

# The consequences of Brexit on Services and Establishment

## Different Scenarios for Exit and Future Cooperation

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28 February 2017

IMCO workshop on Implications of Brexit  
European Parliament

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# Trade in Services and Establishment: Challenges for Market Integration

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- specific barriers to trade in services and cross border establishment
    - barriers to trade are difficult to identify
    - regulations on services and establishment often address the service supplier
    - services may need temporary access of staff or establishment
  - liberalizing trade in services can require regulation
    - common standards for licences or diplomas ...
    - ...allows mutual recognition of standards (e.g., licences, diplomas)
  - ideal solution: country-of-origin-principle, “passporting”
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# Services and Establishment:

## Conditions for Integrated Markets

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- negative integration
    - removal of hindering regulation
      - access to the market, competitive equality (national treatment)
      - may lead to mutual recognition of standards and supervision
  - positive integration
    - approximation of standards
      - eases mutual recognition
      - cuts off justification of restrictions
      - allows passporting
  - scope
    - commitment/annex method in international trade law
    - positive/negative list approach
  - reliable, enforceable subjective rights
    - transparent, applicable law; rule of law, direct effect
    - judicial review, legal unity
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## 1. Substance of Law

- largely aligned to the EU single market law
- negative integration: fundamental freedoms of TFEU applicable
- positive integration: EEA incorporates EU single market law into EEA law
- scope: comprehensive, only few exceptions in the treaty

## 2. Quality of Law

- EEA law does not have direct effect
- Member States are obliged to transpose law into national law with direct effect
- judicial review: EFTA Court, ECJ

## 3. Assessment

- comprehensive integration of service markets
- jurisdiction of the CJEU/EFTA-Court
- passporting

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

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## 1. Substance of Law

- negative integration: freedom of services as a stand still clause; Association Council opened negotiations on further market access
- positive integration: only goods are covered by way of reference to EU secondary law
- instrument rather for goods; services are normally not subject to tariffs

## 2. Quality of Law

- international law, but direct effect in EU (no reciprocity)
- judicial review: ECJ

## 3. Assessment

- customs union as such has only little effects on the freedoms of services and establishment
  - often basis for closer integration (e.g., Andean Community, Eurasian Economic Union)
  - no passporting
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## 1. Substance of Law

- negative integration:
  - national treatment; most-favoured-nation treatment; market access; domestic regulation shall not be arbitrary (clear, transparent, objective)
  - temporary entry/stay of natural persons for business purposes
- positive integration: framework to facilitate a regime for the mutual recognition of professional qualifications (purpose: future mutual recognition agreements – MRA)
- scope: negative list approach (but: positive list for the temporary entry of contractual service suppliers and independent professionals)

## 2. Quality of Law

- international law, no direct effect (“no private rights”)
- judicial review: investor-to-state arbitration; dispute settlement

## 3. Assessment

- ambitious approach; but: parties can require national license, registering or qualifications
- no automatic mutual recognition – potential for development
- no passporting

# Service Markets under World Trade Law (GATS)

## 1. Substance of Law

- negative integration:
  - national treatment; most-favoured-nation treatment; market access
  - mutual recognition: framework for further negotiation
  - domestic regulation: shall be administered in a reasonable, objective and impartial manner
- positive harmonisation: none
- scope: unilateral commitments, positive list approach

## 2. Quality of Law

- international law; no direct effect
- Dispute Settlement Understanding

## 3. assessment

- UK will remain a member of GATS (details are controversial)
- commitments can be fixed unilaterally
- no passporting



# Service Markets and Establishment: Step Back after Brexit

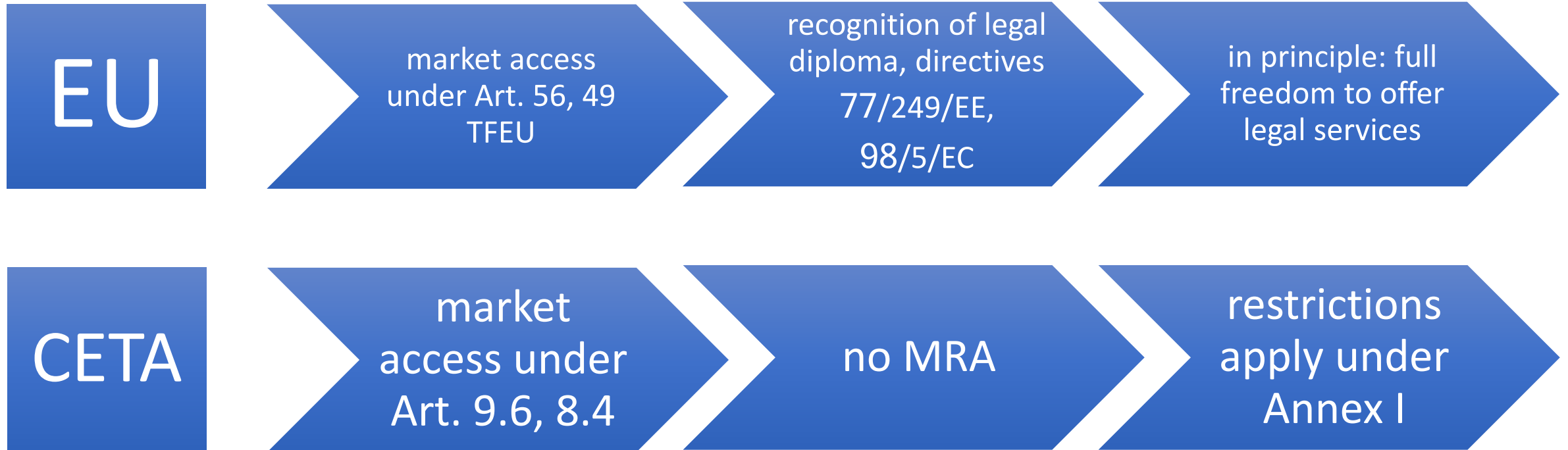
	European Union	CETA	FTA EU-S. Korea	GATS
Negative Integration	Art. 56, 49 TFEU market access, national treatment	Art. 9.6, 9.3: limited market access, national treatment Art. 8.1 ff.: limited market access for investment	Art. 7.5 f., 7.9 f: limited market access, national treatment	Art. XVI, XVII: limited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

# Services and Establishment under CETA:

## Market Access in Detail

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

# Example: Cross-Border legal Service or Establishment of a Law Firm



# Challenges for EU-legislation: **Transitory Measures to Match Legitimate Expectations**

- the problem: service providers and established persons from UK
- the legal issue:
  - when Brexit becomes effective: **UK citizens lose rights under Art. 56, 49 TFEU**
    - expl.: recognition of an English companies (Private Ltd.) in Germany
  - is there a legal obligation to enact transitory measures?
  - possible legal approach:
    - legitimate expectations
      - representation of continued existence of rights vs. Art. 50 TEU?
    - acquired rights
      - but: restricted to property and certain contractual rights
      - intellectual property rights would “survive” Brexit, right to work does not
- possible solution: intertemporal application of law for old cases
- better: EU legislation

# Conclusions: Challenges for Negotiation and Regulation

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1. the design of a free trade agreement must consider the specific challenges for cross-border trade in services and establishment
  2. the models CETA, FTA EU-Korea and GATS lag way behind EU/EEA
    - no comprehensive scope
    - no common standard setting
    - no direct effect of market access and national treatment rules
  3. challenges for the negotiation process with UK
    - to extend the scope of the freedom of services and establishment
    - to find a mechanism for common standards
    - to shape the principle of mutual recognition as self-executing rule
    - to come close to direct effect and effective judicial protection
  4. challenges for EU legislation: adapting secondary law
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