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Brexit and the Professional Services Sector – What Future for UK Professionals in Europe?

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Abstract

Professional services form an important part of the UK economy. Their role is even bigger if their contribution to other key sectors, such as financial services, is taken into consideration. This working paper focuses on the provision of professional services between the EU and the UK under the pending Withdrawal Agreement as well as under the new economic relationship that the two parties are starting to formulate. The EU-UK Withdrawal Agreement provides a transition period until 31 December 2020 during which the UK continues to apply the entire body of EU law. The non-binding Political Declaration on the future EU-UK relationship recognises the need to agree on market access and non-discriminatory treatment for service providers and appropriate arrangements on professional qualifications. However, the level of the commitments depends on the UK's willingness to adhere to the so-called level playing field, referring to the standards required by the EU in the areas of social and economic policy. As the UK is still doing its soul-searching in this regard, it is too early to say what the future framework for the services sector will look like. This uncertainty highlights the need for UK's professional service firms to consider the need to restructure their EU operations during the transition period.

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1. Introduction

The UK decisively voted in a general election to deliver Brexit, though what kind of Brexit remains unclear. The most likely scenario at the moment appears to be a deep trade agreement, the so-called CETA+ (or CETA++) scenario. At the same time, the challenges relating to such deep trade liberalization are being increasingly addressed. Politicians and scholars alike are noting that deep economic integration is possible only when there is sufficient degree of trust between the parties. There must be trust on authorities, on how they set and enforce rules, but also on the content of those rules. As pointed out by the European Commission President Ursula von der Leyen in her early-January speech at the London School of Economics and Political Science, "without a level playing field on the environment, labour, taxation and state aid, you cannot have the highest quality access to the world's largest single market" and that "without the free movement of people, you cannot have the free movement of capital, goods and services".[1]

With the level playing field the Commission President refers to the common rules and standards that are designed to ensure fair competition between the EU member states. Some of such rules are of technical nature but many others are part of a complex regulatory net that is designed to make sure that companies in the single market operate in a similar enough environment. The rules are enforced by the European Commission and the Court of Justice of the European Union. As noted by Nicolaïdis, this complex system is based simultaneously on mutual trust and mutual spying.[2] Without the mix of trust and spying, long-term access to the single market remains superficial and fragile.

This indeed is the core challenge of Brexit. How can UK secure its access to the single market without tying itself to the level playing field that is subject to the controls of the Commission and the Court? The answer to this question is starting to seem obvious. It cannot. The real question therefore is how to secure access that is as open and liberal as possible. The answer to that question will take more time as it will unveil itself during the negotiations that the EU and UK are now embarking on. The UK, as an ex-member of the EU, will not be in the same position as any third state. A high level of trust has been established throughout decades of close cooperation between the Brits and the Europeans. The EU knows the UK, its courts and its regulators. This is of enormous help in the negotiations on the future partnership. At the same time, the trust has to be renewed and maintained. Ultimately, it rests upon a similar enough attitude towards issues that lie at the heart of the society, ranging from social and environmental standards to market regulation.[3]

Public discussion on Brexit has focused much more on goods than services. That is understandable considering that trade in services is harder to explain and harder to put in numbers. It is also harder to liberalize than trade in goods. However, it is especially in the area of services where trust is most crucial. Unlike goods, services are typically not subject to tight standards. Moreover, most services are provided by people. Behind a financial service, IT service or hairdressing service, there is a person designing, implementing or physically delivering that service. When we decide to hire someone to

[1] Speech by President von der Leyen at the London School of Economics on "Old friends, new beginnings: building another future for the EU-UK partnership", 8 January 2020, European Commission. Available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_3.

[2] Nicolaidis, K. *Mutual Recognition: Promise and Denial, from Sapiens to Brexit*, Current Legal Problems, Vol. 70, No. 1 (2017), pp. 1–40.

[3] In the new Political Declaration negotiated simultaneously with the revised Withdrawal agreement in October 2019, this common value base is described in the following matter: "This relationship will be rooted in the values and interests that the Union and the United Kingdom share. These arise from their geography, history and ideals anchored in their common European heritage." See Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 19 October 2019, paragraph 3 of Introduction. Available at: https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration.

provide us a service, we are actually evaluating the person, not the service. His or her background and expertise, qualifications and language skills among many other things. Not all of this information is easily accessible. This asymmetry of information has led regulators to require service providers to fulfil certain criteria relating to their education and professional qualifications. Sometimes these criteria are not entirely adequate and may reflect the demands of inward-looking (protectionist) professional regulators. However, the ultimate goal is to protect the client. Therefore, rather than the service itself, it is often the service provider that faces the strictest scrutiny of the regulators. On some occasions, both the provider and the service are regulated, for example in the case of financial, medical and transport services.

Service liberalization thus relies upon trust on service providers and upon trust on regulators that oversee the providers, whether individuals or companies. The practical consequence is that trade agreements to liberalize services may go further between states that share a certain level of similarity in their cultural, political and economic backgrounds.[4] One of the strongest ways to liberalize services is the acceptance of each other's services and service providers in accordance with the home state criteria, under the principle of mutual recognition. Research has shown that among WTO member states, mutual recognition agreements are frequently concluded between countries having a similar cultural background. Moreover, the majority have so far been signed across geographically proximate partners who usually also share the same language.[5]

The UK is currently enjoying a significant surplus when it comes to international trade in services. Much of this surplus comes from financial services, but a big role is also played by business services, including professional services such as legal services and management consulting services, as well as from information and communication services. The UK's financial sector is supported by a large professional services sector, which covers particularly consulting, legal services and auditing.[6] Together, financial services as well as professional and business services account for a half of UK services exports.[7] Professional services in London, including legal services, consultancy and accounting, employ about 372,000 people, while financial services, including banking, insurance, fund management, securities and others, employ about 354,000 people.

The financial services sector and the professionals serving that sector and the rest of the UK economy have successfully extended their operations across the world. For instance, in 2018 the UK's legal sector contributed £27.9 billion to the UK economy – 1.4 % of GDP – and in 2017 had a trade surplus of £4.4 billion. The Law Society of England and Wales estimates that a big part of the surplus is down to the access given to UK lawyers by EU law and particularly the two directives that allow EU lawyers to practice across the Union. The Law Society has further evaluated that a disorderly Brexit would cost the UK legal sector (and the UK economy) as much as £3.5 billion.[8]

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[4] On the relevance of the "trust theory of economic integration" in the EU and the WTO, see Lianos, I. & Odudu, O. (2012) *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration*, Cambridge University Press.

[5] Marchetti, J. & Mavroidis, P. C. (2012) I now recognize you (and only you) as equal: an anatomy of (mutual) recognition agreements in the GATS, in Lianos, I. & Odudu, O. (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration*, Cambridge University Press.

[6] Batsaikhan et al. 2017, Brexit and the European financial system: mapping markets, players and jobs, Bruegel Policy Contribution Issue No. 4, 2017. Available at : https://bruegel.org/wp-content/uploads/2017/02/PC-04-2017-finance-090217-final.pdf.

[7] Josepa et al. *Trade in services and Brexit*, Briefing Paper Number 8586, House of Commons Library, 20 December 2019. Available at: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8586.

[8] The UK-EU future partnership – legal services sector, report by the Law Society of England and Wales, 1 August 2019. Available at: https://www.lawsociety.org.uk/policy-campaigns/articles/uk-eu-future-partnership-legal-services/.

The numbers are credible. In most regulated professions, such as lawyers, doctors, accountants, auditors, architects and engineers (among many others), access to foreign markets depends on agreements that allow professionals to operate under their home state qualifications and that prohibit discrimination in the establishment and running of subsidiaries. Certain rules apply to all member states of the WTO through the commitments that the members have taken under the General Agreement on Trade in Services (GATS). However, the access levels under the GATS are generally shallow. For example, in the case of lawyers they typically allow discriminatory treatment of foreign lawyers and law firms. Only the practice of the lawyer's home state law is typically allowed and establishment is restricted to specific legal entities. Many sensitive sectors such as the health and education sectors are often carved out from the commitments. Bilateral and regional agreements often-times provide for a somewhat better access to services and service sector professionals than the GATS does but none of them come close to the frictionless environment provided by the EU's internal market.[9]

The reason for this difference is the EU's exceptionally deep internal market in services. It is not perfect, but it provides for much better conditions than those granted by WTO members to each other. For example, a company established in one EU member state can use that country as a springboard to access other member states and be treated in the same manner as local companies. Service sector professionals can move freely, both for temporary and permanent purposes. However, for service suppliers established outside the EU, the situation is quite different. The EU's internal market in services is far less harmonized than for goods and a variety of national conditions still remain. Instead of homogenous access rights across the Union, non-EU service suppliers have to respect the regime that is applied in each member state.

This is especially relevant when it comes to the recognition of professional qualifications, which is as crucial as market access. Access to a country is of little value if one cannot practice one's profession there. The EU has detailed rules for professional recognition of regulated professions, but they do not apply to non-EU nationals. Under WTO law, very little exists in this regard. This means that without continued participation to the internal market rules, UK professionals risk losing their access to the EU's recognition scheme as well. Therefore, when negotiating services with the EU, one of the key issues on the table, along with liberal entry and residence rights, should be the recognition of service suppliers' university degrees, professional certificates and memberships in regulatory bodies. Some of the EU's free trade agreements pave the way for mutual recognition of professional qualifications, but they stay far from the liberal recognition rules of the single market. The UK should therefore aim to secure a current high level of recognition with the EU and similar less ambitious arrangements with non-EU countries.

2. The Withdrawal Agreement and professional services

Armed with a new parliament majority, Prime Minister Boris Johnson reached with the EU a new, revised agreement on the UK's and Northern Ireland's withdrawal from the EU in October 2019. The revised Withdrawal Agreement and Political Declaration were considered and agreed at European Council on 17 October 2019. The UK Parliament approved the agreement already on 9 January 2020, whereas the vote in the European Parliament is foreseen for 29 January 2020. The main differences to the earlier withdrawal agreement negotiated by Prime Minister Theresa May are in the Protocol on Ireland/Northern Ireland, or the 'backstop' as it is commonly known. Under the new arrangement, the UK will no longer be in a single customs territory or union with the EU. This means that the UK will

[9] Separate agreements with the EEA states (Norway, Liechtenstein and Iceland) as well as with Switzerland extend most of the EU's internal market rules to those states.

no longer be legally bound to continue with level playing field commitments at the end of the transition period. Northern Ireland will still be in the UK's customs territory and VAT area; however, the region will align with the EU's rules in these areas. Therefore, Northern Ireland will remain mostly aligned to the EU's regulations for goods.[10]

In the area of services, the situation is different. Northern Ireland as the rest of the UK will not need to continue to align itself with the EU regulations on services. EU law on free movement of persons, services and capital will not apply anywhere in the UK after the end of the transition period. The post-Brexit transition period begins on 31 January 2020. For 11 months, the UK will still follow all the EU's rules and regulations, it will remain in the single market and the customs union, and the free movement of goods, services, people and capital will continue. The big challenge for the parties now is to agree on the new rules and policies to govern the future relationship in place by the end of the year. As will be explained further in the paper, at least in the area of services, this goal is far from realistic. In the meanwhile, the Withdrawal Agreement and Political Declaration include some safeguards especially towards EU and UK citizens, but they only apply to such persons who have secured their residence in the EU or the UK before the end of the transition period. Under the agreement, EU and UK citizens currently living on both sides of the English Channel will keep the same status for the rest of their lives. However, those citizens who decide to move between the EU and UK after the end of the transition period will be subject to those rules that will be negotiated during the transition.[11] During the transition period, UK qualified professionals working in other EU member states and EU qualified professionals working in the UK can rely on the mutual recognition of their professional qualifications under the current regime.[12] Also other EU rules relevant to the provision of services and establishment continue to apply throughout the transition period (most importantly the Services Directive 2006/123/EC). Also, if UK professionals have established their residence in an EU-27 state and had their qualifications recognized before the end of the transition period (when such recognition is required under the host state rules), they can continue to enjoy from their right of establishment and recognition of qualification even after the end of the transition period. However, for those professionals that have not established themselves in the EU before the end of the transition period (as workers, self-employed or through a legal person), all EU law relating to services, establishment and recognition of qualifications will seize to apply at the end of 2020 (unless the transition period is extended).

For those UK professionals who are not set up in the EU before the end of the transition period, the future is therefore very unclear. The same of course applies to the nationals of the EU-27 willing to move to work or to start a business in the UK. To get an idea of the parties' aspirations for the future relationship, one must turn to the Political Declaration. Part III of the Declaration deals with services and investment. According to paragraph 27, "the Parties should conclude ambitious, comprehensive and balanced arrangements on trade in services and investment in services and non-services sectors, respecting each Party's right to regulate".[13] Furthermore, it is specified that the level of liberalisation in trade in services should go well beyond the Parties' World Trade Organization (WTO) commitments and building on recent EU's Free Trade Agreements (FTAs). The following paragraph

[10] The October 2019 EU UK Withdrawal Agreement, House of Commons Library Briefing Paper Number CBP 8713, 17 October 2019, available at: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8713.
[11] The situation is the same under the first and the revised Withdrawal Agreement. For a thorough analysis of the citizens' rights under the first Withdrawal Agreement of November 2018, see Barnard, C. and Leinarte, E., *Brexit and Citizens' Rights*, Brexit Institute Working Paper N. 10-2019, available at: http://dcubrexitinstitute.eu/working-papers/.
[12] Article 27 of the Withdrawal Agreement.
[13] Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 19 October 2019, Part III. Available at: https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration.

explains that in line with Article V of the General Agreement on Trade in Services (GATS), the Parties should aim at substantial sectoral coverage, "covering all modes of supply and providing for the absence of substantially all discrimination in the covered sectors, with exceptions and limitations as appropriate".[14] The following sectors are specifically mentioned: professional and business services, telecommunications services, courier and postal services, distribution services, environmental services, financial services, transport services and other services of mutual interest. Further under paragraph 34 it is mentioned that "the Parties should also develop appropriate arrangements on those professional qualifications which are necessary to the pursuit of regulated professions, where in the Parties' mutual interest".

However, as noted earlier, high level access in services is unlikely to be possible without sufficient commitment on the UK side to uphold EU's regulatory standards. It should therefore not be taken for granted that the aspirations of the Political Declaration will be attained. Even if the importance of single market access to the UK economy is clear, the EU should probably not underestimate the UK's willingness to cut this bond, even if it comes with sacrifices. It is becoming increasingly clear that various operators in the UK are considering the longer-term advantages that can potentially be made out of regulatory divergence. It is increasingly pointed out that Brexit may allow the UK to exploit new commercial opportunities. For example, some argue that if the UK wanted to become a global leader in artificial intelligence, it could be constrained by EU regulations. Similar trade-offs could be available in some services sectors, such as financial services.[15]

For those regulated professionals who service different markets at once, the significance of one single regime is even more important than for labour immigrants who need to get their qualifications recognised only in the country of their employment. At the same time, professional recognition does not do away with differences in the qualifications as such. The recognition rules laid down in the Professional Qualifications Directive 2005/36/EC set out certain minimum training requirements for those professions to which the automatic recognition system applies (e.g. health professionals and architects). However, the member states remain free to design the detailed study plans as well as any obligations for continuing education or professional development as required by some professional bodies. Each member state is also free to decide which professions it considers regulated in its territory. The necessary qualifications and the limits of regulated professional activities thus vary between the member states.[16] Therefore, the EU's recognition rules do not prevent member states or their professional bodies in charge of professional regulation from loosening up national rules. This is visible for instance in the legal sectors in the UK and Spain where the professional bar associations

[14] Article V of the GATS sets out the WTO discipline for services trade agreements. Similarly to agreements in the area of goods (governed by Article XXIV GATT), the provision requires any bilateral and regional agreements concluded outside the WTO to reach a high level of liberalization by eliminating discrimination over a substantial number of service sectors. The requirements of Art. V GATS as well as WTO members' practice in their services trade agreements is analysed in detail in Jacobsson, J., *Preferential Services Liberalization: The Case of the European Union and Federal States*, Cambridge University Press 2019.

[15] See Wolfgang Münchau "A Narrow EU trade deal is the most likely way forward", Opinion EU Trade, Financial Times, 12 January 2020.

[16] For example, there are big differences in how lawyers are regulated across the EU. In Finland and Sweden, the professional title of a "lawyer" is not regulated but in practice anybody can claim to be a lawyer and also provide legal services. Instead, only the activity of an attorney-at-law/advocate ('asianajaja'/'advokat') is regulated and is tied to the representation of clients at courts. In Germany, on the other hand, only a lawyer who has passed the comprehensive educational and practice requirements set by the Federal German Bar Association can use the German title of lawyer ('Rechtsanwalt'). In the UK, the titles of 'solicitor', 'barrister' and 'advocate' can only be used by those who have passed the necessary legal education and training in accordance with the rules applicable in each constituent part of the UK (legal profession being a devolved matter, meaning that law-making powers are in the hands of the local governments in England and Wales, Scotland and Northern Ireland).

in charge of regulating lawyers have over the recent years relaxed some of the professional rules applicable to lawyers.[17] Therefore, if the UK manages to secure the access of UK professionals to the EU's professional recognition regime, that would not hinder its professionals from coming up with new innovative solutions, for example in legal technology. The clear advantage is that UK professionals would remain subject to UK rules while being able to exercise their profession anywhere in the EU.[18]

3. Trade in professional services – inside and outside the EU

3.1. The different ways to sell services

We buy services every day. The moment you get your coffee in the local coffeeshop or buy your metro ticket to go to work, you have carried out two different service transactions. However, these transactions do not form part of international trade in services unless one of the sellers is a locally-established affiliate, subsidiary, or representative office of a foreign-owned and — controlled company. That is because to be categorised as international trade in services, the transaction must always include some cross-border element. Since the WTO's General Agreement on Trade in Services (GATS) of 1995, that cross-border element has generally been considered to be present in four different ways to deliver services between countries.[19] These different ways are generally referred to as "modes". Under mode 1 (generally referred to as "cross-border trade"), services are supplied from the territory of one state into the territory of another state. Under mode 2, the service is supplied by the service seller to the service consumer of another state (the consumer thus travelling to receive the service outside her home country). Mode 3 refers to services supplied by commercial presence (like a foreign-owned coffee shop) and finally, mode 4 covers the movement of service suppliers (natural persons) to supply a service in a state that is not their home state.[20] In international services trade agreements states lay out the conditions under which services can be supplied to their territory or their nationals. The general liberalization level remains relatively shallow.[21]

[17] In the UK, a big change was introduced by the Legal Services Act 2007 that enabled Alternative Business Structures (ABS) which permit lawyers and non-lawyers to form businesses together and for non-lawyers to be involved in the management and ownership of businesses that provide legal services. Both in the UK and Spain, the codes of conduct for solicitors (UK) and abogados (Spain) have recently been updated to correspond better to new business models.

[18] It should, however, be kept in mind that any future partnership agreement is likely to include certain exceptions that are also present in EU law. Therefore, if the movement of services and service sector professionals is liberalised, there will necessarily be an option to restrict such movement based on certain requirements in the public interest. For example, Art. 28.3 ("General Exceptions") of CETA allows the adoption and enforcement of measures that are necessary to protect public security, public morals or to maintain public order. Moreover, restricting measures can be adopted, among other things, to secure compliance with laws or regulations that relate to the prevention of deceptive and fraudulent practices, the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.

[19] The definition is based on the GATS, which defines services through the four modes of supply (Art. I:2 GATS).

[20] The GATS model of categorising service delivery under four modes is not followed rigidly in all bilateral and regional trade agreements. For example, in CETA between the EU and Canada these different modes of delivery are organised somewhat distinctively. This is typical in the EU's latest services agreements. On different methods to schedule services, see Jacobsson, J., *Preferential Services Liberalization: The Case of the European Union and Federal States*, Cambridge University Press 2019, p. 210-212.

[21] About the poor level of liberalization in the WTO Members' GATS commitments, see e.g. Adlung, R. & Roy, M. (2005) Turning Hills into Mountains? Current commitments under the GATS. *Journal of World Trade*, 39(6), 1161-1194. Under some preferential (bilateral and regional) agreements the liberalization levels are somewhat higher but remain subject to a high number of market access barriers and low level of non-discrimination.

The most essential difference between most international services agreements and the EU Treaty comes down to the application of the non-discrimination principle. In EU law, the starting point is national treatment. That means that service providers from other EU member states cannot be discriminated against but must be treated in the same way as similar domestic providers. In case there is an important reason to restrict the provision of the service, that restriction must be exercised under the strict criteria of the case law of the Court of Justice and the Services Directive. The assumption is thus an open access and justification of any restriction. In most international services agreements, including those concluded by the EU, the approach is quite different. The market access and national treatment for foreign service providers is determined *ex ante* by typically excluding a significant number of activities from the scope of the commitments. National treatment is often denied especially in the most sensitive service sectors (such as many of those covering regulated professions). General exceptions (similar to EU law) are used to justify restrictions *ex post*. There is no essential difference between agreements that follow the so-called positive or negative listing as the final result is the same: certain services under certain modes are always carved-out.[22] Finally, international services agreements do not entail as strict proportionality and necessity criteria as those imposed on EU states by the EU Court's case law and the Services Directive. And even if they did, the lack of access to dispute settlement by private parties makes them without much practical significance.

Another difference between EU and the GATS is that the EU Treaty does not differentiate between the two categories of establishments, those set up for the provision of services and those set up for the purpose manufacturing or selling of goods.[23] However, this difference is becoming less relevant as some trade agreements, such as the CETA, have one common discipline for "investment", covering both manufacturing and service activities. However, unlike under EU law where "establishment" covers also the self-employed, most trade agreements do not allow the permanent access of natural persons but keep their access subject to national immigration laws (permanent labour migration not being covered by mode 4).[24] Only the temporary movement of independent professionals and contractual service sellers as well as the temporary access of intra-corporate transferees and graduate trainees is covered by trade agreements, subject to the commitments taken by the contracting parties.

Professional services can be traded under all the traditional four modes of service delivery. Even if in many services such as transport, health or catering services the physical proximity of the seller and the client remains relevant, many professional services can today be provided without any physical contact between the provider and the client. The entire transaction can take place over the internet. Of course, such distance provision of a service (mode 1) is often combined with the other delivery models. A consultant may need to travel to meet the client (mode 4), a law firm may establish a subsidiary in another state (mode 3) and a patient may travel to see a doctor abroad (mode 2). Considering that international service sector professionals combine these different delivery models

[22] In positive listing (followed by the GATS and the EU's older services agreements) access to a particular service sector is liberalized by inserting a commitment to that extent, whereas in negative listing (followed by most of US EIAs and EU's latest agreements) all service sectors are considered liberalized unless a certain measure going against the agreement's disciplines has been specifically exempted. It is sometimes considered that negative listing provides for better access but in the end both methodologies allow states to determine which service sectors they want to liberalize and to what extent. On differences in the scheduling methods of services, see Adlung, R. & Mamdouh, H. (2014) How to Design Trade Agreements in Services: Top Down or Bottom-Up? *Journal of World Trade*, 48(2), 191–218.

[23] Klamert, M. Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches, Cambridge University Press 2015, p. 102.

[24] On the different residence schemes for the EU and UK nationals post-Brexit, see Barnard, C. and Leinarte, E., *Brexit and Citizens' Rights*, Brexit Institute Working Paper N. 10-2019, available at: http://dcubrexitinstitute.eu/working-papers/.

in their business, a high-level services agreement should grant frictionless access across all modes. At the moment, only the EU's internal market really lives up to that standard.

3.2. The issue of recognition

In services agreements states give commitments to allow foreign service providers to access their market under one of the four modes explained above. Non-discriminatory access means that no limitations are put forward in the form of quotas or discriminatory requirements such as a nationality condition or the requirement of a joint venture through which a service supplier may supply a service. However, the elimination of such clearly discriminatory requirements alone does not provide for an unhindered access. In practice, the biggest market access barriers often take the form of various authorization, licensing or certification requirements.[25] Even if on the outset they would treat foreign service providers similarly to national providers, they often include conditions that leave a foreign supplier in a position that is crucially different to a domestic operator. One of such often-applied conditions relate to professional qualifications. A foreign service supplier that is already authorized or certified in her home country may be asked to obtain a new certification in the host country. If her prior education or experience does not match the requirements in the host country, she may be asked to adhere to the host state qualifications. This might require, for instance, the repetition of one's entire university education.

To get around this issue, states can agree on rules regarding the recognition of professional qualifications. On a wider scale, the issue is the same that relates to all opening of services markets.[26] When harmonized rules (common standards) are lacking, there are two principal ways to ensure that goods or services produced in one country (home country) are accepted as being compatible with the standards set in another country (the host country). These are equivalence and mutual recognition. Under an equivalence regime, the host country assesses whether the regulatory standards of the home country meet the regulatory requirements of the host country before the goods or services covered by the regime are allowed to access the host country's market. Identical or very similar regulations must therefore be upheld. A mutual recognition regime, on the other hand, allows goods and services meeting the regulatory standards set in the home country to be sold also in the host country without any further assessment beyond those applied in the home country (thus embodying the country-of-origin principle). This means that there can be a certain degree of divergence between the home and

[25] Even under EU law, local authorisation can be asked for under certain circumstances. Under the EU's Services Directive 2006/123/EC (which largely codifies EU Court's case law), the access to or exercise of a service activity in a member state other than the home state can be subjected to an authorisation scheme as long as it does not discriminate against the provider in question, the need for an authorisation scheme is justified by an overriding reason relating to the public interest and the objective pursued cannot be attained by means of a less restrictive measure (Article 9). Moreover, the conditions for granting an authorisation must not duplicate requirements and controls which are equivalent or essentially comparable to which the provider is already subject in another member state (Article 10). The ambivalence relating to the question of what is 'equivalent' or 'essentially comparable' has led the EU legislator to come up with detailed rules on the recognition of professional qualifications obtained by EU nationals.

[26] The GATS as well as most services trade agreements do not require states to recognise services and service suppliers that do not adhere to the host state standards. The national treatment discipline only asks states not to discriminate against foreign suppliers. Moreover, the comparison is made between 'like' operators (Art. XVII GATS). This means that the host state can always argue that service providers are not like, for instance because of differences in training or experience. Local laws can therefore be applied unless they formally differentiate between national and foreign operators. EU law, on the other hand, has gone further. The EU Court's case law has made clear that also indirect discrimination (such as a language requirement) or even a restriction that applies identically to a domestic and foreign service provider can be against the EU Treaty if it is liable to prohibit or hinder activities of a service provider established in another member state, unless justified by an important public interest (originally, case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12). In the EU's professional recognition scheme, important public interests sometimes require the completion of an additional local training or the completion of a language test for example for health sector workers.

host country regulations.[27] Theoretically, the divergence can be significant, but the risk of far-going divergence is exactly why mutual recognition regimes are so challenging to agree upon. The parties must trust that their regulations will not differ too much from each other and that they are properly and correctly enforced. Such trust requires a certain similarity of values but can also be supported by common rules over economic and social policies.

The deep integration of the EU has been possible because of mutual trust, (close enough) common values and effective policies to secure a level playing field across the member states. The presence of all these three elements, coupled with the powers of the Commission and the Court, is evident in the area of professional qualifications where the EU is a global pioneer in the systematic mutual recognition of qualifications among its member states. In the EU, those working in regulated professions can have their home-qualifications recognised in all other member states.[28] Even if the recognition is not in all cases automatic, the host state authorities cannot discriminate towards professionals from other EU member states and they have to consider all the prior qualifications and experience of each other's citizens when making recognition decisions.

The EU's professional recognition rules apply to regulated professions. For people working in professions that are not regulated in the EU country where they carry out their professional activity, no recognition of qualifications is necessary. On the contrary, there is no automatic EU-wide recognition of academic diplomas. In order to carry out further studies or to apply to a position where a specific academic diploma is required, one must go through a national procedure to get the degree or diploma recognised in another EU country.

Under the EU's general recognition scheme, a person who is qualified in one member state (EU/EEA) to exercise a profession must be recognized, on a general basis, by another member state (EU/EEA) to exercise the same profession.[29] If there are substantial training differences, the host member state may impose compensatory measures (practice period or aptitude test). If the profession is not regulated in the State of origin, one year of professional experience or regulated training (designed specifically to exercise a profession) is required. The rules cover both temporary movement (provision of services under EU law) as well as commercial presence (establishment in EU law terms).

The professional qualifications directive 2005/36 provides also for recognition based on the coordination of the minimum training conditions in certain professions. This regime applies exclusively to the professions of nurses, midwives, doctors (general practitioners and specialists), dental practitioners, pharmacists, architects and veterinary surgeons. The Directive establishes the minimum conditions (duration and content) of the training authorizing the exercise of these

[27] For a comparison of the two regimes with regard to the financial services sector, see Tarrant et al. *Equivalence, mutual recognition in financial services and the UK negotiating position*, Briefing Paper 27, UK Trade Policy Observatory, January 2019. The UK government originally advocated that an EU-UK trade deal on financial services should provide for mutual recognition, whereas the EU stated that the basis for regulatory recognition could only be equivalence.

[28] For a full overview of the rules, see McCormack-George, D. *Recognition of Professional Qualifications in the Single Market: A Recap* (2019) 30 European Business Law Review, Issue 5, pp. 785–815.

[29] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. Directive 2005/36/EC covers EU and EEA citizens with qualifications obtained in one or more EU or EEA States. Under certain conditions and limitations, Directive 2005/36/EC also covers EU/EEA citizens with qualifications obtained in third countries.

professions and offers a list of member state qualifications that fulfil those conditions. Recognition based on qualifications mentioned in this list is automatic.[30]

There is also specific legislation applying to certain specific professional sectors, such as lawyers, sailors, insurance intermediaries and aircraft controllers, as well as some other professions in transport or those linked to activities involving toxic products.[31] For them the recognition of professional qualifications is governed by specific legal provisions. In some cases, the recognition mechanisms of Directive 2005/36/EC may apply on a secondary basis.

Finally, the EU's Services Directive 2006/123/EC applies to all those regulated professions that fall within its scope, and as always in EU law, the EU Treaty applies as the ultimate source. The provisions of the TFEU on establishment and free movement of services apply to all aspects of the provision of professional services that are not exhaustively governed by secondary law.

The consequence of the Brexit will be that unless a new recognition scheme is agreed upon, the recognition of professional qualifications of UK nationals in any EU-27 member state will be governed by the national policies and rules of that member state, irrespective of whether the qualifications of the UK national were obtained in the UK, in another third country or in an EU-27 member state. Moreover, the temporary provision of services by UK nationals in any EU-27 member state, even if they are legally established in another EU-27 member state, will be governed by the national policies and rules of that member state. Also for any EU-27 nationals, qualifications obtained in the UK will, as of the withdrawal date, be considered third country qualifications for the purpose of EU law.[32] The recognition of qualifications will only remain in effect for such UK nationals who will have their qualifications recognized before the end of the transition period. They must be established in an EU-27 member state; continued recognition does not apply to professionals providing services.[33]

For example, for audit firms that are established and approved in an EEA state under the Audit Directive[34], a majority of the ownership and management bodies of an audit firm must be 'qualified persons'. After Brexit, 'qualified persons' will continue to include EEA-qualified auditors and EEA-registered audit firms but would not cover UK-qualified auditors or UK-registered firms. As a result, audit firms may need to restructure the ownership and management of their EU-established entities.

One could argue that since UK qualifications are already recognised in the EU, there is no need for complicated negotiations on the matter and the old regime should be continued based on a bilateral agreement between the EU and the UK. However, any arrangement on professional recognition depends on free movement of labour and the internal EU rules cannot be simply inserted in a trade

[30] For example, under Article 24 of the Directive, basic medical training must comprise a total of at least six years of study or 5 500 hours of theoretical and practical training provided by, or under the supervision of, a university. More detailed rules for the structure of the studies for the covered professions are given in Annex V.

[31] For example, Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

[32] See Notice to stakeholders - Withdrawal of the UK and EU rules in the field of regulated professions and the recognition of professional qualifications, European Commission, 21 June 2018. Available at: https://ec.europa.eu/info/sites/info/files/file_import/professional_qualifications_en.pdf.

[33] Art. 27 of the Withdrawal Agreement.

[34] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts.

deal. Since the UK is not willing to continue the free movement of labour, the EU is unlikely to agree on such a far-going regime on professional recognition as applied under EU law. Moreover, as discussed above, the recognition of each other's educational and professional standards requires also wider trust in the mutual relations and the maintenance of a level playing field.

As an alternative to the EU's recognition scheme, one can turn to the arrangements that the EU has with third states. However, one is faced with the disappointing reality that very little exists with regard to the recognition of professional qualifications outside the EU. Within the WTO, the only agreement reached so far relates to accountants.[35] Through various bilateral and regional agreements states have concluded mutual recognition agreements but they apply to a very limited number of sectors and do not provide for a general scheme, like EU law does.[36]

Among the EU's bilateral agreements, the CETA with Canada includes some of the EU's most ambitious third country arrangements on the mutual recognition of professional qualifications. Yet CETA only sets a framework within which regulators may negotiate recognition agreements for professional qualifications; it does not itself provide for mutual recognition. International practice shows that mutual recognition agreements are very hard and slow to negotiate. The success of the EU in this regard is most likely one of the positive side products of the "complex system of mutual trust and mutual spying".[37]

4. The future of UK professionals in the EU

The EU's internal market is an impressive achievement. In services, the achievement is, however, somewhat less impressing than in the area of goods. This is not surprising considering that services are much harder to liberalize than goods. Therefore, the name of the game is quite different from goods where the UK should remain closely aligned with EU standards if it wants to secure as free access as possible to the EU market. In services, however, the EU's internal market is much less harmonized than its internal market in goods. This means that there is typically no common standard to regulate a specific service. Instead, the member states must accept services and service providers originating in the other member states subject to a limited number of mandatory requirements of their national laws in accordance with Art. 52 TFEU and the Court's case law. Sometimes, these mandatory requirements have, however, been coordinated on the level of the EU. For example, the Posted Workers Directive includes an exhaustive list of requirements that the host state can impose for the protection of workers when they are posted to another EU member state in connection with the provision of a service.[38]

Harmonized EU rules exist only in certain service sectors. Financial services are one of the most prominent examples. The harmonization of the EU's financial market rules has resulted in a whole array of secondary law, including the well-known examples of the capital requirement directives, the

[35] Decision on Disciplines Relating to the Accountancy Sector – Adopted by the Council for Trade in Services on 14 December 1998 (15 December 1998) S/L/63 (WTO document).

[36] Article VII GATS permits bilateral and regional recognition agreements, although such agreements represent a departure from the most-favoured-nation (MFN) principle. However, the parties to such an arrangement must give other members of the WTO an opportunity to reach a similar agreement, and no recognition agreement may be applied in a discriminatory or trade-restricting manner.

[37] Nicolaidis, K. *Mutual Recognition: Promise and Denial, from Sapiens to Brexit*, Current Legal Problems, Vol. 70, No. 1 (2017), pp. 1–40.

[38] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

cross-border payments regulations and the markets in financial instruments directives (MiFiD and MiFiD 2).[39] Mutual recognition and minimum harmonization can be identified as two main features characterizing this regulatory approach. Towards third countries, the EU operates an equivalence system that is based on access being dependent on parity with EU regulation.[40] This regime is available only when the Commission (one-sidedly) determines whether a country's rules and supervisory mechanisms are equivalent to those of the EU. Moreover, the conditions for equivalency depend on the particular EU act and rather than cover all types of financial services, equivalence is available only in those acts that contain third-country provisions. For most states, access to the EU's financial services market remains patchy and the EU's international services trade agreements show that the EU's key trading partners remain subject to a wide array of discriminatory market access barriers.[41]

In professional services it is not possible to develop an approach based on equivalence. Harmonization (internally) and equivalence (externally) are not the approaches that are used to regulate different professional activities in the EU. The EU member states' national rules on regulated professional activities are very diverse. As explained above, in the area of professional recognition, the EU has come up with certain harmonized rules as to the minimum training conditions in certain professions but otherwise each state regulates professional services independently.

Therefore, the key challenge flowing from the setup of the EU's internal services market is that in services one is not actually facing a single market but 28 separate markets. After Brexit, UK professionals in regulated sectors cannot secure access to all EU states at once unless an EU-wide recognition scheme is agreed upon. But the issue is not only about recognition. In services, non-EU states face 28 sets of national rules in a wide range of service-related regulation. Relatively little harmonized legislation exists in services. Whereas the free movement of services helps to eliminate these differences for EU operators, services supplied from outside the EU must comply with each EU state's national rules. In some areas such as consumer protection, the rules have been partially harmonized throughout the EU. In some others, such as licencing requirements, each EU state has its own regime. One particularly significant body of rules that is coordinated on the EU level is that relating to social security.[42] Under the EU's social security coordination professionals working in any EU member state can have access to the local social security system and retain all pension rights accumulated in different member states. Moreover, the EU's social security rules allow the self-employed work in another EU member state up to two years while remaining within the scope of their home state's social security system.

To uphold the current liberal services regime, the EU and UK would need to come up with a model that is based on the current approach. However, this seems unlikely. It is more likely that the future relationship on services will look more similar to the EU's recent services agreements with Canada and Japan. The EU-27 and the UK may even decide to use their schedules from those two agreements as a baseline to schedule their mutual commitments. This FTA-approach is also reflected in Section 29 of Part III of the Political Declaration which provides that the future arrangements should include

[39] A list of the mentioned directives and other key legislation forming EU's banking and financial services law is available at https://ec.europa.eu/info/law/law-topic/eu-banking-and-financial-services-law_en.
[40] See Ferran, E. *Regulatory Parity in Post-Brexit UK-EU Financial Regulation* in Kern, A. et al. Brexit and Financial Services: Law and Policy, Hart Publishing 2018.
[41] The EU's services schedules show a high number of discriminatory measures that can be applied to foreign financial operators especially in cross-border trade (Mode 1). See Jacobsson, J., *Preferential Services Liberalization: The Case of the European Union and Federal States*, Cambridge University Press 2019, 265.
[42] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004).

provisions on market access and national treatment under host state rules for the Parties' service providers and investors, as well as address performance requirements imposed on investors.[43] Ultimately, it may not be a complete disaster to base the future relationship on an FTA model. Even if the EU's agreements with Canada and Japan show a large number of market access barriers towards Canadian and Japanese service suppliers, it does not mean that such barriers are always implemented in practice. Actually, many service-related rules are in the end applied in a non-discriminatory manner even if no such access was given under a trade agreement.[44] Ultimately, the most practical importance may come down to dispute settlement. The real champion in the integration of the EU's internal market has been the Court of Justice. From the point of view of professional service suppliers, it would be critical for them to have access to dispute settlement under the new economic partnership. Whereas in the EU individuals have access to the EU Court under the preliminary reference procedure, the FTA model would pave the way for the much more modest state-to-state dispute settlement.

In addition to market access conditions, there is of course a multitude of other considerations that are relevant for the professional service sector, ranging from data protection rules to consumer protection and distance selling rules. Any departure from common rules currently applied as part of EU law will create fragmentation to the framework under which professional services are provided. A future partnership based on the FTA-model (such as the agreements concluded with Canada and Japan) would allow the UK to depart from such common rules. Considering that the EU is likely to remain the biggest market for UK professional service sellers, the UK may, however, ultimately follow many EU rules to make life easier for its service sector.

5. Conclusion

It is possible that the EU and UK have an agreement in place at the end of the year. However, such an agreement would focus on tariffs and quotas but would do very little to remove or mitigate regulatory barriers to trade in services. For service sector professionals, a final deal by the end of 2020 would in essence amount to a no-deal. That is because it is extremely unlikely that the EU and UK will reach a significant services agreement in a year, unless they end up copy-pasting earlier commitments given as part of the EU's third-country agreements. Such an approach would not be very satisfactory to the UK's service sector. It would be a significant departure from the current framework and would, for example, exclude the recognition of professional qualifications. Mutual recognition takes painfully long to negotiate and is dependent on cooperation between professional bodies of the countries concerned. To avoid serious disruption, the realistic expectation therefore is that the transition period for services will be extended.

Splitting market access from compliance with EU's regulatory conditions will be hard to attain for the UK. It is likely that in the future partnership negotiations regulatory parity is used by the EU to unlock market access both in the area of goods as well as services. In addition to liberal market access and recognition rules, service sector professions depend on free movement (permanent and temporary) as well as coordinated social security rules. Along with professional recognition, social security coordination is likely to rise as one of the top negotiation topics for the professional services sector. Finally, professionals on both sides of the English Channel will depend on well-functioning dispute settlement that should be open to individual complaints.

[43] For an extensive treatment of Brexit from a WTO/GATS perspective, see Adlung, R. *Brexit from a WTO/GATS Perspective: Towards an Easy Divorce?* (2018) Journal of World Trade 52, no. 5 721–744.

[44] This is, however, not the case with the recognition of professional qualifications where differentiation between domestic and foreign service suppliers is easy to make. Furthermore, immigration rules can easily be applied to foreign service suppliers and thus access can be restricted under modes 3 and 4.