreement;[53]
- Euro Mediterranean Agreement with Algeria;[54]
- Bosnia and Herzegovina Stabilisation and Association Agreement;[55]
- EC-Georgia Association Agreement;[56]
- EU-Kazakhstan Partnership and Cooperation Agreement;[57]

49 Case C-265/03 *Simutenkov* [2005] ECLI:EU:C:2005:213.
50 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (1997) OJ L 327/3, art 23.
51 Case C-101/10 *Pavlov* [2011] ECLI:EU:C:2011:462.
52 Agreement establishing an Association between the European Economic Community and Turkey (1977) OJ L 361/1, art 9.
53 EU-Andean Trade Agreement, arts 269, 276.
54 Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part (2005) OJ L 265/2, art 67.
55 Bosnia and Herzegovina Stabilisation and Association Agreement, note 35, art 47.
56 EC-Georgia Association Agreement, note 39, art 416.
57 Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part (1999) OJ L 196/3, art 19.

- Euro-Mediterranean Agreement with Morocco;[58]
- EC-Moldova Association Agreement;[59]
- EC-Russia Partnership and Cooperation Agreement;[60]
- EC-Serbia Stabilisation and Association Agreement;[61]
- EC-Tunisia Agreement,[62] and;
- EU-Ukraine Association Agreement.[63]

It is plausible that the equal treatment guarantees in these agreements could be used to apply the same procedure for the recognition of qualifications as applies to nationals of the member states but, in the light of *Pavlov*, equal treatment in working conditions may not include within its scope access to a profession. However, it is possible to partially distinguish the judgment in *Pavlov* insofar as it was based on a particular interpretation of the EC-Bulgaria Association Agreement which is unlikely to apply with full rigour to all the agreements noted above. According to the CJEU in that case, '[n]othing in the Association Agreement (…) allows it to be deduced (…) that the contracting parties intended to eliminate all discrimination based on nationality as regards access to regulated professions by Bulgarian nationals'.[64] The Court also noted that the non-discrimination clause in that agreement was contained in the title on workers and no equivalent guarantee was provided in the title concerning establishment and service provision. It will thus only be in the light of a holistic interpretation of an equal treatment guarantee and its place within an association and trade agreement that we can judge with certainty whether or not it will extend to the recognition of professional qualifications on equal terms with member state nationals. To apply this principle to the terms of the above agreements, for example, it is unlikely that the equal treatment guarantee in the EU-Kazakhstan Partnership and Cooperation Agreement applies to access to a profession but likely that the equivalent guarantee in the EU-Ukraine

58 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (2000) OJ L 70/2, art 64.
59 EC-Moldova Association Agreement, note 43, art 447.
60 EC-Russia Partnership and Cooperation Agreement, note 50, art 23.
61 Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, on the other part (2013) OJ L 278/16, art 49.
62 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (1998) OJ L 97/2, art 64.
63 EU-Ukraine Association Agreement, note 47, art 17.
64 *Pavlov* case, note 51, para 27.

Association Agreement does so apply, given the difference in their terms, the different degrees of economic integration they reflect and their scope.

3.3 A Good Fit?

Reviewing these agreements, their terms and economic and social context leads me to believe that an agreement similar to CETA is likely to be the best 'fit' for any post-Brexit agreement on the mutual recognition of professional qualifications between the EU and the UK for a number of reasons. First, CETA is a somewhat open-ended agreement, more so than the EEA and Swiss agreements but less so than the EU's agreements with Turkey and its other international partners. The EEA Agreement and EC-Swiss Confederation Agreement oblige the contracting parties to facilitate the mutual recognition of professional qualifications: this connotes a very high degree of mutual coordination, obligation and integration. This model fits for states which wish to be part of the internal market, albeit through a separate agreement. At the other end of the spectrum, the rules concerning the mutual recognition of qualifications in the agreements with Turkey and all other third-countries to date are minimalistic. The furthest these agreements go is to facilitate the development of MRAs, in particular, by professional bodies in the states parties. This does appear quite like CETA at first, but on closer inspection it is obvious that CETA goes some way further than this. Unlike all other agreements, CETA provides a relatively detailed template for the negotiation and drafting of MRAs insofar as it requires certain minimum conditions to be met. Although the guidance provided in annex 11A CETA is described as being 'non-binding', it is reasonable to believe that it will be highly influential in setting minimum standards for future MRAs. CETA may not be a perfect fit for a post-Brexit deal but it is an ideal starting point.

A second (composite) reason for preferring CETA as a model for any post-Brexit agreement is that Canada is more similar to the UK in the relevant economic, social and geopolitical dimensions. In economic terms, both are heavily trade dependent, albeit that Canada's goods exports constitute a much greater proportion of its international trade than the UK's trade in goods does.[65] But services, professional and otherwise, increasingly constitute both Canada and

65 Cf. Statistics Canada, 'Balance of International Payments, Current Account and Capital Account' (2017), available at: http://www5.statcan.gc.ca/cansim/a26?id=3760101&pattern=&p2=-1&stByVal=1&p1=1&tabMode=dataTable&csid=&retrLang=eng&lang=eng (accessed 16 May 2018); and Office for National Statistics, 'UK Balance of Payments, The Pink Book: 2017', available at: https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/unitedkingdombalanceofpaymentsthepinkbook/2017 (accessed 16 May 2018).

the UK's export markets and their domestic labour markets.[66] Thus we see similar domestic demand in both countries for low-skilled and high-skilled labour manifested in these countries' well-documented labour migration regimes.[67] This is surely linked to the broadly liberal economic policies that both the UK and Canada have adopted over the course of their recent (and distant) histories. In social and cultural terms, the UK and Canada share a linked culture and history given the imperial relationship of dominium between the former and the latter. Finally, in geopolitical terms, the UK is relatively culturally similar to, yet geographically furthest from, western continental Europe amongst many of the EU's external trading partners. In socio-economic terms, this spatial and cultural distance has already manifested itself in a 'multi-speed Europe', with differing levels of regional socio-economic and cultural integration.[68] A third reason is pragmatic. Given that CETA has already been negotiated, and given the length of time it took to negotiate that agreement, it would be quite sensible and convenient for the UK and the EU to rely on their existing work. It is for these reasons, therefore, that the CETA model is, out of those agreements previously negotiated between the EU and its international partners, a most appropriate model for any post-Brexit deal, particularly as it relates to MRAs in the context of professional qualifications.

66 See L. James, D. Guile and L. Unwin, 'Learning and Innovation in the Knowledge-Based Economy: Beyond Clusters and Qualifications' (2013) 26 Journal of Education and Work, 243; D.W. Livingstone and B. Watts, 'The Changing Class Structure and Pivotal Role of Professional Employees in an Advanced Capitalist "Knowledge Economy": Canada, 1982-2016' (2018) 99 Studies in Political Economy, 79; A Socialist Review 79; Office of National Statistics, 'UK Labour Market: May 2018', available at: https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/may2018 (accessed 16 May 2018); and Office of National Statistics, 'International Immigration and the Labour Market, UK: 2016', available at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/migrationandthelabourmarketuk/2016 (accessed 16 May 2018).

67 J. Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2011) Metropolis British Columbia: Centre of Excellence for Research on Immigration and Diversity Working Paper No. 11-15; M. Zou, 'The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations' (2015) 31 IJCLLIR, 141; M. Variyam, 'Canada's Skilled Worker Immigration Regulation and its Impact on the Canadian Economy' (2006) 12 Law and Business Review of the Americas, 603; and J. Carvahlo, 'British and French Policies towards High-Skilled Immigration during the 2000s: Policy Outplays Politics or Politics trumps Policy?' (2014) 37 Ethnic and Racial Studies, 2361.

68 See, eg, S. Deakin and A. Koukidaki, 'The Sovereign Debt Crisis and the Evolution of Labour Law in Europe' in N. Countouris and M. Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013), 186-187.

4. The Medical Profession in Ireland and the UK

4.1 Reasons and numbers

The medical profession stands out amongst most, if not all, other professions for a number of reasons. First, it is heavily institutionalised and regulated. Second, the medical profession is characterised by a high degree of mobility—nationally, regionally and internationally. Third, medical professionals are in constant demand: there is and always will be a demand for medical practitioners due to the universal nature of human suffering. Although some of these features seem unique to the medical profession—in particular, the universality of human suffering as constitutive of market demand—it nonetheless seems fitting to consider how the medical profession, and the recognition of medical qualifications, has been regulated so as to address the general goals for the EU we mentioned previously in section 3.1, namely to improve services trade and better manage migration. Viewing the medical profession as a service in this context may seem cynical and harsh, but it is realistic, as will become clear.

I focus on the UK and Ireland for reasons previously noted briefly in the introduction, but which merit elaboration here. Figure 1 is based on the OECD's *Health Workforce Migration* statistics. The statistics detail the number of foreign-qualified doctors in OECD countries. The table presented in Figure 1 extracts information on the ten OECD countries with the highest proportion of foreign-qualified medical doctors as a percentage of all doctors in the jurisdiction.

Country	Australia	Canada	*Ireland*	Israel	New Zealand	*Norway*	*Sweden*	*Switzerland*	*UK*	US
% Foreign Qualified Doctors	32.356	23.96	41.62	57.74	42.362	38.093	27.14	27.048	28.071	24.297

Figure 1. Source: http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT#

What is perhaps more interesting is where foreign-qualified doctors are coming from and where they are going to. Figure 2 assesses this in the context of the EU, Norway and Switzerland, selecting the five largest groups of foreign-qualified doctors which constitute the medical professions in these countries.

Country	*Ireland*	Norway	Sweden	Switzerland	*UK*
Total Number of Foreign Qualified Doctors	9,123	8,659	11,029	8,617	50,177
Country of Origin	Pakistan (2,026)	Germany (1,621)	Poland (1,445)	Germany (5,033)	India (16,407)
	Sudan (1,088)	Poland (1,583)	Germany (1,088)	Italy (645)	Pakistan (5,637)
	UK (731)	Hungary (981)	Iraq (888)	Austria (451)	Nigeria (2,218)
	Romania (723)	Demark (925)	Denmark (816)	France (416)	Egypt (1,926)
	South Africa (683)	Sweden (595)	Hungary (736)	Romania (178)	Ireland (1,837)

Figure 2. Source: http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT#

What is interesting to note is that Ireland and the UK stand out as being quite dependent upon third-country nationals and not EEA nationals to meet domestic labour market demand. The question which then arises, in the context of this paper, is the extent to which the recognition of professional qualifications has an effect on the satisfaction of domestic labour/service demand in the medical profession. If this is the case, then qualification recognition must be understood as an important operative element in the search for skilled labour and satisfactory service provision. Furthermore, the EU and the remaining member states may be able to learn some important lessons from this case study, insofar as Ireland and the UK have successfully satisfied domestic labour market and service demands through external labour migration. It might even be possible to apply these lessons to other professions, although this is not an issue which can be fully explored here.

4.2 Ireland

Doctors, amongst certain other medical professionals, in Ireland are governed by the Medical Practitioners Act 2007, as amended. The 2007 Act empowers the Medical Council — a non-profit corporate entity comprised of doctors, health sector professionals and public officials — as the responsible body for the regulation, education, training and disciplining of medical professionals in Ireland.[69] The Medical Council dispenses this function by, inter alia, setting professional education and training standards for doctors who seek to be *registered to practise* as a medical professional. Among the relevant criteria for

69 Medical Practitioners Act 2007, s 6.

the purposes of registration — professional qualifications, fitness to practise, language competence, insurance, etc — are that the medical practitioner in question holds certain professional qualifications. The Medical Council is thereby responsible for facilitating the mutual recognition of qualifications of doctors[70] and is empowered to issue rules (in the form of secondary legislation) implementing its functions in this respect.[71] For the purposes of the recognition of professional qualifications, medical practitioners from the EU, EEA and Switzerland are governed by the relevant transposition of the terms of the Recognition Directive into Irish law. Medical professionals from third-countries are governed by rules issued directly by the Medical Council.[72] According to the terms of these rules, it is for the Medical Council to determine whether the education, training and qualifications obtained by a third-country national are 'at least equivalent' to programmes completed in the jurisdiction of Ireland for the purposes of registration as a medical practitioner.[73] Little further specific guidance is provided in the legislation as to what might be 'at least equivalent' to programmes completed and recognised in Ireland and so it may be helpful and appropriate to consider what the standards are for Irish programmes and what programmes have been recognised to be 'at least equivalent' in the past. According to the rules, programmes in Ireland must, inter alia, comply with the basic requirements of the *World Federation for Medical Education Global Standards for Quality in Improvement in Medical Education: 2015 Revision* and the rules in the Recognition Directive on basic medical education and training.[74] Certain professional qualifications obtained in other jurisdictions have been recognised as equivalent by the Medical Council, primarily higher specialist medical qualifications obtained in certain English-speaking countries or countries which have historical social, economic and cultural links with Ireland and the UK.[75] If a medical practitioner's qualifications are not found to be 'at least equivalent' to these standards, then that practitioner may take an examination, the successful completion of which will provide sufficient evidence of their skills and competences for the purposes of registration to practise as a medical practitioner.

70 Medical Practitioners Act 2007, s 7.

71 Medical Practitioners Act 2007, s 11.

72 Thus, in the absence of any agreement to the contrary, UK nationals will be governed by these default rules.

73 Medical Practitioners Act 2007, ss 46(b)(iv), 48(2)(c), 88(7).

74 Medical Council Rules in respect of Training Bodies and Qualifications for the Purposes of the Specialist and Trainee Specialist Divisions (Section 89 of the Medical Practitioners Act 2007) SI 529/2010; Medical Council Registration Rules SI 417/2011; and Medical Council Rules in Respect of the Duties of the Council in relation to Medical Education and Training (Section 88 of the Medical Practitioners Act 2007) SI 685/2016.

75 Medical Council Registration Rules SI 417/2011, Appendix A.

The question that now arises in the light of the numbers presented in Figure 2 is the link, if any, between the recognition of professional qualifications, and the origins and numbers of medical practitioners who have come to Ireland. Why, for example, have so many Pakistani doctors come to Ireland? The answer lies partly in the recognition of qualifications and partly in advertising. The Health Service Executive ('HSE'), the statutory body responsible for the national health service in Ireland, sought to recruit foreign doctors to meet local labour market demands. The Medical Council had previously recognised the qualifications of certain Pakistani doctors as 'at least equivalent' and so the HSE targeted advertising at Pakistani doctors. Eventually, it was accepted by the HSE and the now responsible appointment body—the National Doctors Training and Planning ('NDTP') organisation—that such conduct was in breach of the *WHO Global Code of Practice on the International Recruitment of Health Personnel*. Notwithstanding the subsequent abandonment of this ethically questionable policy by the HSE and the NDTP, Pakistani doctors have continued to come to Ireland in light of the, apparently, attractive working conditions and high domestic demand. An increase in intra-EU mobility, particularly by Romanian doctors to Ireland after the revision of the Recognition Directive has, however, recently decreased the need for third-country nationals.[76] It therefore seems that a combination of existing qualification recognition in the context of an already highly institutionalised, organised and regulated professional environment and targeted advertising operated to successfully satisfy domestic labour market needs through managed migration, albeit in an ethically questionable manner.

4.3 The UK

The legal position in the UK is very similar to that in Ireland. The Medical Act 1983, as amended, governs the regulation of the medical profession and empowers a body similar to the Medical Council in Ireland—the General Medical Council—to exercise all powers and functions necessary for that purpose. Doctors, amongst other medical practitioners, are required to register with the General Medical Council; registration entails the provision of a licence to practise as a medical practitioner.[77] For the purposes of registration of third-country

76 Thanks to the staff of the NDTP for their guidance in locating documentation on this matter: N. Humphries, R. Brugha and H. McGee, 'Nurse migration and health workforce planning: Ireland as illustrative of international challenges' (2012) 107 Health Policy, 44; P. Bidwell, N. Humphries, P. Dicker, S. Thomas, C. Normand and R. Brugha, 'The National and International Implications of a Decade of Doctor Migration in the Irish Context' (2013) 110 Health Policy, 29; Health Service Executive, 'National Doctors Training and Planning' available at: https://www.hse.ie/eng/staff/leadership-education-development/met/ (accessed 16 May 2018).

77 Medical Act 1983, s 29B.

nationals, or UK and EEA nationals holding a third-country qualification, the General Medical Council is empowered to register persons with an 'acceptable overseas qualification', namely, 'any qualification granted outside the United Kingdom, where that qualification is for the time being accepted by the General Council as qualifying a person to practise as a medical practitioner in the United Kingdom'.[78] What, then, is an 'acceptable overseas qualification'? The General Medical Council has developed criteria to assess overseas qualifications over many years and presently[79] requires, inter alia, that the qualification is listed in the World Directory of Medical Schools,[80] and was based on a programme of study that was made up of at least 5,500 hours and lasted at least three years. The General Medical Council also provides a list of specific programmes and qualifications from certain countries and universities which it may accept[81] or does not accept[82] at present.

Again, as with the Irish case, what is it about these rules and systems of recognition which attracts workers from certain countries? Why are Indian qualified doctors overwhelmingly the largest constituent of foreign-qualified doctors in the UK? Unlike the Irish case, histories of imperialism are more relevant here. The National Health Service, the UK body responsible for staffing of the UK's public health services, recruited doctors from British colonies since its inception. Indeed, '[i]n 1963, Tory health minister Enoch Powell, later a fierce opponent of immigration, led a recruitment drive to hire 18,000 doctors from India and Pakistan alone'.[83] Many African countries, former colonies or dependencies of the Crown, have also 'exported' their doctors to the UK.[84]

78 Medical Act 1983, s 21B(2).

79 General Medical Council, 'Acceptable Overseas Qualifications', available at: https://www.gmc-uk.org/registration-and-licensing/join-the-register/before-you-apply/acceptable-overseas-qualifications (accessed 17 May 2018).

80 World Directory of Medical Schools, available at: https://www.wdoms.org/ (accessed 17 May 2018).

81 General Medical Council, 'Overseas Medical Qualifications we may accept', available at: https://www.gmc-uk.org/registration-and-licensing/join-the-register/before-you-apply/acceptable-overseas-qualifications/overseas-medical-qualifications-we-may-accept (accessed 17 May 2018).

82 General Medical Council, 'Overseas Medical Qualifications we do not accept', available at: https://www.gmc-uk.org/registration-and-licensing/join-the-register/before-you-apply/acceptable-overseas-qualifications/overseas-medical-qualifications-we-do-not-accept (accessed 17 May 2018).

83 'The Foreign Backbone of the NHS', *The Week Magazine* (21 March 2015), available at: http://try.theweek.co.uk/the-foreign-backbone-of-the-nhs/ (accessed 17 May 2018).

84 M. Mackintosh, P. Raghuram and L. Henry, 'A Perverse Subsidy: African trained nurses and doctors in the NHS: What would constitute an ethical policy towards the recruitment of African-trained health professionals for the NHS?' (2006) 34 Soundings, 103; R. Young, J. Noble, A. Mahon, M. Maxted, J. Grant and B. Sibbald, 'Evaluation of international recruitment of health professionals in England' (2010) 15 Journal of Health Services Research and Policy, 195; J. Connell, 'International Trade in Health Workers' in A. Culyer (ed), *Encyclopedia of Health Economics, Volume 2* (Elsevier 2014); and B.K. Potnuru and V. Sam, 'India-EU Engagement and International Migration: Historical Perspectives, Future Challenges and Policy Imperatives' (2015) 27 IIMB Management Review, 35.

Once again, it seems that a strong sense of a shared (albeit imposed) history and mutual understanding combined with effective advertising and recruitment policies operated to meet domestic labour market and services demands.

4.4 Lessons

Leaving aside some obvious criticisms concerning (neo)colonialism[85] and the efficacy of ethical migration practices for now,[86] what lessons emerge from the above analysis of the medical profession in Ireland and the UK for the post-Brexit world? Are there lessons to be learned from these experiences for the UK and Europe, and what, if any, is the link between the above analysis and the recognition of professional qualifications? To my mind, a number of salient points stand out which address both of those questions. First, the UK seems more able, at least in some professional sectors, to stand on its own feet — or, indeed, on the shoulders of its former colonies — in the post-Brexit world than much contemporary commentary would suggest. While, of course, much of the UK's trade at present is with the EU, from the point of view of the UK's domestic services economy, its dependency on EU migration and service provision is not overwhelming. The EU could do well to learn from this point in its external trade relations. Further institutionalising educational and training links with its regional and international partners might eventually provide the EU with fertile services and labour markets which could provide mutual benefits. Creating mutual histories — cultural, social and economic — appear to facilitate long-term integration. Second, it is admittedly difficult to separate the issue of recognising professional qualifications from the broader context of economic integration. But what my case study of the medical profession in the Ireland and the UK does suggest is that third-country professional qualifications are more likely to be recognised where there is an existing degree of commonality in educational systems and professional or industrial culture.

It might therefore be fruitful for the EU to place more emphasis in its external relations on cultivating trading relationships with third-countries with which the member states have common histories. Many of the agreements noted in section 3.2 illustrate that the EU is already doing so. A good example of the EU's work on promoting qualification recognition in its external relations lies in

85 P. Raghuram, 'Caring about 'brain drain' migration in a postcolonial world' (2009) 40 Geoforum, 25.

86 T. Martineau and A. Willetts, 'The health workforce: Managing the crisis ethical international recruitment of health professionals: will codes of practice protect developing country health systems?' (2006) 75 Health Policy, 358; and R. Young, 'How effective is an ethical international recruitment policy? Reflections on a decade of experience in England' (2013) 111 Health Policy, 184.

the European Qualification Framework ('EQF'),[87] which 'serves as a translation device between different qualifications systems and their levels'.[88] It does this by ranking qualifications obtained at every stage of education according to eight levels, based on their learning outcomes. In serving this purpose, it aims to make qualifications obtained in different educational systems and institutions more comparable by reference to a single framework for qualifications. The EQF is embodied in a Council Recommendation, and is therefore not legally binding on the member states. However, it is increasingly the case that qualifications obtained at all stages in the EU refer to the appropriate level of the EQF. As Sacha Garben notes, for the EQF to be truly successful, it must become '*the* general framework of assessing the level of education courses, both nationally and internationally'.[89] This extends not only to qualifications obtained in formal educational courses and education institutions, but also those obtained professionally.

The EQF was originally introduced by a Council Recommendation in 2008[90] which has since been repealed and replaced by a Recommendation in 2017. In its 2017 Recommendation, the Council makes a number of important observations in relation to the qualifications of third-country nationals. First, it notes that third-country nationals already resident in the EU are often over-qualified and under-employed.[91] Second, an increasing number of third-countries are seeking 'closer links' between their qualifications frameworks and the EQF.[92] On the basis of these and other observations, the Council therefore recommended that the Commission, in cooperation with the member states and stakeholders in the EQF Advisory Group, explore the possibility of developing criteria and procedures which enable the comparability of the frameworks of third-country nationals with the EQF. Although a somewhat weak recommendation, it does suggest the convergence of third-country standards towards the EQF. This may, eventually, provide a basis for third-country qualifications to be more easily compared and recognised with those obtained in the EU in a manner similar to the medical profession in Ireland and the UK.

87 Council Recommendation on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning (2017) OJ C 189/15.

88 S. Garben, *EU Higher Education Law: The Bologna Process and Harmonisation by Stealth* (Wolters Kluwer 2011), 79.

89 ibid, 80 (my emphasis).

90 Council Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning (2008) OJ C 111/1.

91 Council Recommendation (2017) OJ C 189/15, note 87, recital 18.

92 ibid, recital 19.

In addition to the EQF, the Commission also cooperates in education and training with third-countries to prioritise, inter alia, the advancement of the EU as a centre of excellence in education and training; to support partner countries in the modernisation of their legal system; and to promote common values and closer understanding between different peoples and cultures. The EU has thus established a policy dialogue with several partner states and groups, namely with the EU neighbouring countries through the Eastern Partnership, Southern Mediterranean Partnership and Western Balkans Platform on Education and Training, with Africa through the EU-Africa Partnership, and with several countries in the Americas and Asia. These dialogues provide opportunities for EU and non-EU officials and member state representatives to meet, discuss competing goals, form joint agendas and goals and produce reports or evaluations on respective recognition methods, policies and cooperation. While these dialogues and fora are primarily targeted at education, it cannot be doubted that they may have spillover effects on the recognition of professional qualifications and even require the involvement of professional bodies in the long run.

An example of this is the joint study commissioned by the EU-Australia Partnership on the role of qualifications frameworks in facilitating the mobility of workers and learners in 2011. The study noted the significance of professional organisations in recognising qualifications, and several problems surrounding the lack of professional qualification recognition. These problems included the lack of professional networks, the great diversity of professional bodies and organisations, and the different qualification assessment and recognition methodologies adopted in respect of vocational, academic and professional qualifications.[93] The study was completed against the background of the European Commission—Government of Australia Joint Declaration on Cooperation in Education and Training in 2007, which required cooperation by both parties on, inter alia, 'facilitating the quality of student/learner and professional mobility by promoting transparent, mutual recognition of qualifications and periods of study, training, and where appropriate, portability of credits'. Since the report in 2011, the EU-Australia Partnership has agreed to foster linkages between the EQF and the Australian Qualifications Framework for

93 GHK, *Study on the (potential) role of qualifications frameworks in supporting mobility of workers and learners: European Commission and Australian Department of Education, Employment and Workplace Relations Joint EU-Australia Study* (DEEWR and DG EAC 2011).

the purposes of better facilitating the recognition of qualifications.[94] In its third Policy Dialogue with Southern Mediterranean Countries on Higher Education as part of the Southern Mediterranean Partnership, the Commission encouraged participating partner countries to adopt the EQF in the development of their national qualification frameworks,[95] and the Astana Declaration of the Second Meeting of Ministers for Education of the member states of the European Union and of the Central Asian Countries encouraged members of the EU's Education Initiative for Central Asia to consider the recent Council Recommendation on the EQF and take it into account in forming and updating their respective national qualification frameworks.[96] In addition, the EQF has been, or soon will be, adopted by a number of countries participating in the Western Partnership[97] and the Eastern Partnership.[98]

The EQF has also featured more generally in the EU's external relations. For example, the European Neighbourhood Policy ('ENP'), the EU's policy governing its relations with its southern and eastern neighbours, requires the development and implementation of country-specific action plans on an annual basis. In general, these action plans require of countries in the ENP, inter alia:

- the development of national qualification frameworks in line with the EQF;
- the development of labour market skills matching tools, ie, professional qualification recognition systems;
- the implementation of ILO core labour standards, and;
- educational exchanges between participating third-country students and EU students.

While none of the action plans or implementation reports thereon to date reveal an acknowledgement of the significance of labour market skills matching toolsets such as professional recognition schemes in labour migration or internal labour market demands, a foundation is nonetheless being laid by the EU in its external

94 EU-Australia Education and Training Policy Dialogue, 'Fourth European Union-Australia Education and Training Policy Dialogue: Joint Statement' (Brussels, 12 March 2012); and EU-Australia Education and Training Policy Dialogue, 'Fifth European Union-Australia Education and Training Policy Dialogue: Joint Statement' (Melbourne, 4 March 2013).

95 European Commission, *Report on the Third Policy Dialogue with Southern Mediterranean Countries on Higher Education* (Brussels, 12-13 July 2016), 12.

96 Astana Declaration of the Second Meeting of Ministers for Education of the Member states of the European Union and of the Central Asian Countries (Astana, 23 June 2017).

97 DG Education and Culture, *From University to Employment: Higher Education Provision and Labour Market Needs in the Western Balkans Synthesis Report* (European Commission 2016).

98 'Mutual Learning for Better Qualifications Regional Conference October 2015: Conference Conclusions and Follow-up Actions' (6-8 October 2015).

relations. In addition, the EU's enlargement policy also touches on certain elements of qualification recognition. In its enlargement policy, the EU monitors the progress of such countries in meeting certain basic, minimum standards in relation to, amongst other things, their national institutions, education and training, fiscal stability and market rules. The Commission draws up reports on each country's progress towards compliance with such EU norms and standards on an annual basis. So far, the recognition of professional qualifications and the previously-discussed EQF above have featured in these reports. Thus Turkey, Kosovo, the Former Yugoslav Republic of Macedonia and Montenegro have adopted and implemented a national qualifications framework which references the EQF. In respect of the recognition of professional qualifications, while some potential and actual candidate accession states have implemented a recognition scheme, obstacles to recognition, such as nationality and language requirements, remain.[99] Moreover, such recognition schemes have generally been quite partial, applying to a handful professions only.[100] It thus seems that the groundwork for the improved recognition of professional qualifications, and the improved labour mobility and services trade which follows therefrom, has been set by the EU in and through its education policy and external relations but much remains to be achieved.

5. Conclusion

This paper makes two points. The first is about the recognition of professional qualifications between the UK and the EU, post-Brexit. It provides a reasoned argument as to the best model for an agreement on this issue, in the light of the EU's existing association and trade agreements. The second point the paper makes concerns the role of professional qualifications in the EU's external relations generally. It invokes the medical profession in Ireland and the UK as a useful example of the successful institutionalisation of common education and training policies between member states and international trading partners. This is something that the EU is currently working on but in order to meet European labour market demands and increase trade in services, more needs to be achieved.

99 European Commission, 'Turkey 2018 Report accompanying the 2018 Communication on EU Enlargement Policy' (Staff Working Document) SWD (2018) 153 final, 65.

100 European Commission, 'Bosnia and Herzegovina 2016 Report accompanying the 2016 Communication on EU Enlargement Policy' (Staff Working Document) SWD (2016) 365 final, 42; European Commission, 'The former Yugoslav Republic of Macedonia 2018 Report accompanying the 2018 Communication on EU Enlargement Policy' (Staff Working Document) SWD (2018) 154 final, para 5.3; and European Commission, 'Albania 2018 Report accompanying the 2018 Communication on EU Enlargement Policy' (Staff Working Document) SWD (2018) 151 final, 56.

Chapter 7:

Service Mobility and International Trade Dispute Settlement, Ensuring The Rights of Mode 4 Service Suppliers Granted by the EU

*Simon Tans**

1. Introduction

The General Agreement on Trade in Services (GATS) has introduced a treaty model to reduce barriers to trade in services. Besides the multilateral GATS, many states seek to liberalize trade in services on a bilateral or plurilateral basis as well, in the form of Free Trade Agreements (FTA). The example used in this chapter is the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which has provisionally entered into force in 2017. Service trade liberalization agreements often include mobility rights for natural persons in order to allow service providers to supply its service. This concept, referred to as Mode 4 in international trade parlance, thus provides rights for natural persons to temporarily move to a host country.

In practice this means that states that have accepted this specific form of trade liberalization need to accept that natural persons, under the conditions identified at the international level, enter their territory, perform economic activities there, and reside on their territory for at least the duration of the service. The impact of Mode 4 on immigration law has, in the authors opinion, been underestimated. This form of service provision is quite different from traditional cross-border trade, as Mode 4 has a direct impact on immigration policies and domestic labour market policies, policy fields where states traditionally wish to remain autonomous.[1] As GATS Mode 4 provides mobility rights on a non-regional level, this is quite extraordinary.

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1 S. Tans, *Service provision and migration, EU and WTO service trade liberalization and their impact on Dutch and UK immigration rules* (Brill Nijhoff 2017), 1-2.

Research in several EU Member States executed by the author demonstrates a lack of awareness of the reduced autonomy at WTO Member State level when it comes to liberalized Mode 4 service provision sectors.[2] In parallel, most EU Member States are consistently tightening their control on migration.[3] When observing the trend in immigration rules in the Netherlands, Germany and the UK, it is safe to assume that the decade of the 90's, which saw an opening up of borders for international trade, has made way for a new trend of selective entry of migrants that are perceived to contribute to the host state. Interestingly, this tightening of immigration rules, in the author's opinion, encroaches on the international commitments.

The question whether certain immigration rules indeed violate international trade commitments relating to Mode 4 itself is rather complex and will only be briefly summarized here to build on the argumentation. This paper will focus on a closely related topic, the opportunities for Mode 4 service providers to rely on dispute settlement if they consider their Mode 4 rights to be violated. Consequently, the topic addressed here is highly relevant, precisely because it is hard to assess the practical implications of Mode 4 commitments in the national legal order.

The WTO Dispute Settlement Mechanism provides WTO Members with the possibility to initiate proceedings when they consider that obligations derived from the GATS are not upheld by other Members. Similarly, CETA contains a bilateral dispute settlement mechanism which allows its signatory states to settle disputes arising under the agreement. This mechanism uses the WTO dispute settlement system as a model. Note that the CETA trade dispute settlement mechanism is not the same as the often discussed investment dispute settlement system under CETA, a topic which is unrelated to the topic here under discussion.[4]

2 For the Netherlands and the UK: *Ibid*, see in particular the concluding chapter; Most recently as well in relation to Germany and Sweden: S. Tans, P. Herzfeld-Olsson, C. Hörich, K. Neundorf and H. Tewocht, *The interaction between trade commitments and immigration rules, admitting contractual service suppliers and independent professionals* (EU Commission expert report, forthcoming 2019). Note that specifically in relation to Sweden it is unclear whether this form of liberalization was underestimated. This has to do with the fact that the Swedish immigration rules are quite open, thus there is little conflict between the Swedish rules and the international obligations.

3 This seems deliberate in the form of administrative obfuscation. Dawson uses this term to indicate that developed WTO Member States seem to accept Mode 4 commitments to appear development friendly, yet in practice then use administrative obfuscation to ensure that low skilled workers still have difficult access: L. Dawson 'Labour mobility and the WTO: The limits of GATS Mode 4' (2013) 51(1) International Migration, 5.

4 As such, this paper addresses CETA chapter 29 (dispute settlement), it does not address CETA chapter 8 section F (resolution of investment disputes).

This chapter will specifically address dispute settlement in relation to Mode 4 commitments. It builds on the argument that identifying a breach of Mode 4 rights as a result of immigration rules is difficult. Additionally, the bearers of Mode 4 related rights need to persuade their governments to initiate such proceedings. This will be problematic in practice, as in many service sectors a strong national pressure group is lacking. However, the international obligations under discussion have repercussions for immigration and domestic labour market policies. The WTO entails a rules based system that requires objective justification in the case of a conflict with national regulations in these two policy fields.

This paper will investigate the following central question: Mode 4 commitments have an underestimated influence on national immigration law which in practice is hard to ensure. To what extent does, or can, international trade dispute settlement contribute to the implementation of international obligations in domestic legal orders?

In order to provide a full overview of this topic, this chapter will first describe the concept of Mode 4, as well as the specific categories of Mode 4 service suppliers that are identified in the international agreements (§ 2). The next paragraph will describe the consequences of Mode 4 trade liberalization for immigration rules and access to the labour market rules (§ 3). An explanation of the premise that Mode 4 rights are difficult to enforce when it comes to dispute settlement will follow (§ 4). The chapter will end with a conclusion (§ 5).

2. Mode 4, movement of natural persons

The GATS has introduced a trade liberalization mechanism that targets 'measures affecting trade in services'. In essence, this broad definition seeks to address governmental action which has a negative competitive effect on foreign services / service suppliers in comparison with domestic services / service suppliers.[5]

The GATS defines 'trade in services' by dividing the concept into four modalities: cross-border trade in services (Mode 1); service provision where the consumer move to the state of the provider (Mode 2); service provision where the provider establishes a commercial presence in the host state (Mode 3); and service provision where the service provider, or its personnel, temporarily moves to the host state to provide services (Mode 4). These modalities serve a purpose

5 See extensively M. Trebilcock, R. Howse and A. Eliason, *The Regulation of International Trade* (Routledge 2013), 480-482.

from the perspective of negotiations on service trade liberalization as well. More specific, Mode 4 service provision is defined as the temporary movement of either self-employed service providers, or employees of a service provider, providing a service to a consumer on the territory of another World Trade Organization (WTO) Member.[6]

The impact on national regulation of these modalities strongly differs, as do the policy fields which are affected by each Mode.[7] From a host state regulatory perspective, cross border trade in services (Mode 2) may lead to the wish to protect consumers. This could lead to an obligation to comply with a licence requirement for the service provider. For instance, legal profession services can be provided via telephone and email which allows both the provider and the receiver of the service to remain in their respective states. Clearly, the creation of a commercial establishment to start providing services in another country is far more intrusive from the host state perspective. The same holds true for Mode 4 as this form of service trade by definition temporarily leads to entry, residence and the right to perform an economic activity within the host state. As will be described, the magnitude of this impact becomes apparent when looking at the implementation of Mode 4 commitments within a Member States immigration rules.

The GATS is based on progressive liberalization. The central idea is that WTO Members gradually commit to refrain from maintaining and adopting trade obstructive measures in specific service sectors. These commitments are inscribed in a WTO Member's schedule of commitments, which is structured into specific service sectors and the four modes of supply. For example, a WTO Member may inscribe a commitment not to impose discriminatory measures in the accountancy services sector in relation to Mode 4 (national treatment). The consequence would be that an accountant from another WTO Member State, that provides its service on the territory of that host state, must be treated at least equal to a domestic accountant. Practically, imposing a condition on the foreign accountant when it is providing its services would breach the commitment if domestic accountants do not have to comply with that rule, unless a legitimate exemption applies. In trade liberalization words, the extra condition influences the conditions of competition negatively for the foreign service supplier.

6 GATS Annex on Movement of Natural Persons.

7 M Fiorini and B Hoekman, *Services Market Liberalization, Economic Governance and Trade Agreements*, workshop paper (Structural Reforms and European Integration, London School of Economics 2017), available online: http://www.structural-reforms.eu/workshops/session2/Fiorini-Hoekman-EU-services-trade-integration-governance-April-2017.pdf, 1. (accessed 9/3/2019)

2.1 Categories of Mode 4 service suppliers

The modality movement of natural persons to provide services is further specified into two main categories: natural persons supplying services, and natural persons of a WTO Member who are employed by a service supplier of a Member, in respect of the supply of a service.[8] A service supplier, for instance a self-employed service provider, can travel to a host state to provide its service. However, a service provider may also need to rely on its personnel to provide a certain service. As such, Mode 4 also covers the right to send employees to the country where the service is received. To follow this logic, it is helpful to imagine a specific company providing a service without the right to send its personnel to the host state. This would require the hiring of local workers of the host state to provide a service, placing domestic companies (which can use their own personnel) at such a competitive advantage that service liberalization would only be reached on paper. From the outset, it should be made clear that both GATS and CETA currently limit almost all forms of Mode 4 mobility to services that require a university degree. As such, for example, construction companies (a service sector that is part of the commitments offered by the EU) can rely on Mode 4 to send technical engineers, not masons.

In practice, certain specific categories of Mode 4 service suppliers are identified. These categories are: independent professionals (IP), contractual service suppliers (CSS), business visitors (BV), intra-company transfers (ICT) and graduate trainees (GT).[9] IP refers to service suppliers that provide the service themselves, for instance, a self-employed architect designing a building in another state that travels to that state to perform the service contract. CSS refers to the personnel of a service supplier being send to another state. In EU parlance, this concept is referred to as the posting of workers. BV in practice refers to managing personnel, or specialized personnel needed to either negotiate a service contract in a host state, or to facilitate the establishment of a commercial presence of a service provider in a host state. In the example of an architect company, if that company is still in the process of convincing the service receiver to make use of its services, it may be necessary to travel to the service receiver and visit the site, or to demonstrate the design before actually receiving the service contract. If the architect company has the intention to set up a branch office in another state, this too will require the director or other highly placed personnel to travel to that state. This second form of BV is therefore closely related to mode 3. Finally, ICT and GT accommodates the

8 GATS Annex on Movement of Natural Persons.

9 Tans, note 1, par 2.4.2.3.

need of multinationals to send personnel to branch offices in other states. For instance, a manager overseeing the business in a commercial presence established in another state will practically work from that office for a certain period of time. Similarly, GT may be send to an office in another state for training purposes.

These categories are incorporated differently in GATS and CETA. The GATS itself refers to Mode 4 and contains the division between self-employed natural persons and employees of a service provider in the Annex Movement of Natural Persons (Annex MNP). The specific categories are not in the agreement itself, rather, these are specified in the schedules of commitments. Note however, that the schedules of commitments are annexed to the GATS and form an integral part thereof.[10] The EU, as do other WTO Members, uses these specific categories in practice to clarify which natural persons have service mobility rights. However, another WTO Member State may use different definitions in its schedule. Moreover, not all categories may be subject to liberalization. The EU currently is not bound to any commitment on IP or GT on the basis of GATS. CETA on the other hand specifically refers to these categories in the treaty itself. Chapter ten of CETA refers to CSS and IP. ICT, BV and GT are included as well as sub-categories of the overarching category 'key personnel'.[11]

3. The practical consequences of Mode 4 commitments

Accepting Mode 4 commitments essentially entails the international contractual promise to no longer impose certain measures. Certain obligations apply in general, such as transparency and Most Favoured Nation (MFN) treatment. In relation to the central liberalization provisions included in the agreement, the GATS allows WTO Members to decide whether they will apply in relation to a specific modality and a specific service sector. As such, Members decide if they wish to inscribe a commitment in relation to Article XVI, the market access (MA) provision and Article XVII, the national treatment (NT) provision.[12] As described above, inscribing commitments is done in relation to specific service (sub-) sectors and separately regarding each mode of supply.

10 GATS Article XX(3).

11 CETA Article 10.1. This overview is not meant to compare specific details of the GATS and CETA definitions of these categories. For the purpose of this chapter, these differences are not relevant.

12 Article XVIII, additional commitments falls beyond the scope of the topic of this chapter.

3.1 Market access[13]

MA is the first step towards providing foreign service suppliers the possibility to compete on the domestic market. Article XVI GATS, containing the MA provision, provides a list of conditions which are particularly obstructive from an international trade in services perspective. An example relevant in relation to Mode 4 is an economic needs test requirement (in EU terminology, a resident labour market test). In effect, this entails a national requirement which reserves a certain economic activity to residents (nationals and foreigners) unless no suitable supplier for that activity can be found. Another example is the imposing of a quotum in relation to foreign workers for a certain sector, usually in the form of a limited availability of work permits.

3.2 National treatment[14]

The next step in liberalizing a service sector would be inscribing a commitment in relation to NT.[15] Article XVII GATS imposes the obligation to no longer discriminate between national and foreign service suppliers in general. Without specific limitations this requires a WTO Member to no longer negatively affect the conditions of competition between domestic and foreign 'like' services and service suppliers.[16]

13 A useful short assessment of this provision is provided in F. Ortino, Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling*: a Critique' (2006) 9 *Journal of International Economic Law*, 120-121. See also P. Mavroidis 'Highway XVI Re-Visited: The Road from Non-Discrimination to Market Access in GATS' (2007) 6 *World Trade Review*, 3.

14 See: G. Muller 'National Treatment and the GATS: Lessons from Jurisprudence' *Journal of World Trade* (2016) 50, 830-831.

15 The author is aware of the discussion surrounding the scope of Article XVI and XVII GATS. This is not the place to describe it. See for instance Mavroidis, note 13, and J. Pauwelyn 'Rien ne va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS' (2005) 4 *World Trade Review*, see for the author's take on this complicated matter, S. Tans The GATS approach towards liberalization. The interaction between domestic regulation, market access, national treatment and scheduled commitments in the GATS' CTEI Working Paper 111, November 2009, available at: http://graduateinstitute.ch/home/research/centresandprogrammes/ctei/working_papers.html (accessed 9/3/2019).

16 The concept of likeness is extensively described in the literature. In brief, the concept is introduced to reflect that differential treatment is only relevant between service suppliers that are competing. See for instance, K. Nicolaïdis and J.P. Trachtman 'From Policed Regulation to Managed Recognition in GATS' in P. Sauvé and R. Stern (eds), *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution 2000), 254-255.

3.3 Domestic regulation[17]

GATS Article VI, on domestic regulation, completes the obligations derived from inscribing a commitment. While part of this provision applies in general, a specific part of this provision addresses domestic measures that regulate the quality or safety of services / service providers. This specific part of the domestic regulation provision only applies if a MA or NT commitment is inscribed. Thus qualification requirements, technical standards or licensing requirements (QTL) addressing services in a sector subject to MA or NT commitments need to comply with Article VI GATS. In essence, QTL measures become subject to a necessity test. This means that non-discriminatory QTL measures, which are measures no longer related to 'crossing the border' become part of the scrutiny of GATS. For the purposes of this chapter, this provision is not relevant, as immigration measures are not QTL measures. Another way of looking at this is from the perspective of the addressee of immigration measures. Since immigration by definition addresses foreign service suppliers only, such measures are addressed by MA and NT.[18]

3.4 Mode 4 commitments

The GATS provides WTO Members with flexibility in relation to inscribing commitments. It is possible to provide a limitation to commitments by inscribing these limitations in the schedules. A simple and common example is to exclude subsidies from the national treatment obligation. Without that exclusion, providing a subsidy to service providers in a certain sector would violate national treatment. Complicating matters is the fact that the EU Mode 4 commitments (as is the case for other WTO Members) in essence reverse this method. Mode 4 commitments indicate quite specifically which persons under which conditions *are* allowed to rely on service mobility. Again to clarify, a typical Mode 4 commitment indicates that ICT in the architect services sector is possible for managers or directors at university graduate level who have worked for their company (in the home state) for at least a year before the transfer. The transfer is limited to one year and a cooling-off period of one year applies.[19]

17 See for an extensive account on this provision P. Delimatsis, 'Due process and 'good' regulation embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10 *Journal of International Economic Law*.

18 Note that negotiations on the exact content of Article VI of the GATS are not complete. Since 1995 this provision applies provisionally (with a far less intrusive content) until WTO Members agree on the specific obligation. See further, Tans 2017, note 1, par 2.5.1.3 and 2.5.4.3.

19 For the actual EU ICT commitment, which is inscribed in relation to Article XVI and XVII see: WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal commitment Mode 4, i(a) and (b) (Intra-Corporate Transferee).

3.5 *CETA*

When studying the FTA between the EU and Canada, many differences with the GATS become apparent. Mode 4 is part of a specific chapter in the agreement which applies in full unless a reservation is made in the annexes to the agreement. In other words, states do not inscribe specific sectors which they open up to Mode 4 service trade, rather they indicate to which sector the chapter on Mode 4 does not apply. However, the difference between these agreements, a top-down or bottom-up approach, has no consequences in relation to the adopted model. CETA does use the GATS model when it comes to the obligations, as is also clear from the language used in the CETA version of national treatment and market access.[20] Note that Article 9.3 CETA, which contains the MA provision is less extensive at first glance than its GATS counterpart. However, Article 9 is part of the chapter on cross-border trade of services (Mode 1) and thus contains no language relating to Mode 4, whereas the GATS provision on MA addresses all modes simultaneously. The specific measures prohibited by market access in relation to movement of natural persons can be found in Chapter 10 of CETA which does address Mode 4. Article 10.3 CETA indicates that Parties shall allow temporary entry of natural persons for business purposes (which relates to all described forms of Mode 4 movement, see Article 10.1). As such, for the purpose of this chapter, this comparison is sufficient.

3.6 The impact of Mode 4 on immigration law

Based on this brief, and general description, it is possible to provide a summary of the way in which certain commonly used measures in several EU Member States seem to breach Mode 4 commitments. Seem to breach, as there is no case law on this matter. The examples used here are sponsorship obligations and the refusal of entry of a foreigner based on a previous criminal conviction. An extensive analysis in relation to such measures used by the Netherlands, the UK, Germany and Sweden of these possible breaches is made elsewhere.[21] The analysis itself can be applied to other states and other measures related to immigration.

20 Article 9.3 (NT) and 9.6 (MA) CETA, applicable to chapter 10 CETA (the Mode 4 chapter) through Article 10.6(2).

21 Tans, note 1, chapter 7; Tans, Herzfeld-Olsson, Hörich, Neundorf and Tewocht, note 2, see specifically in relation to the issue of blanket references in GATS and the EU CARIFORUM agreement: S. Tans 'Trade Commitments in GATS, EU – CARIFORUM and CETA, and the Inclusion of Blanket References to Entry, Stay, Work and Social Security Measures' in: S. Carrera, A. Geddes, E. Guild and M. Stefan (eds) *Pathways toward Legal Migration into the EU* (Centre for European Policy Studies 2017).

The core of the argument is as follows. GATS and CETA, provided no specific reservation is inscribed, require non-discrimination. Both agreements specifically provide states with the right to maintain immigration measures. A simple example (and the only example provided in the agreements) is the fact that the requirement of a visa, though clearly discriminatory, is still allowed. The GATS Annex MNP provides:

> The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.[22]

The question now becomes which measures fall within the scope of the phrase 'regulating entry and stay of natural persons'. The two examples provided in earlier research, which are used in this chapter as possible material breaches, are Dutch and UK sponsorship obligations and refusal of entry based on previous criminal convictions.[23]

Sponsorship essentially requires the person or entity that has an interest in entry of the foreigner to observe certain duties. For example, in case of ICT, the company that sends a transferee to a branch office in another state is then required to act as the sponsor of that transferee. Sponsorship requires the sponsor to observe certain duties, such as record keeping and reporting certain changes in circumstances regarding the ICT to the authorities. Regarding IP, sponsorship can have the odd consequence that the service receiver becoming the sponsor of the service provider. For CSS the natural persons being sent to the host state again need to rely on the service receiver to observe the sponsorship duties. Refusal based on previous criminal convictions is often incorporated in immigration rules as a ground to refuse a residence permit. Clearly, this ground can lead to the refusal of a Mode 4 service provider on that basis. Since such obligations do not apply to domestic service providers, sponsorship and refusal

22 (Original footnote) The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

23 Tans, note 1, par 5.2.2.3 (sponsorship in Dutch immigration law), par 6.2.2.4 (sponsorship in UK immigration law) and par 7.5.3.1 (analysis of sponsorship in light of the GATS commitments); Tans, Herzfeld-Olsson, Hörich, Neundorf and Tewocht, note 2 (sponsorship and criminal convictions refusal ground).

grounds upsets the conditions of competition for like foreign service suppliers, thus in principle breaching the NT obligation.[24]

Genuine public policy objectives cover these situations. As such, certain measures may be exempted from GATS or CETA obligations based on public policy objectives.[25] When applied to the here used examples, this may be warranted in situations of hardened criminals, who indeed can be considered a threat to public policy. Refusal of a Mode 4 service supplier due to a few days of prison sentence is less convincing from this perspective. As to sponsorship, this type of obligation can certainly be covered by the immigration carve-out as it allows states to 'regulate the entry of natural persons into, or their temporary stay in, its territory'. Yet, Dutch and UK sponsorship contains many specific conditions that seem rather disconnected from this goal. Whether conditions for entry, residence and performing economic activities related to service provision fall within the scope of the immigration rules carve out is hard to assess.[26] In relation to Mode 4, there is no case law to provide any indication.

4. Dispute settlement and Mode 4

Dispute settlement is indispensable to trade agreements. A convincing view on trade liberalization achieved by the WTO and FTA is that of a process based on bargaining between states to achieve a mutually beneficial outcome.[27] To observe that outcome, trade agreements based on this idea require a rules based judicial system to deal with trade conflicts amongst its constituent members. Just as important, the GATS and CETA are complex agreements containing provisions that are the outcome of extensive negotiations. Such provisions require judicial interpretation. Moreover, global trade has changed substantially since the creation of the GATS. To mention just one example, the entire development of E-commerce has taken place since, as the Internet's substantial influence commenced since the mid 90's. In relation to the topic at hand, while the first GATS cases have now appeared, the concept of Mode 4 has not been subject to dispute settlement.[28]

24 Tans, Herzfeld-Olsson, Hörich, Neundorf and Tewocht, note 2.

25 GATS Article XVI or CETA Article 28.3 would require such measures to relate to the listed grounds, see further Tans, note 21.

26 Tans, note 21.

27 Trebilcock, Howse and Eliason, note 5, 175.

28 WTO Cases dealing with GATS provisions are EC – Bananas III (DS 27), Canada – Periodicals (DS 31), Canada – Autos (DS 139), US – Gambling (DS 285), China- Audiovisuals (DS 363) and Argentina – Financial Services (DS 453). Mexico – Telecommunications (DS 204) dealt with the Telecommunications Agreement.

Dispute settlement under the WTO Dispute Settlement Understanding (DSU) and CETA are on a state -vs- state basis. Direct effect, the option to rely on the national court system of a state allegedly breaching its commitments, is not available in relation to WTO law in the EU. This is clear from EU case law in relation to the WTO law. The barring of direct effect is specifically indicated in CETA.[29] The consequence is that those affected by violations of trade commitments need to bring the matter under the attention of their home state. Individuals or international organizations cannot have recourse to WTO dispute settlement.[30]

This is the traditional method of dealing with international disputes. However, modern trade law in the form of GATS and FTA has become quite specific, providing detailed rights to private economic actors. Mode 4 commitments, both under GATS and CETA address details and conditions on an individual basis. With this I mean, as an example, that an ICT needs a university degree and needs to have worked for a certain period for the company before the transfer. This, of course is different from the lowering of a tariff in relation to a certain product. In relation to CETA, EU policy documents explaining the benefits of CETA, often address the critique that small and medium sized enterprises (SME) would not gain from the agreement by emphasizing the chances for such firms.[31] However, dispute settlement is more based on the idea that the state will take action for affected sectors, not individuals.

4.1 Lobbying and Mode 4

The question why states choose to utilize WTO dispute settlement has extensively been analyzed by Davis.[32] As states have various incentives not to seek dispute settlement (WTO dispute settlement is costly, it may have negative political consequences as it can be hostilely perceived by the defendant state) lobbying has a vital role to play. As such, various studies have focused on the process of

29 Case C-104/81 *Kupferberg* [1982] ECLI:EU:C:1982:362; CETA Article 30.6.

30 P Van den Bossche and W Zdouc *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013), 172; See also R Grote 'Article XXII GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers 2008), 492.

31 Naturally, such policy documents are intended to positively present such agreements, see for instance: European Commission, 'The Benefits of CETA' (Publications Office of the European Union 2016), available at: http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154775.pdf (accessed 31 May 2018).

32 C. Davis, *Why Adjudicate? Enforcing trade rules in the WTO* (Princeton University Press, 2012).

lobbying to convince a government to commence dispute settlement.[33] Note that WTO Members, including the EU, provide options to private parties to bring violations of WTO obligations under the attention of their government.[34] This option therefore depends on the home state of the service supplier concerned.

In relation to Mode 4, bringing breaches of commitments under the attention of the home state will be a matter of action taken by service sector based organization as it is unlikely that individual service suppliers lobby their government to start proceedings. However, regarding some of the Mode 4 categories, specific Mode 4 service providers will have difficulties for two reasons. Firstly, the types of measures that restrict access for Mode 4 service suppliers are quite different from 'normal' protectionist measures. Secondly, Mode 4 service suppliers may prove to be quite small in practice, thus lacking an effective lobbying method.

4.2 Not your average trade restriction

Imposing certain measures in relation to goods will affect an entire sector. An example is the (2018) initiative by the US to take protective measures in the steel and aluminum sector, raising import duties with 25 per cent and 10 per cent respectively. A measure to protect an industry will only be imposed if a substantial part of an industry is affected. Otherwise the state imposing such a measure has no incentive. An example in relation to services can be found in the measures forming the subject of the *Gambling* case. The domestic gambling services sector in the US forms a significant industry. Competition in this sector emerged as a consequence of online gambling, targeting US consumers. Lobbying by the US gambling industry has influenced the creation of measures prohibiting cross-border gambling.[35]

A recent example, relevant to the topic here under discussion, is the request for consultations with the US filed in 2016 by India.[36] The US has increased the

33 J. Eckhardt and D. de Bièvre 'Boomerangs over Lac Léman: Transnational Lobbying and Foreign Venue Shopping in WTO Dispute Settlement' (2015) 14(3) World Trade Review, 507; Van den Bossche and Zdouc note 13, 178. Note that the EU, and various other WTO Member States, provide their nationals and firms with options to notify the government (the Commission in case of the EU) of breaches of WTO obligations by other WTO Members.

34 For the EU this is arranged in the Trade Barriers Regulation, Council Regulation (EC) No. 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particularly those established under the auspices of the World Trade Organization OJ (1994) L 348/71.

35 J. Eckhardt and D. de Bièvre, note 33, 508.

36 US – Visas (DS 503).

required fee to obtain a L-1 or H-1B visa. Additionally, India indicates that the quota scheduled in the US GATS commitment are not observed.[37] The US GATS commitments are implemented in these visa categories, and by raising the fees twofold in two legislative steps (2010 and 2016), clearly it becomes more difficult to rely on these commitments. As is described above, visa requirements fall outside the scope of the GATS, yet such requirements may not nullify or impair GATS commitments. This specific visa category is used frequently by firms performing technical services in the US, many of which are based in India. Thus, it is not surprising that the Indian government takes an interest in this matter. While at the time of writing the US visa case is still under consultation and has not reached the Panel stage, the underlying issues will remain. An example derived from the UK is the advice by the Migration Advisory Board to impose a yearly charge of £1,000 for the skilled-worker entry route.[38]

The argument here being that protectionist measures will attract the attention, ensured by lobbying, of governments of affected service suppliers. The described gradual tightening of immigration rules however, is not specifically targeted at service suppliers. Such measures are simply part of the general rules addressing immigrants, or addressing labour migration (including temporary labour migration and thus service mobility) through work permit conditions in general. To be clear, the increase in fees for visa by the US is imposed specifically to target Mode 4 service suppliers. Contrary, a tightening of immigration rules, whether in the form of sponsorship, or the lowering of the threshold to refuse immigrants with a criminal past, is part of the above described trend to reduce immigration in certain EU Member States.

4.3 Multinationals and individuals

How difficult it is to ensure that possible breaches of Mode 4 commitments are picked up by the home state, and thus become subject to dispute settlement, also depend on the category of Mode 4 service providers. In case of ICT and GT, the economic entity aiming for the transfer may be a multinational. As an example, representatives of 25 multinational companies established in the Netherlands meet in the form of a contact group. This group discusses inter alia legal issues in relation to employment of foreigners. Such groups may effectively lobby governments in relation to Mode 4 commitments.[39] However, ICT commitments may be utilized by relatively small multinational firms as well.

The perspective becomes different when considering CSS. EU Commitments relate to various sectors, including the already used example of the architectural services sector. Other liberalized sectors for CSS are the computer and related services sector and taxation advisory services.[40] All these services can be performed by relatively small companies that are not part of a trade organization or lobby group.

While not part of the EU GATS commitments, IP are covered by CETA.[41] Here the international commitment to liberalize trade in services relates to individual self-employed service providers. The point being that such individuals are unlikely to persuade governments to initiate dispute settlement.

It should be noted that the possible breach of Mode 4 commitments as a consequence of general immigration rules will apply to all Mode 4 categories simultaneously, precisely because such conditions are attached to residence permits or work permits. As such, Mode 4 service suppliers that are part of a service sector with influence may act as champions for individual IP service suppliers.

5. Conclusion

This chapter takes at its starting point earlier research on the implementation of Mode 4 obligations in several EU Member States (The Netherlands, The UK, Germany and Sweden). The argument is made in that research that immigration rules, sponsorship and the refusal ground relating to previous criminal convictions, is already encroaching on the EU commitments on Mode 4. The argumentation used will only be verified if specific Mode 4 cases will be adjudicated by the dispute settlement mechanism of the WTO or FTA such as CETA. Yet, it is precisely the emergence of such case law that is unlikely to happen in relation to the measures here under discussion.

As a starting point, assessing immigration law in light of Mode 4 is complex. It requires an analysis of such measures in light of the obligations under GATS and

37 Again, the issue is more complex than here described. The quota argument relates to the fact that the US has deducted quota reserved for those applying for visas based on FTA between the US and Chile and the US and Singapore.

38 Migration Advisory Committee *Review of Tier 2: Balancing Migrant Selectivity, Investment in Skills and Impacts on UK Productivity and Competitiveness* (December 2015), in particular chapter 5. The language used there is astonishingly frank in its clarity on the measure intentionally being protectionist, see for example 5.8.

39 Interview held with CapGemini NL by the author (3-12-2010).

40 World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, s/c/w/273, horizontal commitment Mode 4.

41 CETA Article 10.8(2).

CETA. Nevertheless, such rules only apply to foreigners, not domestic service suppliers. This is problematic in light of the NT provision. Clearly, the described rules form additional conditions to provide services, therefore upsetting the conditions of competition. Such measures may be saved by the immigration rules carve out, the right to impose measures to regulate the orderly movement of people across borders. It is questionable if the tightening of immigration rules will still fit this concept. At a certain point, and in the authors view this already happened, this becomes unsustainable. Such measures also may be exempted based on public policy objectives. Again, at a certain point, this becomes unsustainable. Are the provided examples really necessary to genuinely protect public morals or policy?

Mode 4 commitments are different from previous trade liberalization commitments. The reduction of tariffs provides a far more straightforward promise in relation to an entire goods sector. Measures obstructing such promises, the US steel and aluminium tariffs imposed in 2018 forming a prime example, are easily identified. This is clearly not the case for conditions included in the general rules on immigration and access to the labour market. As such, service providers confronted with breaches of the Mode 4 commitments, may not be aware of this. The same holds true for states imposing such measures.

Dispute settlement under GATS and CETA is on a state-vs-state basis. This means that the bearers of service mobility rights must convince their government to bring a case. Service providers are not organized in the same manner as, for example, the tobacco or steel industry. In addition, the more individualistic granting of rights, IP being the clearest example, leads to the situation that a self-employed service provider needs to identify, and bring a claim to its own government.

It may take a specifically blunt and extreme example, the US – India case, targeted clearly at Mode 4 service providers, for case law to emerge. Whether a Panel will be formed to deal with that subject remains to be seen, precisely given the sensitivity of the impact of trade commitments on immigration law. Another option is for those that do have options to lobby their government and rely on Mode 4, for instance multinationals utilizing ICT, to address the tightening of immigration rules.

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