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BREXIT: THE EU'S EXPORT OF LEGAL SERVICES TO THE UK IN JEOPARDY?

AN IN-DEPTH ANALYSIS OF THE CONSEQUENCES OF BREXIT

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ABSTRACT

This dissertation establishes that while there is no actual 'free movement of legal services' through complete harmonisation of the regulations on the legal profession, the EU has provided for a framework that envisages considerable procedural simplification through the principle of 'mutual recognition'.

When the United Kingdom leaves the EU, this dissertation finds that the UK will lose access to this favourable framework for the legal market and the principle of 'mutual recognition'. Even though the UK has created a flexible national framework for foreign lawyers and legal documents, which will become applicable to European legal service providers wishing to practise in the UK, this legislation comes nowhere near the EU framework for legal services. Thus, the current export of legal services from the EU to the UK would become jeopardised if the Parties do not manage to conclude a deal on the matter.

Yet, not every deal is satisfactory in guaranteeing a continuation of the current export of legal services from the EU to the UK. To be more specific, it is found that Free Trade Agreements such as CETA, TTIP and the Singapore Agreements are not able to improve the situation of legal services under a no-deal scenario. In other words, the agreements do not go beyond 'locking in' the current *status quo* under GATS. For the recognition and enforcement of legal documents, there are some more promising models for future negotiations, but it is still unclear whether these would actually be extended to the UK.

Regrettably, the Brexit negotiations do little to accommodate the EU's export of legal services as these are still on-going. While there are some interesting proposals, most of these do not extensively deal with the future of European legal practitioners in the UK after Brexit and remain highly based on the discussed FTAs. Moreover, the Withdrawal Agreement and Political Declaration have been rejected numerous times by the British Parliament. Hence, it remains unclear what the outcome of Brexit will entail for the EU's export of legal services to the UK.

At any rate, based on what is known about Brexit today, *i.e.* the transitional provisions and the Political Declaration, it can be concluded that the EU's export of legal services to the UK will most definitely be jeopardised. As a last point, it can be noted here that this negative effective could possibly be counteracted by concluding agreements in the likes of the EEA and the 2007 Lugano Convention or the 2005 Denmark Agreement.

SAMENVATTING

Dit proefschrift stelt vast dat hoewel er geen sprake is van een daadwerkelijk “vrij verkeer van juridische diensten” door een volledige harmonisatie van de regelgeving inzake juridische dienstverleners, de EU toch een kader heeft geschapen dat voorziet in een aanzienlijke procedurele vereenvoudiging via het beginsel van “wederzijdse erkenning”.

Wanneer het Verenigd Koninkrijk de EU verlaat, blijkt uit dit proefschrift dat het VK de toegang tot dit gunstige kader voor de juridische markt en het beginsel van “wederzijdse erkenning” zal verliezen. Hoewel het VK een flexibel nationaal kader voor buitenlandse advocaten en juridische documenten heeft gecreëerd, dat immers van toepassing zal zijn op Europese juridische dienstverleners die in het VK hun beroep willen uitoefenen, komt deze wetgeving bij lange na niet in de buurt van het EU-kader voor juridische diensten. De huidige export van juridische diensten van de EU naar het VK zou dus in gevaar komen als de partijen er niet in slagen een overeenkomst over deze kwestie te sluiten.

Toch is niet elke overeenkomst bevredigend om de voortzetting van de huidige export van juridische diensten van de EU naar het VK te garanderen. Meer in het bijzonder is gebleken dat vrijhandelsovereenkomsten zoals de CETA, de TTIP en de Singapore-overeenkomsten niet in staat zijn de situatie van juridische diensten te verbeteren in vergelijking met een "no-deal"-scenario. Met andere woorden, de overeenkomsten gaan niet verder dan het “vastleggen” van de huidige *status quo* onder de GATS. Voor de erkenning en handhaving van juridische documenten zijn er wel enkele veelbelovende modellen voor toekomstige onderhandelingen, maar het is nog onduidelijk of deze ook daadwerkelijk tot het VK zullen worden uitgebreid.

Helaas dragen de Brexit-onderhandelingen weinig bij aan de EU-export van juridische diensten, aangezien deze nog steeds aan de gang zijn. Hoewel er enkele interessante voorstellen zijn, gaan de meeste daarvan niet uitgebreid in op de toekomst van de Europese juridische dienstverleners in het VK na Brexit en blijven ze in hoge mate gebaseerd op de besproken vrijhandelsovereenkomsten. Bovendien zijn de *Withdrawal Agreement* en *Political Declaration* herhaaldelijk door het Britse parlement verworpen. Het blijft dan ook onduidelijk wat de uitkomst van Brexit zal betekenen voor de export van juridische diensten van de EU naar het Verenigd Koninkrijk.

In ieder geval kan op basis van wat vandaag de dag bekend is over Brexit, namelijk de overgangsbepalingen en de politieke verklaring, worden geconcludeerd dat de export van juridische diensten van de EU naar het VK zonder meer in gevaar zal komen. Ten slotte kan hier worden opgemerkt dat dit negatieve effect kan worden tegengegaan door overeenkomsten te sluiten zoals de EER en het Verdrag van Lugano van 2007 of de Overeenkomst met Denemarken van 2005.

WORD OF THANKS

By writing these words, I am not only finishing this dissertation, but also completing a five-year study of law at the Ghent University. At the end of this (sometimes trying) period, there are a few people I wish to thank for their support throughout these studies.

First of all, I'd like to thank Professor dr. Govaere, not alone for allowing me to combine the best of both worlds in this dissertation, *i.e.* my passion for EU law and WTO law, but also for her insightful classes on EU law which sparked my interest in the subject in the first place. Furthermore, I would like to thank both Professor dr. Govaere and Ms Gremmelprez for their expert guidance on this dissertation, which allowed me to develop feasible as well as coherent research questions and to further develop my passion for EU law.

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Tine Deschuytere

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LIST OF ABBREVIATIONS

1933 Act	Foreign Judgments (Reciprocal Enforcement) Act 1933
1988 Convention of Lugano	88/592/EEC: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988, *OJ* L 319/9 of 25 November 1988
2005 Denmark Agreement	Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 299/62 of 16 November 2005
2007 Convention of Lugano/Lugano Convention	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 339/3 of 21 December 2007
Brussels Convention	Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, *OJ* L 299/32 of 31 December 1972
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12/1 of 16 January 2001
Brussels Ibis Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 351/1 of 20 December 2012
CCBE	Council of Bars and Law Societies of Europe

CETA	Comprehensive Economic and Trade Agreement concluded with Canada, *OJ* L 11/23 of 14 January 2017
Choice of Court Convention	The Hague Convention of 30 June 2005 on Choice of Court Agreements, *OJ* L 133/1 of 29 May 2009
Citizenship Directive	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, *OJ* L 158/77 of 30 April 2004
CJEU	Court of Justice of the European Union
Directive 2013/55/EU	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* L 354/132 of 28 December 2013
e-Commerce Directive	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, *OJ* L 178/1 of 17 July 2000
EEA	European Economic Area
EEA Agreement	Agreement on the European Economic Area, *OJ* L 1/3 of 3 January 1994
EEIG	European Economic Interest Grouping

EEIG Regulation	Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), *OJ* L 199/1 of 31 July 1985
EEO-certificate	European Enforcement Order-certificate
EFTA	European Free Trade Association
EU/Union	European Union
EU Company Law Directive	Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, *OJ* L 169/46 of 30 June 2017
EUKFTA	Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *OJ* L 127/6 of 14 May 2011
European Account Preservation Order Regulation	Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, *OJ* L 189/59 27 June 2014
European Company Regulation	Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *OJ* L 294/1 of 10 November 2001
European Enforcement Order Regulation	Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ* L 143/15 of 30 April 2004
EUSFTA	European Commission, 'Annex 1 to the Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore' of 18 April 2018 COM(2018) 196 final

EUSIPA	European Commission, 'Annex to the Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part' of 18 April 2018 COM(2018) 194 final
FLC	Foreign Legal Consultant
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services of 1995
GATT	The General Agreement on Tariffs and Trade concluded in 1994 in Marrakesh containing the provisions of the General Agreement on Tariffs and Trade of 1947
HCCH	Hague Conference on Private International Law
Insolvency Regulation	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, *OJ* L 141/19 of 5 June 2015
Lawyers' Establishment Directive	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, *OJ* L 77/36 of 14 March 1998
Lawyers' Services Directive	Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, *OJ* L 78/18 of 26 March 1977
Merger Directives	Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies *and* Directive 2011/35/EU of the European Parliament and of the Council of 5

	April 2011 concerning mergers of public limited liability companies
MFN	Most-Favoured-Nation
MRA	Mutual Recognition Agreement
New York Convention on Arbitration	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
Payment Order Regulation	Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure *as amended by* Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, *OJ* L 399/1 of 30 December 2006 *juncto OJ* L 341/1 of 24 December 2015
PIL	Private International Law
Political Declaration	Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *OJ* C 66 I/185 of 19 February 2019
QLTS	Qualified Lawyer Transfer Scheme
RFL	Registered Foreign Lawyer
Recognition of Professional Qualifications Directive	Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications *as amended by* 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* L 255/22 of 30 September 2005 *juncto OJ* L 354/132 of 28 December 2013
Small Claims Regulation	Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure *as amended by* Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, *OJ* L 199/1 of 31 July 2007 *juncto OJ* L 341/1 of 24 December 2015
Services Directive	Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* L 376/36 of 27 December 2006
Singapore Agreements	The Free Trade Agreement and the Investment Protection Agreement concluded with Singapore
SRA	Solicitors Regulation Authority
TEU	Consolidated version of the Treaty on European Union
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
TRIMS	Agreement on Trade-Related Investment Measures of 1994
TTIP	The Transatlantic and Investment Partnership negotiated with the United States of America
UK	United Kingdom
US/USA	United States of America
Withdrawal Agreement	European Commission, 'Annex to the Proposal for a Council Decision amending Decision (EU) 2019/274 on the signing, on behalf of the

	European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' of 11 April 2019 COM(2019) 194 final
WTO	World Trade Organisation

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INTRODUCTION

1. As a result of the referendum held on the 23 June 2016, the United Kingdom (UK) triggered article 50 TEU on Wednesday 29 March 2017 which means the UK will most likely leave the European Union (EU/Union).[1] This article allows for an extendable two-year period in which both parties will negotiate the terms on which the UK is to leave the EU.[2] At the time of writing, the UK has been granted an extension to allow for the ratification of the Withdrawal Agreement until 31 October 2019.[3] As no Member State of the EU has ever invoked article 50 TEU, the 'Brexit' creates a unique opportunity for ground-breaking research on this article. Moreover, the UK's looming exit has sparked multiple questions concerning the future (trading) relationship between the UK and the EU. While there are many agreements that can be used as a model for these future EU-UK relations, negotiations are still on-going, and it is unclear what the outcome will be.[4]

2. This, in turn, creates an unprecedented uncertainty for British and European businesses alike. One of the biggest concerns for the UK is the impact of Brexit on the services sector, as this accounts for 80% of its national GDP.[5] Right now, most studies tend to mention financial services, due to the UK's position as a key player in the financial market which is hugely dependent on its access to the Single Market.[6] Yet, there are also other service sectors that will be affected in an equally adverse manner to financial services. For instance, the UK houses the second largest legal services market in the world and the largest legal market within the EU, making up 20% of all European legal services fee revenue.[7] The UK was undoubtedly able to secure such a central position due to several favourable instruments enacted by the EU. The EU has namely implemented an extensive framework regulating the cross-border provision of legal services in both primary and secondary law.[8] The appeal of the UK legal market as an international hub for legal services was further accommodated by the EU's framework on the recognition and enforcement of foreign judgments, authentic instruments and court settlements.[9] In other words, the UK's courts became an interesting destination in choice of court agreements

[1] Theresa May, 'Article 50 Notification Letter from the United Kingdom' (*UK Government*, 29 March 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf> accessed 23 April 2018; Panos Koutrakos, 'Negotiating international trade treaties after Brexit' (2017) 41 EL Rev 475, 475.
[2] Article 50 TEU.
[3] Special meeting of the European Council (Art. 50) Conclusions of 10 April 2019, EUCO XT 20015/19, para. 2.
[4] See *infra* 3.
[5] Richard Tauwhare, 'Brexit: achieving near-frictionless trade' (2017) Int TLR 89, 89.
[6] Maziar Peihani, 'Brexit and financial services: a tentative analysis of possible exit scenarios' (2017) 5 JBL 357, 357-358; see also see Kern Alexander and others (eds), *Brexit and Financial Services: Law and Policy* (Hart Publishing 2018).
[7] Hans-Jürgen Hellwig, 'The effects of Brexit on the law of companies and financial and legal services in Europe: a summary overview' (2017) 2 ECFR 252, 261.
[8] See *infra* CHAPTER 1.
[9] See *infra* CHAPTER 1.

for cross-border disputes as UK judgments enjoy a 'free movement' throughout the EU.[10] Similarly, legal documents originating from other EU Member States also enjoy such a favourable treatment within the UK.[11]

Still, this is and should continue to be a very big concern for the EU as well, due to the significance of the services sector to the EU itself. To be more specific, the services sector makes up no less than 70% of the EU's GDP.[12] Legal services form part of the EU's business services sector, which is coincidentally one of its biggest service sectors, accounting for 11% of its GDP.[13] Furthermore, the number of European legal professionals in the UK continues to rise.[14] While there are no exact numbers for every type of legal service provider, there are some numbers to be found with regard to lawyers in the jurisdiction of England and Wales. Most European lawyers appear to register with the Solicitors Regulation Authority (SRA) as their work is often "*more closely aligned to the work of solicitors*".[15] In March 2019, the SRA reported that out of the 144.845 practising solicitors, 4.115 were EU lawyers registered on the basis of the various EU directives or other relevant UK legislation. This is almost twice as much as foreign lawyers registered in the UK from other jurisdictions not covered by the EU framework.[16] Furthermore, in 2015, the Council of Bars and Law Societies of Europe (CCBE) reported that there were 450 European lawyers registered with the Law Society and the Bar Council under their home state Title as well as 442 who had requalified to the profession of UK solicitor using the Lawyers' Establishment Directive in England and Wales alone.[17] Hence, it is clear that there are high stakes involved on both sides of the Channel when the effect of Brexit on legal services is discussed.

3. The negotiations of Brexit were split into two phases, with one phase focusing on the actual withdrawal of the UK from the EU and the other fixed on the future relationship between the EU and the UK.[18] At the moment of writing this dissertation, the EU and UK have only

[10] Mukarrum Ahmed, 'Brexit and English jurisdiction agreements: the post-referendum legal landscape' (2016) 27 EBLR 989, 990.
[11] See *infra* CHAPTER 1.
[12] European Commission, 'Growth: Single Market for Services' <https://ec.europa.eu/growth/single-market/services_en> accessed 30 April 2018.
[13] European Commission, 'Growth: Single Market for Services - Business Services' <https://ec.europa.eu/growth/single-market/services/business-services_en> accessed 30 April 2018.
[14] See e.g. Solicitors Regulation Authority, 'Regulated population statistics' <https://www.sra.org.uk/solicitor-population/> accessed 24 April 2019.
[15] Bar Council of England and Wales, 'What is the financial value that EU lawyers bring to this country, in particular to the City of London?' (*House of Commons*, 20 July 2016) <https://www.parliament.uk/documents/commons-committees/Justice/Further-evidence-from-Bar-Council-of-England-and-Wales-on-legal-services-regulation.pdf> accessed 24 April 2019, 1.
[16] Solicitors Regulation Authority, 'Regulated population statistics' (n 14).
[17] 'CCBE Lawyers' statistics 2015' (*CCBE*, 1 May 2015) <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statistics/EN_STAT_2015_Number_of_lawyers_in_European_countries.pdf> accessed 27 April 2019, 9-10.
[18] EU Select Committee, 'Brexit Negotiations' (*House of Lords*, 2017) <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/inquiries/parliament-2017/scrutiny-of-brexit-negotiations/brexit-negotiations/> accessed 24 April 2019.

managed to conclude a provisional Withdrawal Agreement and Political Declaration which were subsequently firmly rejected by the UK House of Commons.[19] Thus, it remains unclear what direction Brexit will take next. Still, since the referendum, Brexit has become a hot topic in academic literature. Both academic authors and parliamentary enquiries continue to consider several options for the future relations between the EU and the UK. Here, the EU's existing agreements with third countries are considered as a potential model for future trading relations. These models range from a no-deal scenario with World Trading Organisation (WTO)-rules to an accession to the European Economic Area (EEA) as an independent Party.[20] Other models which are being assessed include a Free Trade Agreement (FTA) in the likes of CETA, the Swiss Agreements and a Customs Union.[21] Besides these options, the UK has also discussed a so-called 'bespoke arrangement'.[22] This would entail the conclusion of a *sui generis* agreement that attempts to integrate most of the benefits from the other models and then tries to reconcile this result with the UK's demands.[23] As both the European Parliament and European Council have rejected the idea of 'cherry picking' in the EU Membership rights, it seems unlikely that such an agreement will ever see the light of day.[24] These doubts can also be reiterated with regard to the feasibility of the Swiss Agreements as a model for Brexit.[25]

4. Nonetheless, it should be noted that the majority of this research only considers the UK's stake in Brexit. As pointed out above, the EU has an equally high interest in the outcome of

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[19] European Commission, 'Annex to the Proposal for a Council Decision amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' of 11 April 2019 COM(2019) 194 final (Withdrawal Agreement); Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *OJ* C 66 I/185 of 19 February 2019 (Political Declaration); Brian Wheeler and Paul Seddon, 'Brexit: All you need to know about the UK leaving the EU' *BBC News* (*s.l.*, 2 May 2019) <https://www.bbc.com/news/uk-politics-32810887> accessed 7 May 2019.

[20] Joint letter from the EU and UK permanent representatives to the WTO (*European Commission*, 11 October 2017) <https://ec.europa.eu/commission/sites/betapolitical/files/letter_from_eu_and_uk_permanent_representatives.pdf> accessed 2 May 2018; Peihani (n 6) 374; Tauwhare (n 5) 91; Paolo R Vergano and Tobias Dolle, 'The Trade Law Consequences of "Brexit"' (2016) 7 Eur J Risk Reg 795, 797-798.

[21] Vergano and Dolle (n 20) 797; Martin Rees and Aline Doussin, 'Taking stock on Brexit: what is on the table?' (2016) Int TLR 47, 47; European Union Committee, 'Brexit: the options for trade' (*House of Lords*, 13 December 2016) <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/72/72.pdf> accessed 24 April 2019, 28-35; Christoph Schewe and Davids Lipsens, 'From EFTA to EC/EU and Back to EFTA? The European Economic Area (EEA) As a Possible Scenario for the UK-EU Relations After Brexit' in David Ramiro Troitiño, Tanel Kerikmäe and Archil Chochia (eds), *Brexit: History, Reasoning and Perspectives* (Springer 2018) (215) 216-217; Michael Emerson, 'Theresa May's Deep and Comprehensive Free Trade Agreement' (*CEPS*, 6 March 2018) <https://www.ceps.eu/publications/theresa-mays-deep-and-comprehensive-free-trade-agreement> accessed 18 March 2018; Piet Eeckhout, 'Future trade relations between the EU and the UK: options after Brexit' (*Directorate-General for External Policies – Policy Department*, 22 March 2018) <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603866/EXPO_STU(2018)603866_EN.pdf> accessed 31 March 2018, 20.

[22] European Union Committee (n 21) 69; Peihani (n 6) 369-370.

[23] *Ibid*.

[24] European Parliament Resolution of 14 March 2018 on the framework of the future EU-UK relationship, 2018/2573(RSP), para. 12; European Council Guidelines (Art. 50) of 23 March 2018, EUCO XT 20001/18, 3.

[25] *Ibid*.; Schewe and Lipsens (n 21) 217.

Brexit.[26] Furthermore, there is little substantive research being published by independent authors on the effect of Brexit for legal services.[27] Hence, the fate of European legal services providers in the UK after Brexit will be examined here. In other words, this research will assess whether Brexit will jeopardise the EU's export of legal services to the UK.

Before going into a substantive analysis on what happens after Brexit for legal services, the existing EU framework on legal services must be examined. This will allow for a detailed appraisal of the rights European lawyers currently enjoy in the UK and which they risk losing due to the UK's exit from the EU.[28] Further, the implications of a no-deal scenario for the EU's export of legal services to the UK will be extensively assessed. This way, the obstacles that should be tackled by a future EU-UK trading arrangement can be thoroughly considered.[29] Next, the extent to which the EU has granted a somewhat favourable treatment of legal services of third countries through FTAs will be analysed. Here, CETA, TTIP and EUSFTA and other relevant FTAs concluded by the EU will be discussed.[30] The Swiss Agreements will not be discussed hitherto, as it is doubtful that the EU will allow the UK to negotiate similar 'cherry picking' agreements. The same can be said for the omission of an appraisal of the 'bespoke arrangement'.[31] Moreover, in the spirit of 'taking back control' neither the EEA or a Customs Union will be extensively assessed here as these do not seem to be realistic options for the UK.[32] Moreover, the Ukraine agreement will not be discussed as a model here either. Ukraine is seeking rapprochement to the EU, while the UK is trying to distance itself from the EU.[33] Hence, the idea behind the Ukraine-agreement is a fundamentally different one than the one behind a possible EU-UK agreement. Additionally, the results of the Brexit negotiations will be evaluated in comparison to the previously analysed agreements. More specifically, the progress of the negotiations will be scrutinised to review to what extent they accommodate trade in legal services.[34] Finally, the results of these four different appraisals should allow for a careful examination of Brexit and to what extent it could jeopardise the EU's export of legal services to the UK.[35]

[26] See *supra* 2.
[27] See e.g. Hellwig (n 7).
[28] See *infra* CHAPTER 1.
[29] See *infra* CHAPTER 2.
[30] See *infra* CHAPTER 3.
[31] See *supra* 3.
[32] This was recently confirmed in some indicative votes conducted by the UK House of Commons, albeit with some very small majorities. See 'House of Commons holds second round of indicative votes' (*UK Parliament*, 1 April 2019) <https://www.parliament.uk/business/news/2019/april/house-of-commons-holds-second-round-of-indicative-votes/> accessed 8 May 2019. Tauwhare (n 5) 89.
[33] European Union External Action Service, 'Factsheet: EU-Ukraine relations' (*European Union External Action Service*, 6 March 2018) <https://eeas.europa.eu/headquarters/headquarters-Homepage/4081/eu-ukraine-relations-factsheet_en> accessed 2 May 2018.
[34] See *infra* CHAPTER 4.
[35] See *infra* CHAPTER 5.

This research will be predominantly based on primary sources. Still, secondary resources will be examined and used as well, but only to the extent that they are relevant. Furthermore, as this is a master's dissertation, this study is bound to be limited. As mentioned above, this analysis will mainly focus on the EU's perspective of Brexit. Additionally, this examination will avoid going into an in-depth discussion on the public-sector exception which has surrounded legal professions such as notaries.[36] Finally, this dissertation will limit itself to the discussion on the potential EU-UK agreement and their future relationships. It will therefore not go into the analysis on the impact of Brexit for trade relations with third countries, as this will hugely depend on the potential EU-UK agreement.[37]

[36] Articles 51 and 62 TFEU; see also A van den Brink and HMM Zelen, 'Nee tegen nationaliteitseisen notarissen' (2011) 10 NtEr 329.

[37] Silvia Merler in International Trade Committee, 'Oral evidence: Continuing application of EU trade agreements after Brexit' (*House of Commons*, 24 January 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/continuing-application-of-eu-trade-agreements/oral/77638.pdf> accessed 9 February 2018, 5, Q211.

CHAPTER 1. THE SITUATION PRE-BREXIT: FREE MOVEMENT OF LEGAL SERVICES?

I. Introduction

5. In a continuously globalising world, the law has transformed into an internationalised phenomenon.[38] Moreover, the number of transnational mergers of lawyers, correlating with an increase in demand for cross-border legal services, is ever-growing in the European Union.[39] Still, substantial differences in the strict regulation of the legal profession throughout the Member States of the EU lead to significant obstacles to the free movement of legal services.[40] To address this upcoming demand in cross-border services and to enable the European legal profession to withstand the competition of global firms, the EU has opted to liberalise the legal market.[41] While the implementation of EU law on trade in legal services has not been without its controversies, the EU Members still maintain a considerable amount of restrictions on the legal profession.[42] After all, for reasons of consumer protection, fair and proper administration of justice and rule of law, some degree of regulation of the legal profession is considered to be necessary.[43]

6. Closely related to the free movement of legal services, is the free movement of judicial decisions and acts (also known as 'the fifth freedom'). In other words, not only does cross-border litigation cause the need for the provision of cross-border legal services, the allure of the British legal market as a global hub for legal services is highly dependent on the ability to enforce UK judgments in the other EU Member States and *vice versa*.[44]

7. In this chapter, the acts enabling the free movement of legal services and documents will be assessed in relation to the export of legal services to the United Kingdom as a Member State of the EU.

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[38] Christopher Toms, 'Associations of lawyers in the European Union' (2005) 16 EBLR 113, 114; Julian Lonbay, 'Assessing the European market for legal services: developments in the free movement of lawyers in the European Union' (2010) 33 Fordham Int'l L J 1629, 1629; Gilles Muller, 'Free movement of lawyers within the EU internal market: achievements and remaining challenges' (2015) 26 EBLR 355, 355-356.
[39] Irini Katsirea and Anne Ruff, 'Free movement of law students and lawyers in the EU: a comparison of English, German and Greek legislation' (2005) 12 IJTLP 367, 367; Gilles Muller, 'The liberalization of legal services within the EU internal market' (2014) 9 GTCJ 123, 124.
[40] Muller (n 39) 123; Elisabetta Bergamini, 'Lawyers and their freedom of establishment and access to the profession – new perspectives and still existing restrictions: the case of Italy' (2017) 8 Rom J Comp L 100, 120.
[41] Bruno Nascimbene, *The Legal Profession in the European Union* (Kluwer 2009) 7.
[42] Katsirea and Ruff (n 39) 387-393; Hana Horak, Nada Bodiroga-Vukobrat and Kosjenka Dumančic, 'Professional qualification and diploma recognition in EU law' (2014) 1 InterEuLawEast 87, 92-93; Laura Bugatti, 'Towards a new era for the legal profession' (2019) 1 ERPL 83, 108.
[43] Mislav Mataija, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law* (1st edition, OUP 2016) 190-195; Bergamini (n 40) 103.
[44] See *supra* 2; Ahmed (n 10) 990.

II. Free movement of legal *services* in the EU

8. Due to the marked difference between on the one hand the legislation governing the free movement of legal services and on the other hand the legislation governing the free movement of judgments and legal acts, these will be discussed separately. In this section, a critical assessment of the EU's infrastructure for the free movement of legal services will be made.

2.1. Applicable primary law

9. Over the years, the EU was able to create the notion of free movement of legal services through its primary law, captured in the treaties and the case law of the Court of Justice of the European Union (CJEU).[45] Although there are several directives that take precedence over primary law, the primary law concerning legal services still serves as a safety net. Namely, when the directives are not applicable to the case, the legal services provider or receiver can still invoke the applicable articles from the Treaties and the comprehensive case law of the CJEU.[46] Hence, this will be discussed first.

2.1.1. Freedom of establishment and to provide services

10. The first freedoms that come to mind when discussing the free movement of legal services, are the freedom of establishment (Article 49 and following TFEU) and the freedom to provide services (Article 56 and following TFEU). Generally, it is accepted that there are four modes of supply of services, *i.e.* cross-border supply of services, consumption abroad, temporary movement abroad and establishment. The first three modes are covered by the chapter on the freedom to provide services, while the fourth mode is covered by the chapter on the freedom of establishment.[47] The distinction between the two chapters is of the utmost importance, as the conditions imposed on establishments are not only much stricter than those imposed on the provision of services, but the provisions are also mutually exclusive.[48] Still, this distinction has not been easy to define, as can be deduced from cases such as *Gebhard* and *Schnitzer*.[49] In *Gebhard*, the Court of Justice held that the provisions of services concern the pursuit of activities on a temporary basis, which must be "*determined in light of not only the duration of the service, but also of its regularity, periodicity or continuity*".[50] The provisions on establishment, however, allow EU citizens "*to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin and to profit therefrom*".[51] Still, the CJEU specified

[45] See *supra* 5.
[46] Muller (n 38) 364.
[47] See Article I:2 GATS; Muller (n 39) 126-127; Muller (n 38) 359-360.
[48] Muller (n 39) 127.
[49] Judgment of 11 December 2003, *Schnitzer*, C-215/01, ECLI:EU:C:2003:662; Judgment of 30 November 1995, *Gebhard*, C-55/94, ECLI:EU:C:1995:411.
[50] *Gebhard* case (n 49), para. 26-27.
[51] *Ibid*. para. 25.

that a provision of services remains temporary when the provider equips himself with some form of infrastructure "*necessary for the purposes of performing the services in question*".[52]

11. Legal services fall under the scope of the EU provisions relevant to trade in services.[53] Furthermore, the CJEU has established that legal services, including those of lawyers and notaries, do not fall under the 'official authority' exception laid down in Article 51 *juncto* 62 TFEU.[54] Thus, States and/or any private institution regulating the legal profession, will have to abide by the provisions of the TFEU relevant for the free movement of legal services.

12. On the one hand, the freedom of establishment, incorporated in Article 49 TFEU and following, prohibits restrictions on the freedom of primary and secondary establishment and stipulates a right to pursue self-employed activities under the same conditions as the nationals of the Member State of establishment.[55] These Articles have been granted direct effect and can thus be invoked in front of British courts by private persons.[56] Additionally, for this chapter, companies can invoke the same rights as natural persons.[57] This right also includes the right to secondary establishment in the context of legal services.[58] Still, this freedom is not unlimited as Article 52 TFEU foresees exceptions for discriminatory measures, *i.e.* on grounds of public policy, public security or public health.[59] Differently put, directly discriminatory measures can be maintained, but only when these measures are justified on the basis of Article 52 TFEU. Indirectly discriminatory measures can be justified by either Article 52 TFEU or 'overriding reasons in the public interest'.[60] The CJEU's case law has evolved from a focus on (directly or indirectly) discriminatory measures to "*national measures liable to hinder or make less attractive the exercise of fundamental freedoms*".[61] To be more specific, the latter measures can also infringe the freedom of establishment, unless they fulfil four conditions.[62] These conditions are: "*they must*

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[52] *Ibid*. para. 27.
[53] They are, for example, 'normally provided for numeration'. Article 57 TFEU; see also Judgment of 18 December 2007, *Jundt*, C-281/06, ECLI:EU:C:2007:816.
[54] Judgment of 21 June 1974, *Reyners*, C-2/74, ECLI:EU:C:1974:68 (hereafter: *Reyners* case); Judgment of 24 May 2011, *Commission v Belgium*, C-47/08, ECLI:EU:C:2011:334; Judgment of 24 May 2011, *Commission v France*, C-50/08, ECLI:EU:C:2011:335; Judgment of 24 May 2011, *Commission v Luxembourg*, C-51/08, ECLI:EU:C:2011:336; Judgment of 24 May 2011, *Commission v Portugal*, C-52/08, ECLI:EU:C:2011:337; Judgment of 24 May 2011, *Commission v Austria*, C-53/08, ECLI:EU:C:2011:338; Judgment of 24 May 2011, *Commission v Germany*, C-54/08, ECLI:EU:C:2011:339; Judgment of 24 May 2011, *Commission v Greece*, C-61/08, ECLI:EU:C:2011:340; Judgment of 1 December 2011, *Commission v The Netherlands*, C-157/09, ECLI:EU:C:2011:794; Judgment of 10 September 2015, *Commission v Latvia*, C-151/14, ECLI:EU:C:2015:577 (hereafter: *Notary* cases).
[55] Article 49 TFEU; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edition, OUP 2015) 801.
[56] *Reyners* case (n 54); *Notary* cases (n 54).
[57] See *infra* 29-31; Article 54 TFEU; Craig and de Búrca (n 55) 802.
[58] Judgment of 12 July 1984, *Klopp*, C-107/83, ECLI:EU:C:1984:270.
[59] Article 52 TFEU.
[60] Muller (n 38) 363.
[61] *Gebhard* case (n 49), para. 37; Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edition, OUP 2013) 308-309.
[62] *Ibid*.

be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".[63] This test applies to measures concerning the access to the legal profession as well as the conduct of legal services.[64] This is an extension of the rule of reason-doctrine, which was first developed in *Cassis de Dijon*, to the right of establishment.[65]

13. On the other hand, the freedom to provide services, as described by Article 56 TFEU and following, prohibits restrictions on said freedom in respect of EU citizens who are already established in a Member State which is different than that of the (intended) service receiver(s).[66] These Articles were granted also direct effect.[67] Besides the general exception of the freedom of establishment which is made applicable by Article 62 TFEU, transport, banking and insurance services connected with capital movements are also excluded from this chapter.[68] The exceptions for directly and indirectly discriminatory measures concerning establishments can be reiterated for the freedom to provide legal services.[69] The case law of the CJEU concerning the freedom to provide legal services also largely reflects the discussed evolution in the case law on the freedom of establishment.[70] In *Reisebüro*, the CJEU held that professional rules applicable to lawyers could be justified by the protection of "*the ultimate consumers of legal services*" and by "*the need for necessary guarantees for the sound administration of justice*".[71] The conditions of *Gebhard* equally apply here.[72] Yet, in case of the freedom to provide services, derogations can only be valid, when they are justified by public interest requirements or express derogations from Article 52 TFEU *and* the interest is not protected by the home state.[73]

14. The case law discussed above mostly concerns measures implementing nationality-requirements, a required residence in the state concerned, licence requirements, restrictions on business forms, et cetera.[74] Still, a significant obstacle for a single market for legal services, is

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[63] *Ibid*.
[64] Judgment of 31 March 1993, *Kraus v Land Baden-Württemberg*, C-19/92, ECLI:EU:C:1993:125, para. 23.
[65] Judgment of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein*, C-120/78, ECLI:EU:C:1979:42; Muller (n 38) 362-363. See also *Kraus* case (n 64); Judgment of 19 February 2002, *Wouters e.a.*, C-309/99, ECLI:EU:C:2002:98; Judgment of 5 December 2006, *Cipolla e.a.*, Joined cases C-94/04 and C-202/04, ECLI:EU:C:2006:758.
[66] Article 56 TFEU; Craig and de Búrca (n 55) 821-822.
[67] Judgment of 3 December 1974, *Van Binsbergen v Bedrijfsvereniging voor de Metaalnijverheid*, C-33/74, ECLI:EU:C:1974:131
[68] Articles 62 *juncto* 52 TFEU; 58 TFEU; 59 TFEU; Craig and de Búrca (n 55) 822.
[69] See *supra* 12; Judgment of 25 July 1991, *Säger v Dennemeyer*, C-76/90, ECLI:EU:C:1991:331; Barnard (n 61) 382-386; Muller (n 38) 361-362.
[70] *Ibid*.
[71] Judgment of 12 December 1996, *Reisebüro Broede v Sandker*, C-3/95, ECLI:EU:C:1996:487, para. 38.
[72] *Gebhard* case (n 49), para. 37; Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edition, CUP 2010) 803.
[73] Judgment of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media*, C-288/89, ECLI:EU:C:1991:323, para. 13; Chalmers and others (n 72) 803; Barnard (n 61) 387.
[74] See *supra* 12-13.

the requirement to have adequate (national) professional qualifications. If the CJEU would continue to use its strict approach concerning non-discrimination, it would require foreign lawyers, legal consultants, notaries, and so on, to obtain the same diploma as the nationals from the Member State where they intend to practise. This would amount to a considerable obstruction to the free movement of legal services as it entails an extra education of 4-5 years.[75] So, the CJEU changed its approach from non-discrimination to the now essential principle of *mutual recognition* and likewise addressed the problem of obtaining sufficient professional qualifications.[76] The CJEU further clarified the principle of mutual recognition in the *Vlassopoulou* case. Here, the CJEU stated that Member States have to assess all "*the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in another Member State*".[77] When this is compared to the qualifications required by the national rules and it is shown that the knowledge held by the person concerned is equivalent to the knowledge nationally required, Member States are under an obligation to recognise these qualifications.[78] Accordingly, the CJEU definitively prescribed the principle of mutual recognition. This principle has subsequently been harmonised through multiple directives. Still, when these directives do not apply, EU citizens can invoke the principles laid down by this case law.[79] Thus, the refusal to allow lawyers to the bar, despite their degrees being equivalent and their passing of the state exams, is considered to be an unjustifiable infringement on the freedom of establishment of the lawyers in question.[80]

2.1.2. Free movement of workers

15. As mentioned above, the free movement of workers is also relevant for the free movement of legal services. That is to say, it is possible that legal services could be rendered in a salaried position.[81] The free movement of workers is laid down in Article 45 TFEU and following and enables EU citizens to apply for jobs in other EU Member States and effectively work there without needing a licence to do so. These articles were also granted horizontal direct effect, similar to the Articles mentioned above.[82] Moreover, Article 45 TFEU gives these 'foreign workers' the right to be treated equally to national workers in terms of "*employment, remuneration and*

[75] Barnard (n 61) 316.
[76] Judgment of 28 April 1977, *Thieffry v Conseil d l'ordre des avocats de la Cour de Paris*, C-71/76, ECLI:EU:C:1977:65; Nascimbene (n 41) 10; Muller (n 38) 365.
[77] Judgment of 7 May 1991, *Vlassopoulou v Ministerium für Justiz, Bundes- u. Europeaangelegenheiten Baden-Württemberg*, C-340/89, ECLI:EU:C:1991:193, paras. 5, 16; Lavinia Kortese, 'Exploring professional recognition in the EU: a legal perspective' (2016) 4 J Int Mobil 43, 47.
[78] *Vlassopoulou* case (n 77), para. 17; Kortese (n 77) 47.
[79] Muller (n 38) 365.
[80] See *Thieffry* case (n 76).
[81] Merijn Chamon and Valerie Demedts, 'Een sectorale doorsnede van de internemarktregels: vrij verkeer van juristen, advocaten en notarissen' in Inge Govaere (ed), *Europees recht: moderne interne markt voor de praktijkjurist* (Kluwer 2012) (315) 319-321.
[82] Judgment of 15 December 1995, *Union royale belge des sociétés de football association and Others v Bosman and Others*, C-415/93, ECLI:EU:C:1995:463, paras. 86, 93, 129; Judgment of 6 June 2000, *Angonese*, C-281/98, ECLI:EU:C:2000:296, paras. 34-36.

other conditions of work and employment".[83] A 'worker' has been construed as someone who performs a task, for and under the direction of someone else, for a certain duration against remuneration.[84]

16. The development in the case law of the CJEU is quite parallel to the evolution described above. More specifically, in the *Kraus* case on the use of the LLM-title, it was confirmed that not only discriminatory (direct and indirect) measures can infringe upon Article 45 TFEU, but also measures that are "*liable to hinder or make less attractive the exercise of fundamental freedoms*".[85] Furthermore, derogations from the non-discrimination obligation are also possible. In the absence of harmonisation, derogations on the basis of public policy, public security or public health are permitted in the cases summed up in Article 45(3) TFEU.[86] Besides this express derogation, the rule of reason-doctrine has also been declared applicable by the CJEU, in case of non-discriminatory or indirectly discriminatory measures regarding foreign employees, in the absence of harmonisation. Still, these restrictive measures must be proportionate.[87] The free movement also has a specific exception in relation to employment in the public services. However, the CJEU interpreted this exception rather restrictively in the *NMBS* case.[88] To invoke this exception, the employee in question must be involved with the core issues of the state, he/she must have a role in the exercise of the powers of state.[89] In line with the case law on legal services in light of the freedom of services and establishment, it is unlikely that legal services will be caught by this provision.[90]

2.1.3. Free movement of persons

17. Finally, the EU's primary law on the free movement of persons should also be mentioned here. While an in-depth discussion is outside the scope of this thesis, this freedom of the EU remains highly relevant to the free movement of legal services. After all, legal professionals all over the EU are also able to move swiftly throughout the EU under this regime. To be more specific, (eventual) legal service providers could have used the free movement of persons when they first exercised their free movement rights not as a worker or a self-employed person, but just based on their EU citizenship, for example for studies abroad, and only later decided to offer their legal services using one of the Articles discussed above.[91] Additionally, under this regime, they do not have to comply with rigorous immigration requirements, such as obtaining a visa, due to

[83] Article 45 TFEU; Chamon and Demedts (n 81) 319; Craig and de Búrca (n 55) 758.
[84] Judgment of 5 October 1988, *Steymann v Staatssecretaris van Justitie*, C-196/87, ECLI:EU:C:1988:475; Judgment of 8 June 1999, *Meeusen*, C-337/97, ECLI:EU:C:1999:284.
[85] *Kraus* case (n 64), para. 32.
[86] Article 45(3) TFEU.
[87] *Bosman* case (n 82) paras. 107-110.
[88] Judgment of 17 December 1980, *Commission v Belgium*, C-149/79, ECLI:EU:C:1980:297.
[89] *Ibid*. para. 10.
[90] See *supra* 11.
[91] Articles 20-21 TFEU.

the abolition of these requirements for EU citizens laid down in Articles 20 and 21 TFEU and further specified by the Citizenship Directive.[92] Moreover, in the CJEU's case law it is clear that these provisions are interpreted widely and can certainly be used for the provision of legal services in the UK while they are still a Member State of the EU.[93]

2.2. Access to the legal profession

18. Besides, the EU has also enacted several directives to enable the European legal market to adapt to the challenges of internationalisation of the law, the increase in demand for cross-border legal services and intra- as well as extra-EU competition.[94] The following sections will assess whether these directives attained their objective.

2.2.1. Directive 77/249/EEC: The Lawyers' Services Directive

19. The first directive that was passed concerning trade in legal services, was Lawyers' Services Directive. This Directive has been implemented rather well in the UK through the European Communities (Services of Lawyers) Order 1978 and appears to be used quite often.[95] Notwithstanding, the Lawyer's Services Directive only concerns the temporary provision of services pursued by lawyers *sensu stricto*, as defined by Article 1(2).[96] Subject to some formalities and exceptions, the Lawyers' Services Directive essentially allows European lawyers to advise and represent clients on any law (besides those excluded aspects of inheritance and property law) and thus provide legal services on a temporary basis within the UK.[97] This includes activities which are normally reserved to UK lawyers.[98] Nonetheless, Article 6 allows the host State to exclude lawyers in a salaried employment[99] in private or public organisations from representing clients in legal proceedings, when this is not allowed by the laws in place in the host State for lawyers established in said State.[100]

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[92] *Ibid.*; see *infra* 28.
[93] Judgment of 13 September 2016, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675; Judgment of 14 November 2017, *Lounes*, C-165/16, ECLI:EU:C:2017:862; Judgment of 5 June 2018, *Coman and Others*, C-673/16, ECLI:EU:C:2018:385.
[94] See *supra* 5.
[95] The European Communities (Services of Lawyers) Order 1978, SI 1978/1910; Sjoerd Claessens and others, *Evaluation of the Legal Framework for the Free Movement of Lawyers: Final Report* (Panteia and the University of Maastricht 2012) 75-117, 119.
[96] See *supra* 10-14; Article 1(2) Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, *OJ* L 78/18 of 26 March 1977 (Lawyers' Services Directive).
[97] Articles 1(1) *juncto* 5 Lawyers' Services Directive; Judgment of 25 February 1988, *Commission v Germany*, C-427/85, ECLI:EU:C:1988:98, paras. 6–18; Judgment of 10 July 1991, *Commission v France*, C-294/89, ECLI:EU:C:1991:302, para. 19.
[98] 'Ethics guidance – European Lawyers practising in the UK' (*Solicitors Regulation Authority*, 22 April 2016) <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/European-Lawyers-practising-in-the-UK.page> accessed 28 April 2019.
[99] E.g. in-house counsel.
[100] Article 6 Lawyers' Services Directive.

20. Still, in accordance with Article 5, the UK requires European lawyers to work in conjunction with a lawyer who practises before the judicial authority when representing clients in court.[101] Additionally, the Lawyers' Service Directive maintains a rigorous double deontology system (excluding residence or registration requirements) for those European lawyers wishing to represent clients in court.[102] This essentially means that European lawyers must work under the same conditions, abiding by the same rules of conduct, as national lawyers in representation activities.[103] In the territory of the UK, the 'professional rules of conduct' that the European lawyer has to abide by, are those of a solicitor, unless the foreign lawyer practises those activities that are reserved to barristers and advocates. In this case, the rules of conduct of the latter apply.[104] In any other activity concerning legal services, however, the lawyer only falls under the rules of conduct from his home State, provided that these rules are able to ensure "*the proper exercise of a lawyer's activities*" as well as respect for the reputation of the profession and incompatibility rules.[105] Further, Article 3 requires the foreign lawyer to use his/her home State Title, in the language of that State, along with a reference to the organisation or the court of law by/before which he/she is authorised to practise.[106] In any case, the host State is entitled to ask the foreign lawyer to prove his/her qualifications as a lawyer and determine the consequences of non-compliance with its rules of conduct.[107]

21. Besides the rules established in the Lawyers' Services Directive concerning professional conduct, the Member States remain free to adopt measures of their own choosing. Thus, except for the obligation to work under the home State Title, the rules on salaried practice and the double deontology, Member States can still apply *any* rule of conduct to the foreign lawyer to their liking which could still seriously obstruct the free movement of legal services as the States remain entitled to implement demanding codes of conduct for European lawyers from other Member States, provided that these abide by EU competition law.[108]

2.2.2. Directive 98/5/EC: The Lawyers' Establishment Directive

22. The Lawyers' Establishment Directive concerns the *establishment* of European lawyers *sensu stricto*, as opposed to the temporary provision of services regulated by the Lawyers'

[101] Article 5 Lawyers' Services Directive; Solicitors Regulation Authority, 'Ethics guidance – European Lawyers practising in the UK' (n 98).
[102] Article 4 Lawyers' Services Directive; Judgment of 11 December 2003, *AMOK*, C-289/02, ECLI:EU:C:2003:669, para. 29-30; Julian Lonbay, 'Legal ethics and professional responsibility in a global context' (2005) 4 Wash U Global Stud L Rev 609, 611; Muller (n 38) 371. See also the *Van Binsbergen* case (n 67).
[103] Article 4(1) Lawyers' Services Directive.
[104] Article 4(3) Lawyers' Services Directive.
[105] Article 4(4) Lawyers' Services Directive.
[106] Article 3 Lawyers' Services Directive.
[107] Article 7(1)-(2) Lawyers' Services Directive.
[108] See *infra* 32-33; *AMOK* case (n 102), paras. 29-30; Muller (n 38) 372.

Services Directive.[109] This Directive was implemented in the UK through the European Communities (Lawyer's Practice) Regulations of 2000.[110] Studies show that the Lawyers' Establishment Directive was also implemented rather well.[111] The Lawyers' Establishment Directive harmonises the rules on access to the profession meaning that the migrant European lawyers are now only obliged to register with the competent authority and present a certificate showing his/her registration with the competent authority in the home Member State.[112] The rules on professional conduct are, however, not fully harmonised. Yet, the CCBE has enacted a code of conduct for European Lawyers. Still, these mostly focus on cross-border supply of legal services and do not take into account the changes in rules on professional conduct in the Member States due to competition law.[113] Thus, while the access to the profession is significantly simplified by this Directive, Member States, again, retain the possibility to obstruct free movement of legal services by enacting burdensome codes of conduct (although these must still abide by EU competition law).[114]

23. The Lawyers' Establishment Directive foresees two different regimes to facilitate the practice of legal services. The first regime, where the foreign lawyer uses his/her home professional title, allows a lawyer to advise and represent clients, as a legal consultant, on their home State law, EU law, international law and the host State law.[115] Here, again, the migrant law falls under a system of double deontology and some extra requirements regarding insurance and provided that the rules of conduct from the home and host State do not conflict.[116] Moreover, the migrant lawyer can provide legal advice in a salaried position, as long as the host Member State has permitted this for its own lawyers, the measures are proportionate in their objective of preventing a conflict of interest and apply equally to *every* lawyer.[117]

The second regime concerns the situation where an already qualified legal professional in their respective home State is admitted to the legal profession in the host State.[118] This process is also covered by the Directive 2005/36/EC, as amended by the Directive 2013/55/EU, which will be

[109] Article 1 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, *OJ* L 77/36 of 14 March 1998 (Lawyers' Establishment Directive).
[110] The European Communities (Lawyer's Practice) Regulations 2000, SI 2000/1119; The European Communities (Lawyer's Practice) (Scotland) Regulations 2000, SI 2000/121.
[111] Claessens and others (n 95) 75-117; see also Solicitors Regulation Authority, 'Regulated population statistics' (n 14); 'CCBE Lawyers' statistics 2015' (n 17).
[112] Article 3 Lawyers' Establishment Directive; Judgment of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587, paras. 66-67; Judgment of 19 September 2006, *Commission v Luxembourg*, C-193/05, ECLI:EU:C:2006:588, para. 36. See also Article 9 Lawyers' Establishment Directive.
[113] Muller (n 38) 368.
[114] See *supra* 21; see *infra* 32-33.
[115] Articles 4-5 Lawyers' Establishment Directive.
[116] Articles 6(1), 6(3) Lawyers' Establishment Directive.
[117] Article 8 Lawyers' Establishment Directive; Judgment of 2 December 2010, *Jakubowska*, C-225/09, ECLI:EU:C:2010:729, para. 61.
[118] Lonbay (n 103) 610; Chamon and Demedts (n 81) 338; Muller (n 38) 370.

discussed later.[119] The Lawyers' Establishment Directive envisages a "*gradual assimilation of knowledge*".[120] That is to say, a migrant lawyer who has practised law of the host State, including EU Law, for three years, is entitled to be admitted to the legal profession of the host state and thus receive a host state title. This admission via practice of three years takes place *without* the foreign lawyer having to take an aptitude test, as defined by the Professional Qualifications Directive.[121] A lawyer who has "*effectively and regularly pursued*" the legal profession in the host State for at least three years but practised the host State law for less than three years, can also be admitted to the host State legal profession on the basis of Article 10(3).[122]

24. Lastly, the Directive also contains rules on the joint practice of migrant lawyers practising under their home State title, possibly with a host State national. These lawyers may open branch offices or form a joint practice, provided that the host State authorises it.[123] The host State can refuse this joint practice when this is contrary to their fundamental rules on the grouping of lawyers or when it prohibits the merging with non-members of the legal profession for its own lawyers.[124]

2.2.3. Directive 2005/36/EC as amended by Directive 2013/55/EU: The Recognition of Professional Qualifications Directive

25. The Recognition of Professional Qualifications Directive covers the recognition of lawyers' qualifications as well as the requalification of a migrant European lawyer to a lawyer of the host State. This Directive was implemented in the UK by the European Union (Recognition of Professional Qualifications) Regulations of 2015.[125] Additionally, when considering the establishment of lawyers in the last decade (2010-2017) through the Recognition of Professional Qualifications Directive, the UK has adopted the most positive decisions out of all the Member States regarding lawyers, barristers and solicitors.[126] The CJEU stated in the *Ebert* case that this manner of requalification is an alternative, yet complementary option to the assimilation of knowledge through the Lawyers' Establishment Directive.[127] This means that European lawyers looking to establish themselves in another Member State can obtain the host State title through *either* the required three years of practice under the Lawyers' Establishment Directive *or* by following the provisions of the Recognition of Professional Qualifications Directive discussed in

[119] See *supra* 25-27.
[120] Judgment of 7 November 2000, *Luxembourg v Parliament and Council*, C-168/98, ECLI:EU:C:2000:598, para. 43.
[121] Article 10(1) Lawyers' Establishment Directive.
[122] Article 10(3) Lawyers' Establishment Directive.
[123] Article 11 Lawyers' Establishment Directive. For more on the association of lawyers: see *infra* 29-31.
[124] Article 11 (5) Lawyers' Establishment Directive.
[125] The European Union (Recognition of Professional Qualifications) Regulations 2015, SI 2015/2059.
[126] European Commission, 'Regulated professions database' <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm> accessed 11 March 2018.
[127] Judgment of 3 February 2011, *Ebert*, C-359/09, ECLI:EU:C:2011:44, para. 35.

this section.[128] It should also be noted that this directive can also be used for host State nationals that received their training abroad.[129]

26. Generally, the Recognition of Professional Qualifications Directive codifies the principle of mutual recognition as developed by the CJEU in the *Vlassopoulou* case for multiple professional services, including legal services.[130] The most relevant provisions for the legal profession, however, are Articles 13 and 14(3) of the Directive. Otherwise put, Article 13 lays down the conditions for the recognition of the professional qualifications while Article 14(3) states that Member States are entitled to require applicants to take an adaptation test or follow an adaptation period when the profession requires the knowledge of the national law and advice on this law is an essential part of that profession.[131] Hence the UK has, like most Member States, instated an aptitude test for lawyers when they apply for recognition of their professional qualifications.[132] This test has been perceived as fairly easy in the UK, which, in turn, only fosters the possibility of European lawyers to settle in the UK. While the Member States are free to regulate these aptitude tests, they must publish the essential elements of the profession along with the rules of conduct for the aptitude tests.[133]

27. The amendment of Directive 2013/55/EU codifies some of the more recent case law of the CJEU and addresses some of the problems that were raised in the subsequent years after the original Recognition of Professional Qualifications Directive. Following the controversial *Notary* cases, the Recognition of Professional Qualifications Directive now explicitly excludes notaries appointed by an official authority from the simplified recognition of professional qualifications.[134] However, the Commission stated in its impact assessment that any regulation regarding notaries must still abide by the primary law of the treaties and case law of the CJEU.[135] The Recognition of Professional Qualifications Directive now also covers persons wishing to pursue a remunerated traineeship in another Member State than the one where they received

[128] Chamon and Demedts (n 81) 338; Muller (n 39) 137.
[129] Judgment of 13 November 2003, *Morgenbesser*, C-313/01, ECLI:EU:C:2003:612; Lonbay (n 38) 1661-1665.
[130] See *supra* 14; Article 2 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications *as amended by* 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* L 255/22 of 30 September 2005 *juncto OJ* L 354/132 of 28 December 2013 (Recognition of Professional Qualifications Directive).
[131] Articles 13 *juncto* 14(3) Recognition of Professional Qualifications Directive.
[132] Schedule 3 The European Union (Recognition of Professional Qualifications) Regulations 2015, SI 2015/2059; Sjoerd Claessens, *Free Movement of Lawyers in the European Union* (Wolf Legal Publishers 2008) 31-32.
[133] Judgment of 7 March 2002, *Commission v Italy*, C-145/99, ECLI:EU:C:2002:142, para. 53.
[134] Article 2(4) Recognition of Professional Qualifications Directive; *Notary* cases (n 54).
[135] See *supra* 10-14; *Notary* cases (n 54); European Commission, 'Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions' of 10 January 2017 SWD(2016) 463 final, 7.

their professional qualifications, on a self-employed as well as an employed basis.[136] Due to the CJEU's case law, the partial recognition of professional qualifications (*i.e.* partial practice) has become possible now, subject to certain conditions.[137] The Recognition of Professional Qualifications Directive also creates common training frameworks that allows groups of Member States to streamline their 'curricula' in certain educations.[138] Probably the most important innovation of the Directive, however, is the European Professional Card which can be issued upon request but this has not yet been created for the legal profession.[139] As a last point, Directive 2013/55/EU also provides significant administrative simplification and further develops the existing transparency-requirements of Directive 2005/36/EC.[140]

2.2.4. Other relevant EU instruments

28. Finally, the free movement of legal services is also accommodated through several other secondary EU instruments. First, the Citizenship Directive regulates the movement of *all* EU citizens and their family members to another Member State, including the conditions under which economically active persons are to move to and reside in another State.[141] As mentioned above, the CJEU has shown itself to be very willing to interpret this right to free movement as extensively as possible, under either the primary law of the Union or the Directive.[142] Second, the free movement of workers is further concretised through the Regulation (EU) No 492/2011 on the freedom of movement for workers within the Union and the Regulation (EC) No 883/2004 on the coordination of social security systems.[143] In 2014, two Directives were adopted not only improving certain supplementary pension rights, but also facilitating the exercise of rights conferred on workers through the provisions on free movement of workers.[144]

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[136] Articles 2(1) and 3(1)(j) Recognition of Professional Qualifications Directive; *Morgenbesser* case (n 129); Judgment of 10 December 2009, *Peśla*, C-345/08, ECLI:EU:C:2009:771.
[137] Article 4(f) Recognition of Professional Qualifications Directive; Judgment of 19 January 2006, *Colegio*, C-330/03, ECLI:EU:C:2006:45.
[138] Article 49a Recognition of Professional Qualifications Directive; Horak and others (n 42) 107.
[139] Article 4a-e Recognition of Professional Qualifications Directive; Horak and others (n 42) 108; 'European Professional Card – EPC' (*Your Europe*, 24 January 2019) <https://europa.eu/youreurope/citizens/work/professional-qualifications/european-professional-card/index_en.htm> accessed 8 March 2019
[140] Articles 56-61 Recognition of Professional Qualifications Directive.
[141] Implemented in the UK through The Immigration (European Economic Area) Regulations 2006, SI 2006/1003. Article 1 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, *OJ* L 158/77 of 30 April 2004 (Citizenship Directive).
[142] See e.g. *Rendón Marín* case (n 93); *Lounes* case (n 93); *Coman and Others* case (n 93).
[143] Regulation (EC) No 883/2004 on the coordination of social security systems, *OJ* L 166/1 of 30 April 2004; Regulation (EU) No 492/2011 on freedom of movement for workers within the Union, *OJ* L 141/1 of 27 May 2011; Susanna Kraatz, 'Fact Sheets on the European Union: Free movement of workers' (*European Parliament*, October 2018) < http://www.europarl.europa.eu/factsheets/en/sheet/41/free-movement-of-workers> accessed 1 May 2019.
[144] Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and

2.3. Rules of conduct regulating the legal profession

2.3.1 Association of lawyers

29. The above-mentioned framework focused mostly on the free movement of individual providers of legal services, but the cross-border legal demand has also led to an increase in transnational mergers and groupings of lawyers, legal consultants, et cetera.[145] While an in-depth discussion of the free movement of companies in the EU lies outside the scope of the directive, it nevertheless remains highly relevant for the free movement of legal services. As a preliminary remark, it must be noted that although the rules on joint practice and the formation of companies concerning legal services is a regulation on the content of codes of conduct, it also impacts the access to the legal profession, as shown in the Lawyers' Establishment Directive.[146] Generally speaking, legal services can be organised into different types of companies, some of which have been regulated by the EU but overall this type of joint practice is mostly regulated by the Member States.[147]

30. It must be kept in mind that the general framework on the free movement of services and freedom of establishment, discussed above, is also applicable to the associations discussed here.[148] So, these undertakings enjoy a right to free movement of legal services. Moreover, these companies also fall under the freedom of (primary and secondary) establishment and free movement of companies, as defined by the CJEU in cases such as *Überseering*, *Centros*, *Daily Mail* and *Inspire Art*.[149] Still, when setting up a joint practice in the form of an undertaking or setting up branches in another Member State, lawyers must take into account the requirements of the law of the State of establishment.[150]

With regard to the possibility for the legal profession to organise its activities, British legislation has recently undergone a process of simplification. In general, the UK differentiates between two types of lawyers, namely barristers (or advocates in Scotland) and solicitors.[151] Solicitors, on the one hand, offer a wide range of legal services, in and out of court, and are usually allowed to associate in partnerships with no legal personality and corporate bodies (company or limited

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preservation of supplementary pension rights, *OJ* L 128/1 of 30 April 2014; Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, *OJ* L 128/8 of 30 April 2014.

[145] See *supra* 5.

[146] See *supra* 24; Nascimbene (n 41) 3-5.

[147] Article 54 TFEU; Toms (n 38) 114-115; Craig and de Búrca (n 55) 810.

[148] Article 54 TFEU; Craig and de Búrca (n 55) 802.

[149] Judgment of 27 September 1988, *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*, C-81/87, ECLI:EU:C:1988:456; Judgment of 9 March 1999, *Centros*, C-212/97, ECLI:EU:C:1999:126; Judgment of 5 November 2002, *Überseering*, C-208/00, ECLI:EU:C:2002:632; Judgment of 30 September 2003, *Inspire Art*, C-167/01, ECLI:EU:C:2003:512.

[150] *Daily Mail* case (n 149) para. 19; Toms (n 38) 126.

[151] Nascimbene (n 41) 210-233.

liability partnership) as long as this is a recognised body.[152] Additionally, solicitors are also allowed to associate with migrant lawyers through multinational partnerships.[153] Barristers, on the other hand, are a select group of specialist advisers and court advocates with as their main task litigation.[154] There used to be very strict rules on the association of barristers, but nowadays, as a consequence of the overall deregulation in the UK due to global competition, barristers and solicitors are now allowed to associate with one another and form firms.[155] Moreover, the Alternative Business Structure (licensed legal service providers in Scotland) law firms now allow solicitors and barristers to partner up with non-lawyer directors and investors.[156] Besides, the SRA has also foreseen in the status of 'Exempt European Lawyer' which allows European lawyers established entirely outside the UK to be a manager of a recognised body without being an 'authorised' person in England and Wales.[157] Furthermore, the SRA has also created 'Exempt European Practices' which allows Registered European Lawyers to practise within the UK through legal entities established in other EU Member States, after being registered and individually authorised by the SRA to practise that is.[158]

Besides, lawyers all over Europe can also choose to create cross-border associations through unregistered forms of collaboration, such as alliances, clubs or just work together on a case-by-case basis.[159]

31. Furthermore, European lawyers can also choose to structure their activities in the UK using one of the company forms created by the EU through Regulations (which have direct effect in the UK).[160] A first instrument useful for lawyers is the European Economic Interest Grouping (EEIG) which essentially boils down to a business structure established by a contract that can be

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[152] See Solicitors Regulation Authority Board, 'SRA Practice Framework Rules 2011 – Version 21' (*Solicitors Regulation Authority*, 6 December 2018) <https://www.sra.org.uk/solicitors/handbook/practising/content.page> accessed 12 May 2019.
[153] Rules 2-3 *juncto* 11 SRA Practice Framework Rules 2011 (n 152).
[154] Judith A McMorrow, 'UK Alternative Business Structures for legal practice: emerging models and lessons for the US' (2016) 47 Geo J Int'l L 665, 677.
[155] See Bar Council, 'The old Code of Conduct' (Bar Standards Board, 18 September 2004) <https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/the-old-code-of-conduct/> accessed 15 March 2019; 'BSB handbook' (*Bar Standards Board*, April 2019) <https://www.barstandardsboard.org.uk/media/1983861/bsb_handbook_april_2019.pdf> accessed 12 May 2019; McMorrow (n 154) 677.
[156] Part 5 Legal Services Act 2007; Part 2 Legal Services (Scotland) Act 2010; McMorrow (n 154) 690.
[157] SRA Renewals, 'Registered European Lawyers (REL) Guide' (*Solicitors Regulation Authority*, October 2018) < https://sra.org.uk/documents/mySRA/registered-european-lawyers-guide.pdf> accessed 28 April 2019, 3; 'Ethics guidance – guidance note on the impact on exempt European lawyers of the Government's Statutory Instrument on the basis of a 'no deal' EU exit scenario' (*Solicitors Regulation Authority*, 10 December 2018) <https://www.sra.org.uk/solicitors/guidance/ethics-guidance/Guidance-on-the-impact-on-exempt-European-lawyers-of-the-Government%E2%80%99s-Statutory-Instrument-on-the-basis-of-a-%E2%80%98no-deal%E2%80%99-EU-exit-scenario.page> accessed 28 April 2019.
[158] 'Registered European lawyers and registered foreign lawyers' (*Solicitors Regulation Authority*, December 2016) <https://www.sra.org.uk/solicitors/resources/registered-european-foreign-lawyers.page> accessed 28 April 2019.
[159] Toms (n 38) 140-141.
[160] Article 288 TFEU; Nascimbene (n 41) 41-45; Toms (n 38) 142-148.

registered with either the European Commission or Member States.[161] This can be established between legal services providers (individuals or companies) originating from different Member states.[162] However, this business structure is purely ancillary to the economic activities of its members and may not pursue any principal activities itself.[163] Yet, the European Company is a company in its own right.[164] This can thus be used as a 'vehicle' for the legal profession depending on the possibility of lawyers to practise in a public limited liability company pursuant to conditions laid down by the Member State of establishment of the company or the Lawyers' Establishment Directive.[165] The members of the European Company, however, can only be companies from at least two different Member States.[166] This business form can be established in four different ways; through a merger, the incorporation of a holding company, the incorporation of a joint subsidiary or the conversion of a public limited company established in a Member State.[167] Besides, the EU has foreseen in a similar association for cooperatives, called the European Cooperative Society.[168] Furthermore, the EU has also facilitated cross-border merger within the EU through the EU Company Law Directive which amended the previous Merger Directives.[169] A substantive discussion of European company law is outside the scope of this dissertation, but it is nevertheless interesting to keep in mind that this process has been simplified within the EU.

2.3.2 The relevance of EU competition law

32. As can be deduced from the assessment made above, the discussed instruments primarily regulate the access to the legal profession, while only incidentally touching upon the structure and organisation of the profession.[170] Yet, it is exactly these rules that remain the biggest possible source for obstacles to intra-EU trade in legal services. This development did not go by unnoticed, though. This situation has been addressed not only through the adoption of

[161] Article 2 Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), *OJ* L 199/1 of 31 July 1985 (EEIG Regulation).
[162] Article 4 EEIG Regulation.
[163] Article 3(1) EEIG Regulation.
[164] Article 1 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *OJ* L 294/1 of 10 November 2001 (European Company Regulation).
[165] See *supra* 24, 29-30; Toms (n 38) 147.
[166] Articles 2(1)-(4) European Company Regulation.
[167] Merger: Articles 17 and following European Company Regulation; holding company: Articles 32 and following European Company Regulation; subsidiary: Article 35 European Company Regulation; Article 37 European Company Regulation.
[168] See Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), *OJ* L 207/1 of 18 August 2003; European Commission, 'Internal Market, Industry, Entrepreneurship and SMEs: Sectors – The European Cooperative Society (SCE)' <http://ec.europa.eu/growth/sectors/social-economy/cooperatives/european-cooperative-society_en> accessed 28 March 2018.
[169] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, *OJ* L 169/46 of 30 June 2017 (EU Company Law Directive). See also: Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, *OJ* L 310/1 of 25 November 2005 and Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, *OJ* L 110/1 of 29 April 2011 (Merger Directives).
[170] See *supra* 19-28.

the CCBE's code of conduct, the regulations on the EEIG and European Company, but also through the application of competition law. More specifically, by applying the rules of competition law on regulations of the legal profession enacted by either Member States or professional bodies, the EU has further continued its quest to streamline the Member States' regulation.[171]

33. In essence, competition law prohibits "*agreements between undertakings, decisions by associations of undertakings and concerted practices*" that could possible affect intra-EU trade and "*which have as their object or effect the prevention, restriction or distortion of competition within the internal market*".[172] Furthermore, the EU competition rules also prohibit the abuse of a dominant position by an undertaking that could affect intra-EU trade.[173]

Rules adopted by professional bodies and Member states regulating the legal profession can, following the *Arduino* and *Wouters* cases, be caught by article 101 TFEU as decisions taken by associations of undertakings. Rules of conduct concerning price fixing schemes, minimum fee-requirements and multidisciplinary partnerships of lawyers can therefore be found anti-competitive.[174] Moreover, even the rules of the CCBE could be subject to EU competition rules.[175] In any case, since the adoption of Regulation 1/2003, the enforcement of competition law has been brought down to the national level. Still, except for a few national cases and reforms, this tool for creating a single market in legal services has largely dropped off the EU radar.[176] Nevertheless, competition rules still hold great potential for any further European integration concerning the legal market. To be more specific, as long as there is no binding legislation in place that regulates the content of rules of conduct, competition rules can fulfil the role of a safety net to tackle the most extreme anti-competitive cases when regulating the legal profession.

2.3.3 Directive 2006/123/EC: the Services Directive[177]

34. As a study made on the request of the Commissions suggested, European rules on the legal profession[178] are also affected by the provisions of the Services Directive.[179] In other words, the activities of the legal profession, along with the several Lawyers' Directives, have not been

[171] Lonbay (n 38) 1634-1636; Mataija (n 43) 208.
[172] Article 101 TFEU.
[173] Article 102 TFEU.
[174] Judgment of 19 February 2002, *Arduino*, C-35/99, ECLI:EU:C:2002:97; *Wouters* case (n 65); Judgment of 23 November 2017, *CHEZ Elektro Bulgaria*, C-427/16, ECLI:EU:C:2017:890, para. 58.
[175] Judgment of 28 March 2001, *Institut des mandataires agréés v Commission*, T-144/99, ECLI:EU:T:2001:105; Mataija (n 43) 212.
[176] Mataija (n 43) 215-218.
[177] Implemented in the UK through The Provision of Services Regulation 2009, SI 2009/2999.
[178] Excluding activities of bailiffs and notaries. Article 2 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* L 376/36 of 27 December 2006 (Services Directive).
[179] Claessens and others (n 95) 64-66; for more info see Catherine Barnard, 'Unravelling the Services Directive', (2008) 45 CMLRev 323.

excluded from the general scope of the Services Directive.[180] As the Lawyers' Directives only regulate the access to the profession and the applicability of the professional rules of conduct, the content of said rules of conduct falls under the scope of the Directive.[181] So, pursuant to article 16 of the Services Directive, a considerable amount of rules of conduct could be declared invalid when these obstruct the freedom of provision of legal services that is.[182] Other rules, such as those on commercial communications, are also applicable to legal services. This is why a total ban on advertising by lawyers is now prohibited.[183] In short, this all shows that the content of professional rules of conduct with regard to the legal profession, as well as the regulation of the legal profession itself, can be affected and possibly streamlined through the Services Directive. This could, in turn, benefit the free movement of legal services due to a greater similarity in rules on the legal profession, of which current differences remain a significant obstacle to a single market in legal services.[184]

35. Furthermore, it must be mentioned here that the Services Directive also regulates the access to as well as the regulation of the profession for those legal service providers not covered by either one of the Lawyers' Directives. The Services Directive enables businesses to establish themselves more easily by prohibiting unproportionate authorisation schemes and discriminatory, restrictive or burdensome requirements which are not justified.[185] In general, this codifies the CJEU's case law on the matter and while it does give EU citizens a right of access to the profession, certain burdensome regulations, such as ethical codes, are still allowed regarding legal services.[186] The Services Directive also codifies the Court's case law on the freedom to provide services, but it does stress that certain requirements can still be imposed under the conditions prescribed by the relevant articles of the Services Directive.[187] Moreover, some derogations are covered by the Lawyers' Services Directive and the Recognition of Professional Qualifications Directive, discussed above.[188] The Services Directive also foresees in significant administrative simplification, for instance by creating points of single contact where businesses can request all information on the requirements and laws applicable to them.[189]

[180] Article 2-3 Services Directive; Claessens and others (n 95) 65; Louise Lark Hill, 'Alternative Business Structure for lawyers and law firms: a view from the global legal services market' (2017) 18 Or Rev Int'l L 135, 141. However, see Articles 16-17 Services Directive.
[181] See *supra* 19-24; Claessens and others (n 95) 65.
[182] Article 16 Services Directive; Claessens and others (n 95) 65-66; Hill (n 180) 141.
[183] Article 24 Services Directive.
[184] Claessens and others (n 95) 66; Hill (n 180) 141.
[185] Article 9-15 Services Directive.
[186] See *supra* 10-14; Article 15 Services Directive.
[187] Articles 16-18 Services Directive.
[188] Articles 17 (4) and (6) Services Directive.
[189] See Chapter II and more specifically Article 6 Services Directive.

2.3.4 Directive 2000/31/EC: the e-Commerce Directive[190]

36. Lastly, the e-Commerce Directive also influences the legal profession. To be more specific, nowadays, the internet has become the main platform through which (cross-border) legal advice is given, that is through emails, conference calls, Skype, et cetera.[191] It is exactly this type of trade in services that is regulated by the e-Commerce Directive.[192] As an in-depth analysis of the e-Commerce Directive lies beyond the scope of this thesis, only those provisions which are relevant for the legal profession will be discussed. This Directive applies a country of origin-principle, so when a lawyer or a legal consultant gives legal advice via email to a client in another Member State, the rules governing this transaction will be those of where the practitioner of the legal profession is established.[193] Moreover, the e-Commerce Directive aims to create a single market for information society services.[194] Refusal of these services can therefore only be justified on grounds of public policy, public health, public security and consumer protection, but the chance is small that these can be applied to cross-border legal services.[195] Furthermore, the Directive recommends the adoption of codes of conduct governing the provision of services as regulated by the e-Commerce Directive.[196] The CCBE has enacted several rules of conduct for the legal profession which also deal with e-commerce.[197]

2.4. Free movement of legal services: an on-going process

37. Furthermore, recent case law shows that there are still uncertainties concerning the implementation of the directives and the Member States therefore still ask for clarifications on the legal framework outlined above. For instance, the CJEU still has to give certain clarifications on the scope of the Lawyers' Services Directive. In a recent Bulgarian case, the CJEU namely clarified that provisions on reimbursements ordered by courts do not fall within the scope of the Lawyers' Services Directive.[198] The CJEU further stated in another case that the refusal to allow a lawyer access to a virtual private network for lawyers solely because he/she is not registered in the Member State of practice, while being registered in his/her home State, could constitute a restriction contrary to Article 4 Lawyers' Services Directive. This case applies in situations where the lawyer is not obliged to work in conjunction with a national lawyer and there are no

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[190] Implemented in the UK through The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.
[191] Claessens and others (n 95) 66-67; Muller (n 39) 127.
[192] Article 1 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, *OJ* L 178/1 of 17 July 2000 (e-Commerce Directive).
[193] Article 3(1) e-Commerce Directive.
[194] Article 3(2) e-Commerce Directive.
[195] Article 3(4) e-Commerce Directive; Claessens and others (n 95) 67.
[196] Article 8 e-Commerce Directive.
[197] 'Electronic communication and the internet' (*CCBE*, 24 October 2008) <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Position_papers/EN_ITL_20081024_CCBE_Guidance_electronic_communication-internet.pdf> accessed 9 March 2019.
[198] *CHEZ Elektro Bulgaria* case (n 174) para. 62.

(proportional) justifications of consumer protection or proper administration of justice.[199] Also on the Lawyers' Services Directive, the CJEU clarified that it does not apply to the activity of authentication of signatures by notaries on instruments concerning rights to property. Moreover, Article 56 TFEU does not preclude legislation which reserves such activities to notaries.[200]

38. Even with regard to the Lawyers' Establishment Directive, the CJEU still has to rule on preliminary requests. For example, the CJEU recently stated that there is no abuse when someone obtains a university degree in their own Member State, travels to another Member State to obtain the professional qualification of lawyer only to return to their own Member State to practise the profession of lawyer under the Lawyers' Establishment Directive. Still, this lawyer will have to practise under the title received in the Member State where the professional qualification originated from.[201]

39. The Belgian case of *Brouillard* is another recent example of the CJEU ruling on the scope of the free movement of legal services.[202] Here, the CJEU declared Article 45 TFEU to be applicable on an application of a national of a Member State, holding a diploma obtained in another Member State, for the position of legal secretary at the *Cour de Cassation* of that first Member State. Moreover, this position did not fall under the public services-exception.[203] Still, while not being covered by Recognition of Professional Qualifications Directive, the Member State still had to apply the principle of mutual recognition to the application.[204] Regarding the Recognition of Professional Qualifications Directive, the CJEU has stated that Articles 21, 22 and 24 Recognition of Professional Qualifications Directive can oblige a Member State to recognise the completion of part-time training in another Member State, under similar conditions as full-time training.[205]

2.5. Does the EU have a free movement of legal *services* nowadays?

40. Considering all of the discussed elements together, it is clear that the EU has implemented a quite comprehensive framework for the access to the legal profession. That is to say, both the primary and secondary law allow the providers of legal services to move around in the EU and temporarily or permanently provide legal services in other Member States.[206] Furthermore, with regard to export of legal services to the UK, it is clear that conditions of the British legal market are not unfavourable to lawyers, legal consultants and in-house counsels from all over the EU.

[199] Judgment of 18 May 2017, *Lahorgue*, C-99/16, ECLI:EU:C:2017:391, para. 42.
[200] Judgment of 9 March 2017, *Piringer*, C-342/15, ECLI:EU:C:2017:196, paras. 47 and 71.
[201] Judgment of 17 July 2014, *Torresi*, C-58/13, ECLI:EU:C:2014:2088, para. 52.
[202] Judgment of 6 October 2015, *Brouillard*, C-298/14, ECLI:EU:C:2015:652.
[203] *Ibid*. para. 34.
[204] *Ibid*. para. 42, 67.
[205] Judgment of 6 December 2018, *Preindl*, C-675/17, ECLI:EU:C:2018:990, paras. 32 and 41.
[206] See *supra* 9-39.

To be more specific, the UK has been shown to have a quite open and flexible framework for European lawyers as it has implemented the applicable EU law quite well.[207]

41. However, this does not mean that the single market for the provision of legal services, either temporary of permanently, is achieved. While there is an impressive framework for the access to the legal profession, the remainder of the rules on legal services are still developed at a national level. This leads to significant discrepancies between the different States. Furthermore, lawyers have been found to have most problems with "*professional indemnity insurance, requirements of the bar in the home Member State, and double deontology*".[208] Interestingly, these problems do not all stem from national legislation, as some burdensome rules such as double deontology and certain requirements of indemnity insurance were introduced by EU instruments themselves.[209] Admittedly, the EU and the CCBE have enacted several instruments that aim to tackle several of these issues, but the cross-border provision of legal services remains a burdensome activity.[210] In other words, while these instruments, such as EU competition law, show great potential of tackling restrictions to the free movement of legal services, they are obviously not used as such, due to the still-existing restrictive regulations on the legal profession.

42. Finally, it should be noted here that a certain level of regulation is considered necessary for the protection of consumers, proper administration of justice and the rule of law of the EU.[211] As long as the EU has not found a way to safeguard these on a harmonised level, the Member States retain the competence to regulate these and thus to uphold some restrictive measures. Additionally, national requirements do not infringe upon the free movement of legal services just because other Member states apply "*less strict or economically more favourable*" rules to the legal profession.[212] To conclude, while the EU has made significant progress in creating a single market for legal services, this still remains an on-going process and this story is far from over.

III. Free movement of legal *documents* in the EU

43. As mentioned above, the free movement of legal documents is closely related to the free movement of legal services.[213] This free movement is covered by the private international law (PIL) harmonised by the European Union. Private international law is the sector of the law specialised in cross-border litigation, which has become more important in recent years due to

[207] Claessens and others (n 95) 75-117.
[208] *Ibid*. 119.
[209] See *supra* 20,23.
[210] See *supra* 29-36.
[211] See *supra* 5; Mataija (n 43) 190-195; Kortese (n 77) 56; Elisabetta Bergamini (n 40) 101-106.
[212] Judgment of 29 March 2011, *Commission v Italy*, C-565/08, ECLI:EU:C:2011:188, para. 49.
[213] See *supra* 6.

globalisation and the improvement of the EU framework for the recognition and enforcement of judgments, authentic instruments and court settlements.[214]

First, it is important to note that the essential principle here is the objective of the EU to create the free movement of judicial decisions and authentic acts.[215] This free movement is, just as the free movement of legal services is, primarily based on mutual recognition and thus mutual trust in the judicial systems of the other Member States.[216] Secondly, it must be remarked that this assessment of the 'fifth freedom' will limit itself to the regulations on civil and commercial matters, as most cross-border legal services were rendered in these areas.[217] However, it must be kept in mind that this principle has been incorporated into nearly all of the most recent EU instruments on private international law. Moreover, the most recent regulations try to combine all of the different aspects of private international law and have as their objective the simplification of procedural rules.[218] Lastly, only instruments regarding civil and commercial matters applicable in the UK will be mentioned. So, the European Account Preservation Order Regulation will not be discussed here.[219]

3.1. The Brussels regime

44. The first, and most important, instrument concerning the free movement of judicial decisions and acts in civil and commercial matters is the Brussels Ibis Regulation. This Regulation stems from the Brussels Convention, signed in 1968. Even then, the CJEU had already shaped the notion of free movement of judgments through its extensive case law on the Convention.[220] This Convention was then transposed into the Brussels I Regulation, which was

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[214] Burkhard Hess, 'The Brussels I Regulation: recent case law of the Court of Justice and the Commission's proposed recast' (2012) 49 CMLR 1075, 1075 and 1111.
[215] Jannet A Pontier and Edwige Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters according to the case law of the European Court of Justice* (Asser press 2004) 27.
[216] Xandra Kramer, 'Cross-border enforcement in the EU: mutual trust versus fair trial: towards principles of European civil procedure' (2011) 1 IJPL 202, 208-209, 217-218; Vesna Lazić and Steven Stuij, 'Brussels Ibis in relation to other instruments on the global level' in Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (Springer 2017) (119) 124.
[217] See *infra* 44-47; Claessens and others (n 95) 127.
[218] See e.g. Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ* L 201/107 of 27 July 2012; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *OJ* L 183/1 of 8 July 2016.
[219] Recital 50 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, *OJ* L 189/59 27 June 2014 (European Account Preservation Order Regulation); Laura Deschuyteneer and Jinske Verhellen, 'Brexit en de erkenning en tenuitvoerlegging van rechterlijke beslissingen in burgerlijke en handelszaken' (2018) 11 SEW 428, 430.
[220] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, *OJ* L 299/32 of 31 December 1972 (Brussels Convention); Judgment of 4 February 1988, *Hoffman v Krieg*, C-145/86, ECLI:EU:C:1988:61, para. 10; Judgment of 29 April 1999, *Coursier*, C-267/97, ECLI:EU:C:1999:213,

recently recast itself and thus became the Brussels Ibis Regulation.[221] Yet, the provisions of Brussels I Regulation still remain relevant to this day, as this regulation was not only transposed to most of the EEA countries and Switzerland through the Lugano Convention, but it also remains applicable to legal proceeding instituted, authentic instruments and court settlements made before 10 January 2015.[222] As for insolvency-cases, these fall under the Brussels Regulations as long as the procedures are opened before 26 June 2017. Any procedure initiated after this date, falls under the new Insolvency Regulation.[223] Here, the recognition and enforcement of judgments can only be refused based upon the violation of the international public order.[224]

45. In principle, the recognition of judgments under the Brussels I and Ibis Regulations happens without a procedure, *i.e. de plano*, but in case of a refusal, recognition can be asked in front of a judge.[225] This gives the parties involved more certainty as to the recognition of their decision/act, as a judicial recognition has *erga omnes* force.[226] To get a decision or authentic instrument recognised, the parties shall procure evidence that the document is authentic and provide the relevant authorities with the certificate from Annex I of the Regulation, which is attached to the document.[227] Still, the biggest amendment of the Brussels Ibis Regulation, is the elimination of the *exequatur* procedure. This procedure, which was still required under the Brussels I Regulation, obliged people to first go through a procedure in front of a judge to receive a declaration of enforceability of the legal document.[228] To make the free movement of judgments a reality, this procedure was deleted from the Regulation. Nowadays, any European judgment will be enforced under the same conditions as a national judgment, provided that its authenticity is established and the certificate of Annex I is attached to an extract of the judgment regarding costs and interests.[229] A judgment must be enforceable in its State of origin before it can be enforceable in other Member States of the EU.[230] Authentic instruments and court settlements will also be enforceable without an *exequatur* procedure, provided that they are authentic and

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para. 25; Judgment of 17 June 1999, *Unibank*, C-260/97, ECLI:EU:C:1999:312, para. 14; Judgment of 28 March 2000, *Krombach*, C-7/98, ECLI:EU:C:2000:164, para. 19; Pontier and Burg (n 215) 27.

[221] Hélène Gaudemet-Tallon, *Compétence et execution des jugements en Europe: Règlement 44/2001, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (4th edition, LGDJ 2010) 19.

[222] See *infra* 50-51; Article 66(2) Brussels Ibis Regulation; Andrew Dickinson, 'Transitional provisions' in Andrew Dickinson and Eva Lein (eds.), *The Brussels I Regulation Recast* (1st edition, OUP 2015) (557) 558.

[223] Article 84(1) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, *OJ* L 141/19 of 5 June 2015 (Insolvency Regulation).

[224] Article 43 and 47 Insolvency Regulation.

[225] Article 33 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12/1 of 16 January 2001 (Brussels I Regulation); Article 36 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 351/1 of 20 December 2012 (Brussels Ibis Regulation.

[226] Thalia Kruger and Jinske Verhellen, *Internationaal privaatrecht. De essentie* (die Keure 2016) 164.

[227] Article 37 *juncto* 53 Brussels Ibis Regulation.

[228] Article 39 Brussels Ibis Regulation; Deschuyteneer and Verhellen (n 219) 429.

[229] Article 42(1)-(2) *juncto* 53 Brussels Ibis Regulation.

[230] Article 42(2) Brussels Ibis Regulation.

enforceable in their State of origin.[231] The conditions that apply to judgments also apply to these instruments.[232]

It must be noted, however, that the possibility of enforcing judgments and authentic instruments is not unlimited. More specifically, the recognition and enforcement of such documents can be refused on the basis of the grounds listed in Article 45 Brussels Ibis Regulation. These grounds are largely the same as those listed in the Articles 34 and 35 Brussels I Regulation.[233] Thus, the case law from the CJEU concerning the Brussels Convention and the Brussels I Regulation remains relevant, even now.[234] Here, the Court always interpreted these grounds for refusal very restrictively as to ensure the free movement of legal documents. For instance, the Court will only view the most flagrant violations of public order as falling under Article 45(1)(a) Brussels Ibis Regulation.[235] In any case, there may not be any reviews of the substance of the judgments and instruments, nor may there be any examinations of the jurisdictions of the court of origin, excepts for the grounds listed in Article 45(1)(e) Brussel Ibis Regulation.[236]

46. As a last remark, for the judgments and acts covered by Brussels I Regulation there is also free movement, even though the *exequatur* procedure is applicable.[237] To be more specific, even under the Brussels Convention, the CJEU was prone to enforce not only full respect for judgments of other Member States, but also a restrictive interpretation of the grounds for refusal.[238] Furthermore, while the *exequatur* procedure was an extra administrative hurdle with extra costs, overall it was found that the procedures in the different Member States ran quite smoothly.[239] To conclude, while there are grounds for possible obstacles to this free movement, these are generally interpreted restrictively.[240] Thus, the free movement of legal documents is essentially unobstructed, and it seems that the EU has largely succeeded in its quest to creating a framework enabling free movement of such documents.

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[231] Article 58-59 Brussels Ibis Regulation.
[232] Article 58(1) Brussels Ibis Regulation.
[233] Article 34-35 Brussels I Regulation; Article 45 Brussels Ibis Regulation; Peter Arnt Nielsen, 'The new Brussels I Regulation' (2013) 50 CMLR 503, 526-528; Pietro Franzina, Xandra Kramer and Jonathan Fitchen, 'The recognition and enforcement of Member State judgments' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (1st edition, OUP 2015) (373) 436; Jonathan Fitchen and Xandra Kramer, 'Authentic instruments and court settlements' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (1st edition, OUP 2015) (521) 529, 532-533, 536-538.
[234] Kruger and Verhellen (n 226) 169-170.
[235] See e.g. Judgment of 2 April 2009, *Gambazzi*, C-394/07, ECLI:EU:C:2009:219; Judgment of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, ECLI:EU:C:2014:2319; Judgment of 16 July 2015, *Diageo Brands*, C-681/13, ECLI:EU:C:2015:471.
[236] Article 45(3), 52 Brussel Ibis Regulation.
[237] Pontier (n 215) 27; Hess (n 214) 1094.
[238] Pontier (n 215) 27-44; Hess (n 214) 1094-1097.
[239] Hess (n 214) 1094.
[240] See *supra* 45.

3.2. Other relevant instruments

47. Next to the Brussels Regulations, the EU has also harmonised certain aspects of procedural law to further enable the free movement of legal documents. To be more specific, both the Small Claims Regulation and the Payment Order Regulation create a European instrument which is enforceable throughout the entire EU. Every Member State has to recognise and enforce instruments made on the basis of these regulations, without going through an *exequatur* procedure.[241] The EU also enacted a Regulation that creates a European Enforcement Order for uncontested claims. This Regulation also regulates civil and commercial matters as described by the Brussels I Regulation and eliminates the *exequatur* procedure for undisputed claims provided with an European Enforcement Order-certificate prescribed by article 6.[242]

48. Besides these EU instruments, most of the EU Member States, including the UK, have also become Signatories to the Convention of New York on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958. Admittedly, this agreement is rather old, but it nevertheless remains relevant with regard to international arbitration as it is the only Convention regulating the matter. Otherwise put, most EU instruments explicitly exclude arbitral awards from their scope and thus do not apply to the execution of arbitral awards originating from the EU within the UK and *vice versa*.[243] In essence, the agreement requires the signatories to not only recognise written agreements on the use of arbitration originating from another Party, but also to recognise and enforce the arbitral awards stemming from such agreements as if they were a domestic award.[244] Furthermore, the New York Convention prohibits more strenuous conditions or costs to be imposed upon the recognition or enforcement of such foreign arbitral awards in comparison to those for domestic ones.[245] Yet, such recognition or enforcement is not unlimited and can be refused in the enumerated cases of the Convention. These include, similar to the

[241] Articles 20-23 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure *as amended by* Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, *OJ* L 199/1 of 31 July 2007 *juncto OJ* L 341/1 of 24 December 2015 (Small Claims Regulation); Articles 18-23 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure *as amended by* Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, *OJ* L 399/1 of 30 December 2006 *juncto OJ* L 341/1 of 24 December 2015 (Payment Order Regulation).

[242] Articles 2, 5 and 6 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ* L 143/15 of 30 April 2004 (European Enforcement Order Regulation).

[243] Article 1(2)(d) Brussels Ibis Regulation; Article 1(2) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 339/3 of 21 December 2007 (2007 Convention of Lugano/Lugano Convention); Domenico Acocella, 'Anwendungsbereich' in Anton K Schnyder (ed), *Lugano-Übereinkommen zum internationalen Zilververfahrensrecht: Kommentar* (Dike 2011) (23) 47-48, 72-77.

[244] Article 2-3 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (New York Convention on Arbitration).

[245] Article 3 New York Convention on Arbitration.

grounds listed in the Brussels regulations, procedural unfairness, public policy and unenforceability.[246] Thus, the New York Convention on Arbitration aims for a free movement of arbitral awards on a worldwide level, if these are based on agreement to conduct litigation in this manner that is.

3.3. Does the EU have a free movement of legal *documents* nowadays?

49. It is clear from the discussed Regulations and Conventions that the recognition and enforcement of European legal documents into other Member States than the State of origin is significantly simplified by the EU framework, CJEU case law and New York Convention on Arbitration. Hence, it appears that the EU has succeeded in creating a free movement of legal documents, as there is only a limited number of possibilities to justify a restriction of this free movement.[247] Furthermore, as all of these instruments have direct effect into the UK, it is safe to say that there is an ample legal framework in place to exploit European judicial decisions and acts into the UK and *vice versa*.[248]

IV. Other countries enjoying the free movement of legal services and documents

50. Still, the European integration of the legal market is not limited to the EU. That is to say, over the years, the EU has extended its prosperous legal market to a number of non-EU members. First, the legal framework on the free movement of legal *services* was extended through the EEA to Norway, Iceland and Liechtenstein. These non-EU Member States enjoy equal rights under 'EEA Primary Law' that reflect the right of establishment and freedom to provide and receive services as discussed above, including the CJEU case law on the matter.[249] Moreover, the provisions in the EEA Agreement already reflect the Court's case law on the principle of mutual recognition with regard to professional qualifications.[250] The above-discussed framework has been transposed into EEA law.[251] Switzerland has also gained access to the European legal framework as laid down in the Lawyers' Directives and the Recognition and Professional Qualifications Directive.[252]

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[246] Article 5 New York Convention on Arbitration.
[247] See *supra* 43-47.
[248] See *supra* 46; Article 288 TFEU; see also Sections 100-104 Arbitration Act 1996; Sections 18-22 Arbitration (Scotland) Act 2010; The Civil and Jurisdiction and Judgments (Amendment) Regulations 2014, SI 2014/2947.
[249] Articles 6, 31-39 Agreement on the European Economic Area, *OJ* L 1/3 of 3 January 1994 (EEA Agreement); Philipp Speitler, 'Right of Establishment and Freedom to Provide and Receive Services' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) (437) 443, 452.
[250] Articles 35 *juncto* 30 and 39 EEA Agreement.
[251] Articles 53-64, Annex V-VIII, X, XIV-XV, XXII EEA Agreement; Speitler (n 249) 449.
[252] Annex III 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, *OJ* L 114/6 of 30 April 2002; Chamon and Demedts (n 81) 344.

51. Concerning the framework on the free movement of legal *documents* in civil and commercial matters, the Convention of Lugano extended the territorial scope of the 'fifth freedom' to Norway, Switzerland and Iceland. This convention was first concluded in 1988 with the Member States of European Free Trade Association (EFTA) at that moment. The 1988 Convention of Lugano largely mirrored the Brussels Convention of 1968.[253] The Convention of Lugano was later amended in 2007 and this version largely corresponds with the Brussels I Regulation. The recognition of judgments and authentic acts mirrors the provisions of the Brussels I and Brussels Ibis Regulations.[254] While this version still has an *exequatur* procedure in place for the enforcement of judgments stemming from the EU and going to the EFTA or *vice versa*, the 2007 Convention of Lugano already aims for a 'free movement of judgments'.[255] To be more specific, these procedures can be handled swiftly and the grounds for refusal are interpreted restrictively.[256] Yet, in the UK, judgments must also be registered before being enforceable within its territory.[257]

V. The situation pre-Brexit: free movement of legal services?

52. It is clear from the assessment made above that there are a lot of instruments to consider when assessing the free movement of legal services within the EU, with some achieving their goal better than others. For instance, the Brussels Ibis regime has definitively accommodated the free movement of legal documents by abolishing the *exequatur* procedure.[258] This while migrant European lawyers still find their free movement obstructed by onerous rules such as double deontology and insurance requirements, albeit that their access to the profession has been significantly simplified.[259] Nevertheless, while there is no such thing as a completely unobstructed free movement of legal services in the EU, the efficiency of the significant procedural simplification implemented by the EU cannot be denied. For the free movement of legal documents this has certainly become a reality since the enactment of the Brussels Ibis Regulation which eliminates further procedural obstructions.[260] Even for the free movement of legal services this statement holds some truth, as both primary and secondary law have significantly simplified the access to the profession. In other words, this procedural simplification has enabled

[253] 88/592/EEC: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988, *OJ* L 319/9 of 25 November 1988 (1988 Convention of Lugano); Gaudemet-Tallon (n 221) 507.
[254] See *supra* 45; Article 33-37 2007 Convention of Lugano.
[255] See *supra* 44; Articles 38-52, 57-58 2007 Convention of Lugano; Tanja Domej and Paul Oberhammer, 'Anerkennung und Vollstreckung' in Anton K Schnyder (ed), *Lugano-Übereinkommen zum internationalen Zivilverfahrensrecht: Kommentar* (Dike 2011) (739) 743.
[256] See *supra* 46.
[257] Article 38(2) 2007 Convention of Lugano.
[258] See *supra* 44-46.
[259] See *supra* 9-42.
[260] See *supra* 45-46; Hess (n 214) 1094; Xandra Kramer and Erlis Themeli, 'The party autonomy paradigm: European and global developments on choice of forum' in Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (Springer 2017) (27) 28.

practitioners of law from all over the European Union to move to the UK and offer their services, regardless of their nationality or the origin of their qualifications.[261]

53. The one constant in this exposé appears to be the emphasis of the EU on the importance of mutual recognition. Both the free movement of legal services *sensu stricto* and the free movement of legal documents are the result of the profound trust that the Member States have put in each other's legal systems.[262] After all, the Member States must trust that legal professionals educated in other Member states can provide a satisfactory provision of legal services that upholds Union values such as the rule of law and the proper administration of justice.[263] Additionally, they must trust that other Member States provide for sufficient safeguard for similar Union values when enforcing judicial documents originating from other Member States.[264] Furthermore, they must trust that legal services/documents originating from their own territory will receive the same treatment in other Member States.[265] Still, it should be noted here that this mutual recognition, although it involves some harmonisation of procedural rules, is mainly a type of mutual trust that is imposed by the EU upon its Member States and involves only little convergence of substantive rules.[266] The UK has utilised this mutual trust to create a legal market that is truly international and competitive with flexible regulations for foreign practitioners.[267] The question remains how Brexit will impact the fate of European lawyers wishing to practise in the UK as well as the recognition and enforcement of European judgments in the UK and *vice versa*, when there is no longer such an imposed mutual recognition.

[261] See *supra* 9-42.
[262] Ioannis Lianos and Johannes Le Blanc, 'Trust, distrust and economic integration' in Ioannis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (CUP 2012) (17) 52.
[263] See *supra* 5, 9-42.
[264] See *supra* 43-49.
[265] See *supra* 9-42, 43-49.
[266] Hellwig (n 7) 261.
[267] See *supra* 40, 43, 49.

CHAPTER 2. NO DEAL SCENARIO: WHAT ARE THE MAIN OBSTACLES A POTENTIAL FUTURE AGREEMENT SHOULD TACKLE?

I. Introduction

54. In case of a no-deal Brexit, the UK will have to conduct its international trading relations under the rules of the WTO.[268] This means that the General Agreement on Trade in Services will be the main instrument regulating the export of trade in legal services from the EU to the UK.[269] Hereunder, the UK is required to submit its own Schedule of Commitments which sets out the scope of the specific commitments the UK is willing to grant to services originating from other WTO Members, including the EU Member States.[270] In December 2018, the UK submitted its own Schedule of Commitments for services to the WTO which largely copies the current EU Schedules.[271] Thus, these instruments as well as relevant national legislation will be examined to outline the most likely regulations of the legal profession in the UK in case of a no-deal Brexit.[272] This, in turn, should enable an examination of the main issues any future trade agreement between the EU and UK should tackle with regard to legal services.[273]

55. The export of legal documents, however, has not been extensively dealt with by international agreements. To be more specific, the legal framework on the recognition and enforcement of legal documents originating from other countries is quite fragmented. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 only deals with arbitration, while the Hague Convention on Choice of Court Agreements only deals with cross-border litigation regulated by such an agreement.[274] Hence, the free movement of legal documents will most likely cease to exist if the UK does not manage to conclude a deal with the EU on the matter. Otherwise put, the movement of legal documents will probably be

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[268] See *supra* 3; Gregory Messenger, 'Membership of the World Trade Organization' in Michael Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017) (225) 225-226.
[269] Jonathan Goldsmith, 'Global legal practice and GATS: a Bar viewpoint' (2004) 22 Penn St Int'l L Rev 625, 625; Ryan W Hopkins, 'Liberalizing trade in legal services: the GATS, the accountancy disciplines and the language of core values' (2005) 15 Ind Int'l & Comp L Rev 427, 428.
[270] Article XX GATS.
[271] Department for International Trade and Liam Fox, 'Press Release - Liam Fox submits services schedule to WTO' (*UK Government*, 3 December 2018) <https://www.gov.uk/government/news/liam-fox-submits-services-schedule-to-wto> accessed 20 March 2019; Department for International Trade, 'UK services schedule' (*UK Government*, 7 December 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762808/SCW380_-_UK_GATS_Schedule-FINAL_03_12_2018.pdf> accessed 23 March 2018, 2; Tauwhare (n 5) 90; Messenger (n 268) 229-230.
[272] See e.g. Legal Services Act 2007.
[273] See *supra* 4.
[274] New York Convention on Arbitration; The Hague Convention of 30 June 2005 on Choice of Court Agreements, *OJ* L 133/1 of 29 May 2009 (Choice of Court Convention).

regulated at national level when the UK leaves the EU without a deal and subsequently repeals all of the Brussels Regulations.[275] Overall, national regulation does not guarantee the same flexible free movement of legal documents for foreign judgments and/or acts.[276] This chapter aims to pin-point the exact issues arising from a no-deal scenario for legal documents which should be addressed in any future agreement between the EU and the UK.

II. Trade in legal services in a no-deal scenario

56. Before delving into the UK framework on legal services under international law, the general framework of the GATS and other relevant international trade law for legal services will be assessed. Only then can the most pressing problems that need to be addressed in a future (trade) agreement between the EU and the UK be identified.

It can be noted here that the European Commission, on the one hand, has stated that Brexit does not affect the decisions already taken upon the recognition of professional qualifications.[277] Still, as of the withdrawal date, such decisions will fall under national regulations.[278] The UK government, on the other hand, has provided more extensive information for qualified professionals.[279] More specifically, with regard to the recognition of professional qualifications, the UK parliament has approved legislation that would continue the basic equivalence requirements laid down in EU instruments and the respect for decisions already made with regard to the recognition of professional qualifications.[280] Still, this remains a rather restrictive regulation. This proposal will therefore not be further discussed here. With regard to the several Lawyers' Directives and the Services Directive, the UK government has confirmed that the implementing legislations on the matter will be revoked.[281] Hence, the regulation on legal professionals from third countries currently existing in the UK will become applicable to EU lawyers.[282]

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[275] The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479; Deschuyteneer and Verhellen (n 219) 436.
[276] See *infra* 88-91.
[277] Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 'Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of Regulated professions and the Recognition of Professional Qualifications' (*European Commission*, 21 June 2018) <https://ec.europa.eu/info/sites/info/files/file_import/professional_qualifications_en.pdf> accessed 9 May 2019, 3.
[278] *Ibid*. 3-4.
[279] Department for Business, Energy & Industrial Strategy, 'Guidance: Providing services including those of a qualified professional if there's no Brexit deal' (*UK Government*, 12 October 2018) <https://www.gov.uk/government/publications/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal> accessed 9 May 2019.
[280] *Ibid.*; The Recognition of Professional Qualifications (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/312.
[281] The Provision of Services (Amendment etc.) (EU Exit) Regulations 2018, SI 2018/1329; The Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019, SI 2019/375; The Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019, SI 2019/127; Department for Business, Energy & Industrial Strategy (n 279).
[282] *Ibid*.

2.1. General Agreement on Trade in Services (GATS)

57. The GATS is an annex to the Marrakesh Agreement establishing the WTO concluded in 1994 which lists two types of obligations with regard to trade in services.[283] Firstly, there are general obligations laid down in the GATS which are applicable to all Member States of the WTO.[284] Secondly, there are specific obligations which Member States only have to comply with on the basis of the commitments taken up in their Services Schedules.[285] Besides these Services Schedules, each Member of the GATS also has a list with certain exceptions regarding the Most-Favoured-Nation (MFN) obligation.[286] Furthermore, the GATS also foresees in the "*progressive liberalisation*" of trade in services.[287] This requires the Members of the WTO to negotiate further on (free) trade in services on a global basis and to develop 'disciplines' for certain sectors. Thus, some extra obligations could be added to this list in the future.[288]

58. The GATS has a similar scope to the EU treaties and thus equally applies to the four modes of services supply discussed above.[289] Furthermore, this agreement also excludes public services, *i.e.* services not supplied on a commercial nor in competition with other suppliers, from its scope.[290] Besides, the GATS equally focuses on services suppliers and defines them as "*any natural or juridical person that supplies a service*", including the situation where a legal person supplies services "*through other forms of commercial presence such as a branch or representative office*".[291] This brings us to the issue of 'investment'. To be more specific, in international trade in services, issues normally dealt with by establishment rules in the EU, are regulated by investment treaties.[292] Still, investment also concerns trade in goods. At WTO-level, investment regarding trade in goods is regulated by TRIMS while investment issues relating to

[283] Paul D Patton, 'Legal services and the GATS: norms as barriers to trade' (2003) 9 New Eng J Int'l & Comp L 361, 365; Laurel S Terry, 'From GATS to APEC: the impact of trade agreements on legal services' (2010) 43 Akron L Rev 875, 901; Matthias Herdegen, *Principles of International Economic Law* (2nd edition, OUP 2016) 266. See also 'GATS Handbook' (*International Bar Association*, May 2002) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=4F39B8D5-2110-4A8A-BDAF-7CB1D7083236> accessed 20 March 2019.
[284] Articles II-XV GATS; Terry (n 283) 901; Herdegen (n 283) 266.
[285] Articles XVI-XVIII GATS; Terry (n 283) 901; Peter Van den Bossche and Denise Prévost, *Essentials of WTO Law* (CUP 2016) 41-42.
[286] Article II:2 GATS.
[287] Part IV GATS.
[288] Article XIX GATS; Hopkins (n 269) 428; Laurel S Terry and others, 'Transnational Legal Practice' (2009) 43 Int'l Law 943, 947-948; Terry (n 283) 901.
[289] See *supra* 10; Article I:2 GATS.
[290] See *supra* 11; Article I:3 (c) GATS. See also Rolf Adlung, *Public services and the GATS* (WTO Working Paper, July 2005) ERSD-2005-03.
[291] Articles XXVIII (g) *juncto* (j), Note *ad* Article XVIII GATS.
[292] Rudolf Adlung, 'Trade in services in the WTO: from Marrakesh (1994), to Doha (2001), to… (?)' in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on The World Trade Organization* (OUP 2012) (370) 382-383; Amaly Giødesen Thystrup and Güneş Ünüvar, 'A Waiver for Europe? CETA's trade in services, and investment protection provisions and their legal-political implications on regulatory competence' in Giovanna Adinolfi and others (eds), *International Economic Law: Contemporary Issues* (Springer 2017) (41) 46.

trade in services are also included in GATS.[293] As a last general remark, it should be kept in mind here that the GATS is a government-to-government agreement which is generally not given direct effect and can thus not be invoked by individuals in court.[294]

2.1.1. General obligations

59. The general obligations of the GATS can be found in Articles II through XV. A first obligation, the MFN Treatment, concerns the relationship between the WTO Members.[295] That is to say, this provision prohibits both *de jure* and *de facto* discrimination between the Members of the WTO.[296] Whether a measure is caught by this obligation, is assessed through a threefold test as established in *Canada – Autos (2000)* by the Appellate Body of the WTO.[297]

Firstly, it must concern a measure by a Member State, affecting trade in services.[298] This includes not only official measures enacted by the governmental bodies of a Member State, but also measures taken by associations regulating the legal professions such as the Bar.[299] Further, the measures must impact "*the conditions of competition in supply of a service*". This is generally given a rather broad interpretation.[300] Thus, measures concerning legal services normally fall within the 'trade in services' as defined by article I:2 GATS and the relevant case law of the Appellate Body.[301] However, Member States are allowed to exempt certain measures from this obligation, but the UK has not done so with regard to legal services.[302]

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[293] Article 1 Agreement on Trade-Related Investment Measures of 1994 (TRIMS); Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (3rd edition, OUP 2015) 774-776, 780-783; World Trade Organization, 'Agreement on Trade Related Investment Measures' <https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm> accessed 12 May 2019.

[294] See e.g. Judgment of 12 December 1972, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, C-21/71, ECLI:EU:C:1972:115, paras. 21-27; Judgment of 5 October 1994, *Germany v Council*, C-280/93, ECLI:EU:C:1994:367, para. 110; Judgment of 23 November 1999, *Portugal v Council*, C-194/96, ECLI:EU:C:1999:574, paras. 45-46; Judgment of 9 September 2008, *FIAMM and Others v Council and Commission*, C-120/06 P, ELCI:EU:C:2008:476, paras. 128-129; UK Services Schedule (n 271) 9.

[295] Terry (n 283) 901; Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (4th edition, CUP 2017) 325.

[296] Article II:1 GATS; WTO, *Communities – Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R para. 233; Van den Bossche and Zdouc (n 295) 326.

[297] WTO, *Canada – Certain Measures Affecting the Automotive Industry – Report of the Appellate Body* (31 May 2000) WT/DS139/AB/R and WT/DS142/AB/R paras. 170-171.

[298] Article I:1 GATS.

[299] Articles I:3(a) *juncto* XXVIII(a) GATS; Van den Bossche and Zdouc (n 295) 328.

[300] WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States – Report of the Panel* (22 May 1997) WT/DS27/R/USA para 7.281; *EC – Bananas III (1997)* Appellate Body Report (n 296) para. 220; Van den Bossche and Zdouc (n 295) 331.

[301] See e.g. WTO, *Mexico – Measures Affecting Telecommunications Services – Report of the Panel* (2 April 2004) WT/DS204/R paras. 7.30 and 7.375.

[302] See *supra* 57; Department for International Trade, 'UK services schedule list of most favoured nation (MFN) exemptions' (*UK Government*, 7 December 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762809/SCW381_-_UK_MFN_list_FINAL_03_12_2018.pdf> accessed 20 March 2019.

Secondly, there may be no discrimination between '*like* services and service suppliers' originating from different Member States.[303] This contentious concept of 'likeness' has been the subject of numerous cases of the Appellate Body. In short, this is assessed on a case-by-case basis and generally focuses on the "*competitive relationship between the services and service suppliers*" by using criteria such as the characteristics of the services and suppliers, consumers' preferences, tariff classification and description.[304] The Appellate Body has clarified that 'likeness' under GATS should be examined for both services and service providers together.[305] For example, 'like' service providers generally provide "*like services*".[306] Thus, there is no clear yes or no answer as to whether services are like or not. At any rate, when a country discriminates purely based on the origin of the services/service suppliers, then the 'likeness' between the services/suppliers is presumed.[307]

As a last point, there must be a treatment that is less favourable compared to the services/suppliers originating from other WTO Members.[308] This, again, has not been clearly defined by Article II GATS on the MFN-obligation and for a long time, there was no clear test in the WTO's case law.[309] Recently, the Appellate Body clarified that, while drawing inspiration from the definition of 'treatment no less favourable' in article XVII GATS, it should be considered whether the measure at issues "*modifies the conditions of competition in favour of the services or service suppliers of any other Member*".[310]

60. It should be noted that the MFN-obligation as laid down in Article II GATS is not construed as an absolute obligation. More specifically, the Member States of the WTO allow for exemptions with regard to MFN-treatment besides those listed on the basis of Article II:2 GATS, similar to those from the free movement of legal services in the EU.[311] Exceptions under GATS can only be justified when they can be legitimatised under one of the paragraphs of Article XIV *and* when they meet the requirements of the "*chapeau*" of the article.[312] In other words, measures have to pursue one of the public policy interests listed in the paragraphs and must be proportionate.[313]

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[303] *Canada – Autos (2000)* Appellate Body Report (n 297), para. 171; Van den Bossche and Zdouc (n 295) 332.
[304] WTO, *Argentina – Measures Relating to Trade in Goods and Services – Report of the Appellate Body* (14 April 2016) WT/DS453/AB/R para. 6.24, 6.32; Van den Bossche and Zdouc (n 295) 333.
[305] *Argentina – Financial Services (2016)* Appellate Body Report (n 304) para. 6.29.
[306] *EC – Bananas III (USA) (1997)* Report of the Panel (n 300) para. 7.233; WTO, *Canada – Certain Measures Affecting the Automotive Industry – Report of the Panel* (11 February 2000) WT/DS139/R and WT/DS142/R para. 10.248.
[307] *Argentina – Financial Services (2016)* Appellate Body Report (n 304) paras. 6.60-6.61, 6.70.
[308] *Canada – Autos (2000)* Appellate Body Report (n 297) para. 171.
[309] See e.g. WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador – Report of the Panel* (12 April 1999) WT/DS27/RW/ECU and *EC – Bananas III (1997)* Appellate Body Report (n 296).
[310] *Argentina – Financial Services (2016)* Appellate Body Report (n 304) para. 6.111.
[311] Articles XIV-XIVbis GATS; Van den Bossche and Prévost (n 285) 83-84, 104-105.
[312] WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R para. 292; Van den Bossche and Prévost (n 285) 105; Van den Bossche and Zdouc (n 295) 606-607.
[313] Van den Bossche and Zdouc (n 295) 607-608.

These overriding interests are generally given a quite restrictive interpretation, but can be a useful tool to adopt restrictive legislation on sensitive issues.[314] Furthermore, the *application* of the measures may not institute arbitrary or unjustifiable discrimination between Member States "*where like conditions prevail*" nor may they be a disguised restriction on trade in services.[315] Additionally, on the basis of Article XIVbis GATS, may adopt measures inconsistent with GATS to safeguard national or international security.[316] Still, it must be remarked that this Article has, to date, never been invoked to justify a measure restricting trade in services contrary to the GATS provisions.[317]

61. Pursuant to Article III GATS, Member States have to publish all regulation of "*general application*", answer to requests for information of any other Member State and create "*enquiry points*" where this information can be requested by other Member States.[318] Additionally, the GATS stipulates that the Members of the WTO can recognise diplomas or professional qualifications obtained in other Member States, either on the basis of an agreement or autonomously, but they are not obliged to do so.[319] Still, when doing so, other Members should be given the opportunity to receive the same recognition-privileges.[320] In any case, this may not be applied in a manner constituting discrimination between the Member States of the WTO.[321] Furthermore, the Member States are encouraged to adopt multilateral standards for the recognition of professional qualifications.[322] It should also be noted here that where Member States take up specific commitments regarding professional services in their Schedules, they must accommodate procedures for verifying the competence of professionals from other WTO Members.[323] That same Article on Domestic Regulation also requires the Members to instate appeal procedures against administrative decisions affecting trade in services.[324] Furthermore, the Member States must foresee swift authorisation procedures which give decisions within a reasonable amount of time.[325]

62. While the GATS does not create international competition law equivalent to EU competition law, it does address the situation of monopolies and exclusive service suppliers.[326] To be more specific, Member States must ensure that monopoly or exclusive service providers

[314] Note *ad* Article XIV GATS; Herdegen (n 283) 267-268.
[315] Chapeau Article XIV GATS; Van den Bossche and Zdouc (n 295) 616.
[316] Article XIVbis GATS.
[317] Van den Bossche and Zdouc (n 295) 623.
[318] Article III GATS; Terry (n 283) 901-902; Matsushita and others (n 293) 577.
[319] Article VII:1 GATS; Matsushita and others (n 293) 576.
[320] Article VII:2 GATS; Terry (n 283) 902; Matsushita and others (n 293) 576.
[321] Article VII:3 GATS; Matsushita and others (n 293) 576.
[322] Article VII:5 GATS; Matsushita and others (n 293) 576-577.
[323] Article VI:6 GATS; Matsushita and others (n 293) 578.
[324] Article VI:2 GATS.
[325] Article VI:3 GATS; Matsushita (n 293) 578.
[326] See *supra* 32-33; Article VIII GATS.

do not act in manners inconsistent with the obligations under the GATS and their respective Schedules.[327] Additionally, when granting such exclusive rights to suppliers, Members must notify the Council for Trade in Services of this development.[328] Finally, while the agreement does not regulate the international movement of labour forces, it does allow Member States to conclude agreements aiming for the full integration of labour markets between the parties to such an agreement.[329]

2.1.2. Specific commitments

63. Besides these general obligations, legal services are also regulated by specific commitments laid down in the Schedules of the Member States. In other words, these obligations only bind the Members of the WTO to the extent they have opted to take them on.[330]

The first specific commitment concerns the market access of services and/or service providers.[331] In essence, the Agreement does not require full de-regulation of services but aims for the liberalisation of services and thus allows Member States to maintain some degree of legislation in accordance with this objective.[332] Still, Article XVI on Market Access prohibits both discriminatory and non-discriminatory barriers to trade regarding the access of foreign services/suppliers to the market.[333] These barriers can be either the quantitative restrictions or restrictions that limit the supply of services to specific forms of legal entity of joint venture listed in article XVI:2.[334] These quantitative restrictions all concern maximum limitations and thus still allows certain minimum requirements.[335] For example, a prohibition on the supply of services constitutes a quantitive restriction with the limitation of zero.[336] Still, none of these barriers concerns the limitation on the supply of a service in time. Thus, 'temporal limitations' can never be a market access barrier as defined by Article XVI:2 GATS.[337] Nevertheless, this obligation only binds the Members to the extent they committed themselves to do so in their schedules.[338] Hence, to assess whether and to what extent market access barriers remain in the UK for legal services originating from the EU, a close examination of the UK's future Services Schedule must

[327] Articles VIII:1-2 and 5 GATS.
[328] Article VIII:4 GATS.
[329] Article Vbis GATS.
[330] Terry and others (n 288) 946; Terry (n 283) 903.
[331] Terry (n 283) 906.
[332] Van den Bossche and Zdouc (n 295) 517-518.
[333] Van den Bossche and Prévost (n 285) 73; Van den Bossche and Zdouc (n 295) 518.
[334] Article XVI:2 GATS; Van den Bossche and Prévost (n 285) 72.
[335] Van den Bossche and Zdouc (n 295) 519.
[336] WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel* (10 November 2004) WT/DS285/R paras. 6.330 and 6.347; *US – Gambling (2005)* Appellate Body Report (n 312) paras. 238 and 251.
[337] *Mexico - Telecoms (2004)* Panel Report (n 301) para. 7.358.
[338] Article XVI:1 GATS; Van den Bossche and Zdouc (n 295) 520.

be made.[339] Additionally, these commitments in the UK's Services Schedule imply a standstill obligation not to impose any further barriers than the level laid down in the Schedules.[340]

64. Another equally important specific obligation is what is called 'National Treatment' in the various WTO agreements.[341] This obligation, again, only applies to the extent the Members have taken up commitments regarding the national treatment of (legal) services in their respective Services Schedules. This provision essentially aims to guarantee *de jure* and *de facto* "*equal competitive opportunities*" for like services and service providers originating from other Member States.[342] For a measure to fall under this provision, it must comply with four conditions. Firstly, as mentioned, the Member must have made a commitment in their respective Schedules.[343] With regard to legal services in the UK, this will be discussed later on.[344] Secondly, it concerns measures taken by Member States affecting trade in services which includes the regulation of the legal profession adopted by either the Member State or the competent professional body.[345]

Thirdly, the discrimination must concern 'like' services and/or service providers.[346] The concept of 'likeness' has not been defined under National Treatment either and remains an equally controversial and vague concept as under the MFN-obligation.[347] This means that the 'likeness' of services and suppliers is based on a case-by-case assessment with the same non-exhaustive criteria for both services and service suppliers and that there is no absolute certainty whether two services and suppliers will be presumed 'like' by the WTO Dispute Settlement Body.[348] Anyhow, the 'likeness' of services and suppliers essentially requires an assessment of the competitive relationship between the two services and/or suppliers concerned.[349] If they are "*essentially or generally the same in competitive terms*", they will be presumed to be 'like'.[350] It can also be noted

[339] See *infra* 69-74.
[340] *US – Gambling (2005)* Panel Report (n 336) paras. 6.267-6.279; *US – Gambling (2005)* Appellate Body Report (n 312) paras. 214-215; see also WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Panel* (12 August 2009) WT/DS363/R para. 7.1353.
[341] Article XVII GATS.
[342] Articles II, XVII:3 GATS; Marcus Klamert, *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (CUP 2015) 31; Van den Bossche and Prévost (n 285) 42.
[343] *EC – Bananas III (USA) (1997)* Panel Report (n 300) para. 7.314.
[344] See *infra* 69-74.
[345] See *supra* 59; *EC – Bananas III (USA) (1997)* Panel Report (n 300) para. 7.281; *China – Publications and Audiovisual Products (2010)* Panel Report (n 396) para. 7.971.
[346] Article XVII:1 GATS; *EC – Bananas III (USA) (1997)* Panel Report (n 300) para. 7.314.
[347] See *supra* 59; Mireille Cossy, *Determining 'likeness' under the GATS: Squaring the circle?* (WTO Staff Working Paper, September 2006) ERSD-2006-08 2; Nicolas F Diebold, *Non-discrimination in International Trade in Services: 'Likeness' in WTO/GATS* (CUP 2010) 1-2.
[348] See *supra* 59; WTO, *China – Certain Measures Affecting Electronic Payment Services – Report of the Panel* (16 July 2012) WT/DS413/R para. 7.700; *Argentina – Financial Services (2016)* Appellate Body Report (n 304) para. 6.29, 6.32.
[349] *China – Electronic Payment Services (2012)* Panel Report (n 348) para 7.700.
[350] *China – Electronic Payment Services (2012)* Panel Report (n 348) para. 7.702.

here that an origin-based presumption of 'likeness' can be used as well in case of discrimination solely based on nationality.[351]

Fourthly, Members may not give these like services and suppliers "*less favourable*" treatment. This can be described as the modification of conditions of competition "*in favour of domestic services and suppliers*" which is "*to the detriment*" of identical foreign services and suppliers.[352] These less favourable conditions of competition must be the consequence of *de jure* or *de facto* different treatment of the services/suppliers at issue.[353] Furthermore, the intention of the legislator is not contemplated when assessing whether the measure at issue is "*treatment less favourable*", unless this concerns the conditions of competition.[354] Still, it must be remarked that the Member States are not required to address inherent competitive disadvantages for foreign services/suppliers.[355] In practice, however, this article is interpreted rather restrictively.[356]

65. Members can also take up additional commitments which do not fall under either of the previously discussed articles. Alternatively put, Article XVIII GATS specifies that the Member States are allowed to negotiate other commitments on, for example, "*qualifications, standards or licensing matters*".[357] Yet, it must be kept in mind that these commitments are completely voluntary, and the Members are not required to adopt these additional commitments.[358] If a Member has taken up such commitments, these can be found on their Services Schedule. Furthermore, it should also be remarked that any commitments on a State's Services Schedule must be applied in a "*reasonable, objective and impartial manner*".[359] Finally, the derogations discussed above from these obligations also apply here, except for those for taxation objectives.[360] Thus, Member States can, even where they have taken up commitments concerning National Treatment or Market Access, enact restrictive measures contrary to GATS in pursuit of the objectives described above.[361]

2.1.3. Future obligations

66. As mentioned above, the GATS also requires the Members to enter into negotiations to realise more progressive liberalisation. On the basis of Article XIX GATS, the Members have

[351] *Argentina – Financial Services (2016)* Appellate Body Report (n 304) para. 6.38.
[352] Article XVII:2-3 GATS; *China – Electronic Payment Services (2012)* Panel Report (n 348) para. 7.687.
[353] Article XVII:3 GATS; see also *EC – Bananas III (Ecuador – Article 21.5) (1999)* (n 309) para. 6.126.
[354] *China – Electronic Payment Services (2012)* Panel Report (n 348) para. 6.106 and 6.127.
[355] Note *ad* Article XVII GATS.
[356] See *Canada – Autos (2000)* Panel Report (n 353) para. 10.300; *China – Electronic Payment Services (2012)* Panel Report (n 348) para. 6.146.
[357] Article XVIII GATS.
[358] *Ibid.*; Matsushita and others (n 293) 611-612.
[359] Article VI GATS.
[360] See *supra* 60; Articles XIV-XIVbis GATS; Matsushita and others (n 293) 615.
[361] *Ibid.*

started negotiations which were eventually taken up in the Doha Round of negotiations.[362] These negotiations, also called 'GATS Track #1', aim towards an overall improvement of the existing commitments in the respective Services Schedules of the Member States.[363] In other words, they try to create commitments which achieve a more far-reaching liberalisation of trade in services than currently exists in the GATS framework. Thus far, these negotiations have not been very successful to say the least.[364]

67. Additionally, the GATS also created a so-called 'GATS Track #2' where the Member States have to create certain disciplines.[365] Under this framework, the WTO Members created the Working Party on Domestic Regulation which was later transformed into the Working Party on Professional Services.[366] Herein, the Members created the Accountancy Disciplines which were supposed to be inserted into the GATS after the conclusion of the Doha Round negotiations. While these disciplines contain powerful obligations, these disciplines have not been able to enter into force due to on-going issues in the Doha Round.[367] At the moment, the Members are negotiating horizontal principles within the Doha Round Negotiations. The most 'recent' Progress Report dates back to 2011.[368] These disciplines concern licensing and qualifications procedures and requirements as well as technical standards in sectors where the Members have undertaken specific commitments.[369] The proposals foresee a significant simplification in administrative procedures, a somewhat watered down obligations of mutual recognition and the application of procedures on the basis of objective and transparent criteria.[370] Although these could be very significant principles for the international liberalisation of trade in services, these are still just proposals and have no legal implications for the Members at the moment.[371]

2.2. The UK's instruments regulating trade in legal services

68. While the general framework of GATS seems extensive, it is clear that this has no substantive bearing for trade in legal services as long as the UK's Services Schedule and/or national legislation is not examined.[372] Overall, the UK is praised as one of the most open markets

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[362] Article XIX GATS; World Trade Organization, 'Services negotiations' <https://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm> accessed 23 March 2019.
[363] Laurel S Terry, 'But what will the WTO disciplines apply to – distinguishing among Market Access, National Treatment and Article VI:4 Measures when applying the GATS to legal services' (2003) Prof Law Symp Issues 83, 87; World Trade Organization, 'Services negotiations' (n 352).
[364] Adlung (n 292) 370; Thystrup and Ünüvar (n 292) 44.
[365] Article VI:4 GATS; Terry (n 363) 89.
[366] World Trade Organization, 'WTO negotiations on domestic regulation disciplines' <https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm> accessed 23 March 2019.
[367] Terry (n 283) 953; Klamert (n 342) 42.
[368] See Chairman of the Working Party on Domestic Regulation, *Progress Report on the Disciplines on Domestic Regulation Pursuant to GATS Article VI:4* (14 April 2011) S/WPDR/W/45.
[369] *Ibid*. 56.
[370] Klamert (n 342) 42-43; Progress Report (n 368) 55-60.
[371] Klamert (n 342) 260.
[372] See *supra* 63-65.

for foreign lawyers.[373] This open attitude was adopted when the Services Schedules were still a competence of the EU and further realised by the reforms enacted by the Legal Services Act of 2007.[374] The Services Schedule recently laid down by the UK is intended to copy the commitments made in the EU Services Schedule to a large extent.[375] Thus, an assessment of the recently submitted Schedules by the UK as well as the current national legislation on the topic must be made.

2.2.1. The UK's recently submitted Services Schedule

69. Just as the EU's Schedule, the UK Services Schedule is split up in horizontal and sector-specific commitments. Moreover, the Schedule first shows which changes are made in the EU's Schedule.[376] Furthermore, the Schedule is preceded with two notes, one initiating the certification procedure and explaining the background to the Schedules and another one explaining some technical terms.[377] Thus, Member States of the WTO and the EU Member States in case of a no-deal Brexit, know exactly what changes to expect to their current export of legal services into the EU. Hereunder, the Services Schedules will be considered in light of the EU's export of legal services in case of a no-deal Brexit.

2.2.1.1. Horizontal commitments

70. The UK's horizontal commitments must first be examined as these contain commitments for every service sector, including legal services.[378] With regard to the commitments relevant for legal services the following observations can be made. The UK maintains the EU's existing limitations on Market Access on public services for service providers wishing to establish themselves in the UK.[379] Thus, this concerns the situation where someone from the EU wishes to establish him/herself in the UK after the no-deal Brexit and provide a service which is considered to be a "*public utility*". They might find that, in this case, their access to the market is restricted as the UK preserves its right to let these services be provided by monopolies or exclusive services operators. Note here, however, that in this case, the UK is obliged to ensure that these providers act in a manner consistent with the GATS and the UK's commitments.[380] Yet, this restriction will not apply to telecommunications and to computer and related services.[381]

[373] Sydney M Cone, 'Legal services and the Doha Round dilemma' (2007) 41 JWT 245, 263.
[374] Terry and others (n 288) 960-961; Laurel S. Terry, Carole Silver and Ellyn S. Rosen, 'Transnational Legal Practice 2009' (2010) 44 Int'l Law 563, 565-567.
[375] See *supra* 54; UK Services Schedule (n 271) 2.
[376] UK Services Schedule (n 271) 9-53.
[377] *Ibid*. 2-8.
[378] *Ibid*. 9.
[379] *Ibid*.; Adlung (n 290) 19.
[380] Article VIII GATS.
[381] UK Services Schedule (n 271) 9 *juncto* footnote 1.

71. The EU's policy on companies is slightly updated to reflect the consequences of Brexit. To be more specific, there are no quantitative restrictions nor limitations on the form of the corporate body for people from the EU to establish companies in the UK after a no-deal Brexit.[382] There will remain, however, some limitations on National Treatment for companies coming from the EU wishing to establish themselves in some form in the UK after Brexit. Otherwise put, when an EU company wishes to establish branches or agencies in the UK, they cannot expect to be treated the same as subsidiaries of EU companies established under UK law. However, it must be noted that this regards the treatment granted to subsidiaries *with* a registered office, central administration or principal place of business in the UK.[383] Likewise, subsidiaries of EU companies established under UK law may be discriminated against in comparison to UK companies' subsidiaries when they only have their registered office in the UK. Still, when these subsidiaries can prove that they have an "*effective and continuous link*" with the British economy, they cannot receive less favourable treatment.[384] Further, investments in the form of commercial presence (*i.e.* professional establishments) are not subject to limitations.[385] Thus, the UK must follow the rules of Market Access and National Treatment as laid down in the GATS. Furthermore, no limitations whatsoever are placed on real estate purchases in the UK by EU citizens.[386] Hence, these will be treated the same as purchases by UK citizens.

72. The UK has implemented an extensive regime with regard to the temporary provision of services coming from the EU in case of a no-deal Brexit. Additionally, the UK's commitments are divided into three categories, namely the intra-corporate transfers, the business visitors and the contractual service suppliers.[387] It must be noted here that an economic needs test is not needed for the entry and temporary stay in the UK, except for when a specific commitment requires this for contractual service suppliers.[388] Generally, it can also be noted here that the UK has not taken up any other National Treatment obligations than those listed here for Market Access. Thus, the UK can discriminate against this type of temporary service providers when it concerns a commitment not explained here.[389] Moreover, the UK's legislation on entry, stay, work and social security remains applicable to this temporary provision of services in its territory. Hence, legal practitioners making use of these provisions will have to comply with, for example, immigration and minimum wage requirements.[390]

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[382] *Ibid.* 9.
[383] *Ibid.*
[384] *Ibid.* 10.
[385] *Ibid.*
[386] *Ibid.*
[387] *Ibid.* 11-17.
[388] *Ibid.* 13, 15.
[389] *Ibid.* 11, 13, 14.
[390] *Ibid.* 11, footnote 2.

Firstly, regarding the intra-corporate transfers, natural persons can temporarily provide services through a transfer to a *secondary* establishment in the UK of a company primarily established outside of the UK.[391] This person must have worked in the company for at least a year and must either hold a senior position involved with the management of the corporation or must be an expert in some form of knowledge essential to the company.[392] So, after Brexit, temporary intra-company movements of persons are possible, provided that they follow these conditions.

Secondly, the UK has also foreseen a framework for so-called 'business visitors'. Here, the entry and temporary stay is permitted for service sellers and for the establishment of commercial presence.[393] Service sellers concerns representatives of a supplier who do not live in the UK and ask permission for entry only for the negotiating of a sale of services or enter into agreements hereto. These representatives may not be involved in direct sales to the general public or in supplying services themselves.[394] As for the establishment of commercial presence, persons in the same senior position as described above within a legal entity can set up secondary establishments of companies incorporated in another WTO Member State. However, these senior representatives may not be involved in the direct sale or supply of services either, nor may the company have its principal place of business or any other establishment within the UK.[395]

Lastly, the UK made the access to its market for contractual service suppliers subject to several conditions, *i.e.* only employees working for over a year in a company with no commercial presence in the UK can enjoy this regime.[396] The period of stay is the duration prescribed by the contract and maximum three months per year.[397] Furthermore, the person providing the services must possess the necessary qualifications pursuant to UK law.[398] These commitments only allow the person in question to supply the services defined in the contract and not the provision of other services nor the entitlement to a professional title of the UK.[399] Also, the number of persons sent over on the basis of the contract must be kept to an absolute minimum in accordance with UK legislation.[400] Finally, the service contract can only enjoy the privileges granted by the UK when it is concluded in the listed subjects, which includes legal services, accounting services and taxation advisory services. This last provision is, however, subject to specific commitments made in the sector specific section of the Schedule.[401]

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391 *Ibid.* 11.
392 *Ibid.* 11-13.
393 *Ibid.* 13-14.
394 *Ibid.* 13.
395 *Ibid.* 14.
396 *Ibid.* 15.
397 *Ibid.*
398 *Ibid.*
399 *Ibid.* 16.
400 *Ibid.*
401 *Ibid.*

2.2.1.2. Sector-specific commitments

73. Besides these general commitments, the UK also specified some more concrete commitments with regard to different services sectors. With regard to legal services, the UK has enabled EU legal practitioners give legal advice not only on their home country law and public international law, but also on issues relating to EU law in case of a no-deal Brexit.[402] Furthermore, for the cross-border provision of legal services where both the service receiver and provider remain in their own home State and only the service moves, the UK has taken up the obligation to abide by Article XVI on Market Access and Article XVII on National Treatment completely. This means that there are no quantitative restrictions or limitations on the form of structuring such a legal service whatsoever. Moreover, the UK is forbidden from discriminating against this cross-border provision of legal services in comparison to its own legal services. Besides, the UK has taken up the same commitments where a service receiver (temporarily) moves to the UK to receive legal services. These receivers will be subject to no restrictions when entering the UK market and will be treated the same as UK citizens receiving legal advice.[403] Additionally, legal service providers wishing to establish themselves in the UK are not subject to any quantitative restrictions either, nor are they subject to limitations with regard to the form of legal entity they can structure their services in. Likewise, EU legal service providers will be treated at least the same as UK legal service providers when they want to establish themselves in the UK and provide legal services to the British public.[404]

74. However, the UK has not adopted such a flexible policy with regard to the situation where the service supplier temporarily moves to the UK to provide legal services. In other words, the UK has stated that it will not undertake any commitments with regard to the temporary provision of legal services except those listed in the horizontal section.[405] Meaning, the rules on Market Access and National Treatment of intra-corporate transfers and business visitors stated above apply equally to the legal profession.[406] The same can be said for contractual service suppliers, although the UK has added an extra limitation to the Market Access of these suppliers. To be more specific, on top of the rules stated above, the temporary providers of legal services must also obtain a university degree, professional qualifications and have "*three years' professional experience in the sector*".[407] Almost all of the professional services are subject to these commitments, including taxation advisory services.[408] This policy is, however, not such a big

[402] *Ibid*. 17.
[403] *Ibid*.
[404] *Ibid*.
[405] *Ibid*.
[406] *Ibid*.
[407] *Ibid*.
[408] *Ibid*. 17-22.

change to the EU's current Schedule, except for the division of temporary provision of services into intra-corporation transfers, business visitors and contractual service suppliers.[409]

2.2.2. The UK's current legislation on legal services

75. The UK has developed an extensive framework regulating the legal profession throughout the years while working under the EU's Schedule. While the horizontal section of this Schedule has been changed and further clarified in the UK's Schedule, the commitments with regard to legal services remain very similar.[410] The existing legislation can, therefore, still be indicative of how European lawyers will be treated in case of a no-deal Brexit. Moreover, in case no withdrawal agreement can be concluded before the UK leaves the EU on 31 October 2019, these regulations will be immediately applicable to European legal practitioners as the UK intends to repeal the current legislation on European legal services.[411]

The British legal landscape concerning the legal profession is rather complicated and is regulated by no less than six legal professional bodies, besides the competent governmental legislators.[412] It should be pointed out that the regulation of the legal profession is not uniform throughout the UK as there are three different jurisdictions with each their own regulations on foreign legal practitioners. These jurisdictions are England and Wales, Scotland and Northern Ireland.[413] Each of these jurisdictions has solicitors and barristers (or advocates in Scotland) which are regulated differently with regard to foreign legal services providers.[414] At the moment, there are several regimes in the UK with regard to foreign lawyers. To be more specific, you can either make use of the several Directives discussed above, register as a foreign lawyer, choose to re-qualify into either one of the British legal professions or to practise without any form of registration.[415]

2.2.2.1. Practice under home title: no registration

76. In principle, foreign lawyers are allowed to continue practising under their home state title in the UK without having to register themselves with the competent body.[416] Furthermore, in case of a no-deal Brexit and under the revised UK Services Schedule, EU lawyers will be able to advise

[409] *Ibid.* 17; European Communities and their Member States, 'Schedule of Specific Commitments' of 15 April 1994, GATS/SC/31, 7-11.
[410] See *supra* 69-74; UK Services Schedule (n 271) 17.
[411] 'Brexit no deal – legal services' (*The Law Society*, October 2018) <https://www.lawsociety.org.uk/support-services/documents/no-deal-brexit-providing-legal-services-in-eu-2019/> accessed 2 May 2019, 1; Special meeting of the European Council (Art. 50) Conclusions of 10 April 2019 (n 3) para. 2.
[412] UK Delegation to the CCBE, 'Paper: EU lawyers in the UK – Practice rights under the draft Withdrawal Agreement and Q&A' (*Bar Council*, 16 November 2018) <https://www.barcouncil.org.uk/media/695906/eu-lawyers-in-the-uk-practice-rights-q-a_revised_nov_2018.pdf> accessed 12 May 2019, 1.
[413] UK Delegation to the CCBE (n 412) 1.
[414] See Nascimbene (n 41) 210-233.
[415] See *supra* CHAPTER 1; see *infra* 76-80.
[416] UK Delegation to the CCBE (n 412) 7-8.

on EU law as well as their home state law and public international law.[417] Still, this legal practice is limited to the so-called 'unreserved' legal activities.[418] To clarify, each of the jurisdictions has listed certain activities which are defined as 'reserved'. These acts include the conduct of litigation, the exercise of a right of audience and the preparation of documents concerning the transfer of estate.[419] All of these reserved actions can only be performed by recognised or authorised regulated professionals and these do not include foreign lawyers.[420] Thus, when EU lawyers wish to practise as 'foreign legal consultants' (FLCs) under this regime after a no-deal Brexit, they can give advice on home state law, EU law and public international law, but cannot perform these reserved acts. This allows EU lawyers to temporarily or permanently provide unreserved legal services under their home title.[421] European lawyers wishing to practise in-house are believed not to find any restrictions, if they do not wish to perform one of the reserved activities that is.[422]

77. It should also be noted here that while FLCs normally do not have right to pursue litigation for their clients, they can ask permission to appear in front of English courts on an *ad hoc* basis through the procedure of 'temporary call'.[423] This mechanism is, however, limited to England and Wales and to lawyers with experience in common law similar to the common law of England and Wales.[424] Thus, it appears that only EU lawyers practising permanently in the UK for at least three years at the moment the UK leaves the EU without an agreement can fall under this regime. Furthermore, most specialist tribunals have no restriction on rights of audience for foreign lawyers, but this is limited to all tribunals not at appellate level.[425] Additionally, it should be noted that there is no restriction on the right to represent clients at arbitration or any other form of Alternative Dispute Resolution.[426] By not registering themselves, these legal practitioners are not subject to the deontology rules in the UK.[427]

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[417] See *supra* 73; UK Services Schedule (n 324) 17.
[418] UK Delegation to the CCBE (n 412) 5-6, 7-8.
[419] Section 12 Legal Services Act 2007; Section 32 Solicitors (Scotland) Act 1980; Sections 19 *juncto* 23 Solicitors (Northern Ireland) Order 1976, SI 1976/582; 'Regulation Paper – The case for change: revisited' (*Law Society of Scotland*, January 2018) <https://www.lawscot.org.uk/media/359509/case-for-change-revisited-law-society-of-scotland.pdf> accessed 27 March 2019, 47; Law Council of Australia, 'Factsheet: practice of foreign law – United Kingdom' <http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Country_Fact_Sheets/Europe/PFL%20United%20Kingdom_map.pdf> accessed 27 March 2019, 3.
[420] *Ibid.*; Department for Business, Energy & Industrial Strategy (n 279); UK Delegation to the CCBE (n 412) 5-6; Law Council of Australia (n 419) 2-3.
[421] UK Delegation to the CCBE (n 412) 7-8; UK Services Schedule (n 324) 17; Law Council of Australia (n 419) 3.
[422] UK Delegation to the CCBE (n 412) 8.
[423] *Ibid.* 7.
[424] See 'BSB handbook' (*Bar Standards Board*, April 2019) <https://www.barstandardsboard.org.uk/media/1983861/bsb_handbook_april_2019.pdf> accessed 12 May 2019, Rq24(2) *juncto* 25-28.
[425] UK Delegation to the CCBE (n 412) 7.
[426] *Ibid.*
[427] UK Delegation to the CCBE (n 412) 8.

2.2.2.2. Practice under home title: registration

78. Foreign lawyers can also choose to register with the competent body to be able to practise in a (multinational) partnership with solicitors, become manager or owner of a law firm which is not an Alternative Business Structure as described above in England or Wales.[428] Furthermore, in England and Wales, these Registered Foreign Lawyers (RFLs) will be able to give legal advice on English and Welsh law, besides home state, EU and public international law, and perform some limited reserved actions either on their own or under the supervision and at the discretion of a person qualified to do so.[429] They can also still perform reserved acts in their home state or supervise such work, if their home state allows them to do so from the UK.[430] Moreover, it must be noted that RFLs can practise in any type of law firm but cannot become sole practitioners.[431] This registration makes these legal service providers subject to the rules of conduct enacted by the SRA.[432] With regard to solicitors in Scotland, there is a similar registration obligation to be able to practise in partnerships with Scottish solicitors, called licensed legal service providers. This registration, however, does not allow them to perform reserved legal services.[433] Yet, in Northern Ireland, there are no rules whatsoever on the registration of foreign lawyers.[434] Furthermore, there appear to be no similar registration rules to work together with barristers or advocates.

2.2.2.3. Practice under home title: foreign associations

79. Still, as mentioned above, by implementing the Alternative Business Structure in the Legal Services Act 2007, the UK allowed for more cooperation with non-lawyer professionals and even foreign lawyers. In other words, foreign lawyers can associate with solicitors and barristers/advocates alike in the UK within Alternative Business Structures without even having to register themselves.[435] Additionally, the rules described above on the association of lawyers generally apply here as well.[436] In England and Wales, foreign law firms do not have to register

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[428] 'Ethics guidance: Government's Technical Notice on the impact of a 'no deal' EU exit scenario on EU lawyers practicing in the UK' (*Solicitors Regulation Authority*, 10 April 2019) <http://www.sra.org.uk/solicitors/guidance/ethics-guidance/Government%E2%80%99s-Technical-Notice-on-the-impact-of-a-%E2%80%98no-deal%E2%80%99-EU-exit-scenario-on-EU-lawyers-practising-in-the-UK.page > accessed 12 May 2019.
[429] *Ibid.*; see *supra* 73; Rule 8.4 SRA Practice Framework Rules 2011 (n 152).
[430] 'Ethics guidance: Government's Technical Notice on the impact of a 'no deal' EU exit scenario on EU lawyers practicing in the UK' (n 428).
[431] *Ibid.*
[432] *Ibid.*
[433] Part 2 Legal Services (Scotland) Act 2010; Law Society of Scotland, 'D7/D8: Registration of foreign lawyers and multi-national practices' <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-d/rule-d7/guidance/d7-d8-registration-of-foreign-lawyers-and-multi-national-practices/> accessed 2 May 2019.
[434] Law Council of Australia (n 419) 4.
[435] See *supra* 30; Part 5 Legal Services Act 2007; Part 2 Legal Services (Scotland) Act 2010; McMorrow (n 154) 690
[436] See *supra* 30; UK Delegation to the CCBE (n 412) 8.

themselves when they do not wish to partner up with English solicitors nor practise in the reserved areas. When they do, they have to obtain a licence as a recognised body from the SRA.[437] In Scotland, such law firms wishing to partner up with Scottish solicitors or to practise in reserved areas, must require authorisation from the Law Society of Scotland as a Multi-National Partnership.[438] Northern Ireland's rules are rather strict and generally do not allow the association of foreign law firms with Northern Irish solicitors. Still, foreign law firms are allowed to only employ foreign lawyers and perform unreserved legal activities or to establish a firm with only Northern Irish lawyers who may practise in local law.[439]

2.2.2.4. Practice under host title

80. Lastly, if foreign lawyers want to practise law under a host state title, they can requalify into either one of the British legal professions.[440] In England and Wales, the professional bodies for both solicitors and barristers have enacted special procedures for foreign lawyers wishing to requalify into one of the regulated legal professions in the UK. To be more specific, qualified foreign lawyers can transfer to the Bar Council, provided they give certain documents and evidence in support of their application. Furthermore, the Bar Standards Board will grant foreign lawyers with experience in common law systems certain exemptions.[441] Hence, only EU lawyers practising permanently for three years prior to a no-deal Brexit will be able to enjoy this exemption. With regard to solicitors, the SRA has created the so-called 'Qualified Lawyer Transfer Scheme' (QLTS). This is for fully qualified lawyers with the character and suitability to be admitted as a solicitor. Here, the lawyers have to pass the QLTS assessments, but can receive exemptions in agreeance with the SRA. When they fulfil all of these conditions, they can be admitted to the Law Society of England and Wales as a solicitor.[442]

In Scotland, foreign lawyers now have to take a different test than the EU aptitude test. New standardised processes will be introduced soon for all lawyers wishing to requalify into Scotland and candidates will then be able to apply for exemptions on the basis of their previously received professional qualifications.[443] In Northern Ireland, only holders of the degree Barrister at Law may

[437] UK Delegation to the CCBE (n 412) 7-8; Law Council of Australia (n 419) 4.
[438] Law Council of Australia (n 419) 5.
[439] *Ibid*. 4.
[440] UK Delegation to the CCBE (n 412) 2-3; Law Council of Australia (n 419) 4.
[441] Bar Standards Board, 'Bar training requirements: Qualified foreign lawyers' <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/bar-training-requirements/transferring-lawyers/qualified-foreign-lawyers/> accessed 12 May 2019; BSB handbook (n 424) rQ 7-24.
[442] Solicitors Regulation Authority Board, 'SRA Qualified Lawyers Transfer Scheme Regulations 2011 – Version 21' (*Solicitors Regulation Authority*, 6 December 2018) <https://www.sra.org.uk/solicitors/handbook/qlts/content.page> accessed 12 May 2019.
[443] UK Delegation to the CCBE (n 412) 3; The Faculty of Advocates, 'Becoming an advocate – Information for other Lawyers' <http://www.advocates.org.uk/about-advocates/becoming-an-advocate/information-for-other-lawyers> accessed 12 May 2019; Law Society of Scotland, 'Requalifying into Scotland as an overseas solicitor' <https://www.lawscot.org.uk/qualifying-and-education/qualifying-as-a-scottish-solicitor/requalifying-into-scotland/> accessed 12 May 2019.

be admitted to practise as members of the Bar of Northern Ireland. Furthermore, the Law Society of Northern Ireland requires foreign lawyers to complete certain core subjects and partake in the same apprenticeship as UK nationals applying to the profession of solicitor in Northern Ireland.[444]

2.3. What are the main issues concerning trade in legal services a future EU-UK agreement should address?

81. The main difference between the framework on legal services created by the EU and the one created by the WTO is the principle of mutual recognition. Where the EU bases its entire Single Market on a far-reaching principle of mutual recognition, with a high level of trust in home State regulations, the WTO only makes non-binding mentions of mutual recognition.[445] Thus, while the principle is not completely unknown to the WTO, it has not managed to conclude any enforceable obligations with regard to mutual recognition.[446] This gives rise to a legal framework that is much more restrictive and is still largely fixed on non-discrimination obligations, in comparison to the EU framework.[447] Not only is this cornerstone principle of non-discrimination plagued by disagreements over the exact meaning of 'likeness', it also keeps certain obstructions to the free movement of legal services intact.[448] For instance, it can require legal practitioners to follow an entirely new education, although they are qualified to practise in their home state. This, in itself, is a significant restriction to trade in legal services.[449] Furthermore, all of the important non-discrimination obligations in the WTO are severely weakened by the fact that WTO Members only have to abide by these to the extent that they have taken up commitments to do so in their Services Schedule.[450] Thus, it is clear that the general WTO rules are not as strong as those applicable to legal services in the EU and highly dependent on the will of the WTO Members.

Further restrictions of the GATS framework include the lack of regulation on the international movement of labour. Thus, legal services provided in a salaried position are not regulated by the WTO and remain subject to national legislation that may discriminate against foreign workers.[451] Nevertheless, although the WTO does not create its own competition law, monopolies, exclusive service suppliers and professional bodies are subject to the rules laid down GATS. Thus, they must keep the commitments made in the UK Services Schedule in mind and not enact regulations which are in fact disguised discriminations against foreign legal services.[452] Additionally, the GATS also contains a transparency obligation which is reminiscent of the one contained in the

[444] UK Delegation to the CCBE (n 412) 3.
[445] Klamert (n 342) 254-256; Lianos and Le Blanc (n 262) 52.
[446] See *supra* 61.
[447] See *supra* 9-17, 57-67.
[448] See *supra* 57-67.
[449] See *supra* 14.
[450] See *supra* 57, 63-65.
[451] See *supra* 62.
[452] See *supra* 59, 62.

Services Directive. Although the WTO's obligation seems to be a watered-down version of the Services Directive's requirements, it could potentially fill the vacuum left by Brexit.[453] Finally, the GATS does not foresee a simplification of immigration law applicable to service providers who wish to provide legal services under this framework, even though this is of the utmost importance for trade in legal services.[454]

82. Still, there is no reason to despair as the UK's Services Schedule and its national legislation on legal services have proven to be quite promising. To be more specific, the UK's legal market has been correctly defined as open towards foreign lawyers.[455] However, a significant drawback here is the splitting of the UK into three different jurisdictions with each two different types of legal practitioners.[456] Not only does this make the British legal profession difficult to apprehend, significant differences in the regulations make it impossible to make general observations for the entirety of the UK. In short, England and Wales seem to be the most adept to receiving foreign lawyers, while Northern Ireland seems to uphold the most restrictive regulations. As for Scotland, some regulation of the profession is missing, but efforts are being made to streamline the regulation of the legal profession with England and Wales.[457] Still, this legislation is not entirely in tune with the EU framework. Admittedly, foreign lawyers are still allowed to perform a lot of legal services, but unlike European lawyers at the moment, they cannot perform reserved legal services in the UK nor can they advise on UK law.[458] Furthermore, foreign lawyers cannot be sole practitioners, even when they register themselves.[459] There are some limited possibilities to get temporary rights to represent clients in court, but a more permanent and probably more suitable solution seems to be the requalification into one of the legal professions of the UK.[460] However, it must be noted here that these requalifying schemes only provide for certain exemptions for legal practitioners with experience in common law.[461] Be that as it may, law firms will not be treated differently after a no-deal Brexit as EU law firms are generally treated the same as law firms originating from non-EU countries.[462] This statement is confirmed by the UK's Services Schedule.[463] Yet, EU law firms will lose the opportunity to merge and associate EU-instated corporate forms such as the European Company, the EEIG and the European Cooperative and *vice versa*. They can no longer make use of the cross-border merger

[453] See *supra* 61.
[454] See *supra* 17, 28, 57-67.
[455] See *supra* 68.
[456] See *supra* 75; UK Delegation to the CCBE (n 412) 1.
[457] See *supra* 75-80.
[458] See *supra* 76-80.
[459] See *supra* 78.
[460] See *supra* 77, 80.
[461] See *supra* 80.
[462] See *supra* 79.
[463] See *supra* 71.

Directives either.[464] It should also be kept in mind here that lawyers have to comply with British legislation on entry, stay, work and social security as well as the conditions stipulated in the UK's Services Schedule.[465]

83. As shown by UK legislation, the lack of mutual recognition does not necessarily have to be detrimental to European lawyers, even though other EU Member States uphold much more restrictive legislation with regard to foreign lawyers. Still, this observation has led to the suggestion that the UK could shut down its own borders for legal service providers when it does not receive more favourable treatment from the EU Member States.[466] Still, this would entail that the UK repeals these flexible regulations for other WTO Members as well on the basis of MFN, which is why this scenario seems rather unlikely.[467] At any rate, it is clear that any future EU-UK deal wishing to maintain the current *status quo* regarding legal services, should encompass some form of enforceable mutual recognition. This should allow European lawyers in the UK to practise some reserved actions as well as to advise on UK law, besides including a flexible requalification and recognition of professional qualification scheme. Such an agreement should also aim to simplify the movement of persons across borders and thus the immigration requirements as well as the movement of workers to the UK.

III. Movement of legal documents in a no-deal scenario

84. As mentioned above, the British legal market is not only influenced by the access of legal services to that market, but also by the ability to enforce British legal documents in other EU Member States as well as to enforce European legal documents in the UK.[468] Still, the Brexit has led to the promotion by some of redirecting commercial litigation towards other European centres as opposed to the UK to ensure that these judgments still enjoy free movement throughout the EU. Although this part of Brexit is a hot topic in academic literature, it is still unclear how it will eventually play out.[469] While the many versions of the withdrawal agreement all foresaw in some kind of transitional arrangement, it now appears that there is no guarantee whatsoever that such an arrangement could become a reality. So far, no withdrawal agreement has been approved by the UK Parliament.[470] These versions included a transitional period where most of the EU's

[464] See *supra* 31; Directorate-General Justice and Consumers, 'Notice to stakeholders: Withdrawal of the United Kingdom and EU rules on company law' (*European Commission*, 21 November 2017) <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=607669> accessed 12 May 2019.
[465] See *supra* 72.
[466] Hellwig (n 7) 262-263.
[467] *Ibid*. 263; see *supra* 59.
[468] See *supra* 2.
[469] Ahmed (n 10) 990; Deschuyteneer and Verhellen (n 219) 428. See also Richard Aikens and Andrew Dinsmore, 'Jurisdiction, enforcement and the conflict of laws in cross-border commercial disputes: what are the legal consequences of Brexit?' (2016) 27 EBLR 903; Jonathan Fitchen, 'The PIL consequences of Brexit' (2017) 3 NIPR 411.
[470] See *infra* 139.

instruments keep applying to procedures started before the end of this period, including those on the free movement of legal documents in the EU concerning civil and commercial matters.[471] Furthermore, both the EU and the UK have recently committed themselves to applying the framework discussed above after Brexit for the recognition and enforcement of judgments, authentic instruments and court settlements obtained in proceedings or registered before exit day.[472] It is important to note that these types of arrangements would at least provide for a somewhat smoother adaption to the post-Brexit movement of legal documents from and to the UK.[473] Anyhow, the transition from the free movement of legal documents to the enforcement and recognition in the UK under a no-deal scenario will certainly be a "*'cliff-edge' scenario*" which will hugely impact the British legal market and its reputation as 'European hub for legal services'.[474]

3.1. International agreements on the enforcement and recognition of foreign legal documents

85. The UK has planned to repeal the private international law-instruments instated by the EU.[475] In case of a no-deal scenario this would mean that no EU instrument can be recognised nor enforced in the UK as described above under the free movement of legal documents.[476] In academic literature, this has sparked discussion as to whether previous agreements could be revived. That is to say, several authors considered whether the Brussels Convention of 1968 could become relevant again, as the UK is a signatory to this in its own right.[477] There are some who see article 66 of that Convention, the continued application to some overseas territories as well as the UK's belated accession to the treatment as indicative for a positive answer to this question.[478] However, more recent literature seems to suggest that a revival of this agreement will most likely not happen. The main arguments used here are the continued jurisdiction of the CJEU to which the UK has clearly objected, the UK's current repeal policy along with the rationale

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[471] See *infra* 141.
[472] Regulation 92 The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479; Directorate-General Justice and Consumers, 'Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law' (*European Commission*, 18 January 2019) <https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf> accessed 9 May 2019, 2-3; Ministry of Justice, 'Guidance: Cross-border civil and commercial legal cases after Brexit: Guidance for legal professionals' (*UK Government*, 29 March 2019) <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-after-brexit-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-after-brexit-guidance-for-legal-professionals> accessed 9 May 2019.
[473] See *infra* 137; Deschuyteneer and Verhellen (n 219) 431-432; see also Fitchen (n 469) 419-421, 426.
[474] See *supra* 2; Fitchen (n 469) 426.
[475] The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479.
[476] Sara Masters and Belinda McRae, 'What does Brexit mean for the Brussels regime?' (2016) 33 J Intl Arb 483, 484-485.
[477] Matthias Lehmann and Dirk Zetzsche, 'Brexit and the consequences for commercial and financial relations between the EU and the UK' (2016) 27 EBLR 999, 1023-1024; Masters and McRae (n 476) 492-494; Deschuyteneer and Verhellen (n 219) 435.
[478] Aikens and Dinsmore (n 469) 906-912; Masters and McRae (n 476) 492-493; Deschuyteneer and Verhellen (n 219) 435.

of the UK's accession to the Brussels Convention, *i.e.* its Membership of the European Economic Community.[479] To accurately point out the issues of a no-deal Brexit for the (free) movement of legal documents, this dissertation will use the latter view as a starting point and assume that the Brussels Convention is no longer applicable either. The UK has become a party in its own right to certain interesting agreements on private international law which will be directly applicable in case of a no-deal scenario. Hence, these arrangements will be discussed here first before turning to the more restrictive national regulations.[480]

86. A first agreement that will remain applicable, even in a no-deal scenario, is the New York Convention on Arbitration of 1958. As mentioned above, most EU instruments have excluded arbitration from their scope and a similar exclusion can be found in the Hague Convention on Choice of Court Agreements.[481] Furthermore, these provisions will remain untouched by Brexit due to the UK's status as independent Signatory to the New York Convention.[482] Thus, even under a no-deal scenario, the free movement of arbitral awards created by the New York Convention on Arbitration must be kept in mind as applying between the EU and the UK.[483] Still, a discussion recently erupted on whether the Hague Convention on Choice of Court Agreements would make arbitration as regulated by the New York Convention less popular in comparison to litigation under the Hague Convention. The discussion was sparked by the EU's accession to the Hague Convention on 1 October 2015 which allowed the treaty to finally enter into force.[484] The discussion gives interesting insights to assess the Choice of Court Convention's suitability for the recognition and enforcement of legal documents after Brexit. More specifically, the UK has recently ratified the Choice of Court Convention to ascend to the Convention as an independent signatory after 31 October 2019.[485] Thus, the treaty is another international instrument that will

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[479] Ahmed (n 10) 990-991; Fitchen (n 469) 422-424; Deschuyteneer and Verhellen (n 219) 435.
[480] Ahmed (n 10) 990-991; Aikens and Dinsmore (n 469) 905; Lehmann and Zetzsche (n 477) 1025; Deschuyteneer and Verhellen (n 219) 434-435.
[481] See *supra* 48; Article 2(4) Choice of Court Convention.
[482] See *supra* 48; Sections 100-104 Arbitration Act 1996; Sections 18-22 Arbitration (Scotland) Act 2010.
[483] See *supra* 48.
[484] Mathew Rea and Marcela Calife Marotti, 'What is all the fuss? The potential impact of the Hague Convention on the Choice of Court Agreement on international arbitration' (*Kluwer Arbitration Blog*, 16 June 2017) <http://arbitrationblog.kluwerarbitration.com/2017/06/16/fuss-potential-impact-hague-convention-choice-court-agreement-international-arbitration/> accessed 12 May 2019; Alastair Campbell, 'On the rise or on the rack? The potential impact of the Hague Convention on Choice of Court Agreements on the use of international arbitration' (*Practical Law Arbitration Blog*, 28 June 2016) <http://arbitrationblog.practicallaw.com/on-the-rise-or-on-the-rack-the-potential-impact-of-the-hague-convention-on-choice-of-court-agreements-on-the-use-of-international-arbitration/> accessed 12 May 2019; Sapna Jhangiani and Rosehana Amin, 'The Hague Convention on Choice of Court Agreements: a rival to the New York Convention and a 'game-changer' for international disputes?' (*Kluwer Arbitration Blog*, 23 September 2016) <http://arbitrationblog.kluwerarbitration.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/?_ga=2.169329377.1300040517.1555173247-1294638954.1554132548> accessed 7 May 2019.
[485] 'Notification pursuant to Article 34 of the Convention – United Kingdom' (*Ministry of Foreign Affairs of the Kingdom of the Netherlands*, 28 December 2018) <https://verdragenbank.overheid.nl/nl/Verdrag/Details//011343/011343_Notificaties_13.pdf> accessed 12 May 2019; 'Declarations – Depositary communications' (*HCCH*, 12 April 2019) <https://www.hcch.net/en/instruments/conventions/status-

continue to apply in covered matters between the EU Member States and the UK after Brexit, with or without a deal, subject to the reservations made regarding insurance contracts.[486]

87. While there are some concerns with regard to the limited number of signatories to the Choice of Court Convention, it should be an acceptable instrument to regulate the mutual recognition of judgments within the EU as all of the EU Member States have become signatories to the Agreement.[487] Still, it must be noted that the scope of the Choice of Court Convention is much more limited in comparison to other agreements such as the New York Convention on Arbitration.[488] To be more specific, the Choice of Court Convention lists a lot more subjects excluded from the scope of the agreement, besides the reservations made by the UK on insurance contracts, and essentially only covers exclusive business-to-business choice of courts agreements.[489] Thus, in comparison to both the New York Convention and the current Brussels regime, the Choice of Court Convention leaves a big gap to fill for consumers, employees and the excluded subjects for the mutual recognition of judgments after Brexit.

The Choice of Court Convention gives the court chosen by the parties following Article 3, an exclusive competence to decide on the case covered by the agreement between the parties.[490] A decision taken pursuant to an exclusive choice of court agreement should be recognised and/or enforced in every Party to the Choice of Court Convention if national law of the State where the judgment was given declares it to have legal effect and is enforceable.[491] In any case, the substantive correctness of the judgments may not be checked nor may the factual grounds for the finding of competence by the presiding court.[492] Yet, the recognition or enforcement of the judgment can be refused when it is still open for appeal.[493] Besides these grounds, the Choice of Court Convention has listed a limited amount of grounds for refusal greatly resembling those of the New York Convention and the Brussels regime, *i.e.* nullity, procedural fairness and public policy.[494] The Choice of Court Convention also adds two grounds to that list which concern previous decisions between the same parties taken in either the requested state or any other state when it concerns the same subject and cause and as long as the latter is available for recognition.[495] Furthermore, the Convention stipulates that decisions on the excluded subjects

table/notifications/?csid=1318&disp=resdn&fbclid=IwAR0ZuvF-3-Mx6R-OcK5aHAzBgwSoKcFntk_XnwCAPnQNtfCECPABGXHZLV8> accessed 12 May 2019.
[486] 'Notification pursuant to Article 34 of the Convention – United Kingdom' (n 485) 2-4.
[487] Masters and McRae (n 476) 495; Ahmed (n 10) 998; Deschuyteneer and Verhellen (n 219) 435.
[488] *Ibid*.
[489] Articles 1-2, 19-22 Choice of Court Convention; Faye Fangei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (CUP 2010) 21; Rea and Marotti (n 484); 'Notification pursuant to Article 34 of the Convention – United Kingdom' (n 485) 2-4.
[490] Articles 3 *juncto* 5 Choice of Court Convention.
[491] Articles 8(1) *juncto* (3) Choice of Court Convention.
[492] Article 8(2) Choice of Court Convention.
[493] Article 8(4) Choice of Court Convention.
[494] See *supra* 44-48; Article 9 Choice of Court Convention; Rea and Marotti (n 484).
[495] Articles 9(f)-(g) Choice of Court Convention.

will not be recognised nor enforced.[496] Procedure wise, the Hague Convention explicitly states that there is no legalisation nor *apostille* required, but it does allow for *exequatur* or other national requirements such as registration.[497] Moreover, the Convention requires certain documents to be handed over before a decision can be recognised or enforced.[498] Finally, court settlements are to be treated the same as judgments given by the appointed court.[499]

Somewhat regrettably, the Choice of Court Convention thus only manages to partially deal with the mutual recognition of legal documents between the EU and UK after Brexit, but it still puts a great trust in the judicial systems of the signatories.[500] Hence, it certainly has potential as a partial or interim solution for the matter, even with the procedural hurdles that are kept intact by this agreement.[501] After all, the EU has shown itself willing to allow European judgments to be recognised and enforced fairly easily, even with procedures such as *exequatur* in place.[502] The question remains whether the EU would still treat British judgments so favourably in *exequatur* procedures after the UK has left the Union and *vice versa*.

3.2. National legislation on the recognition and enforcement of foreign legal documents

3.2.1. The fate of EU legal documents in the UK after Brexit

88. In case the EU and the UK do not manage to conclude an agreement addressing the consequences of Brexit for private international law, the recognition and enforcement of EU judgments not covered by international conventions will be primarily dealt with by British Private International Law.[503] As a first point, it should be mentioned that for procedural law, the UK can be split up into three different jurisdictions; England and Wales, Scotland and Northern Ireland. The British private international law is rather fragmentary and can be split up into two regimes, namely the matters within the scope of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (1933 Act) and all other matters falling under common law.[504]

89. The 1933 Act applies equally in England and Wales, Scotland and Northern Ireland and concerns the enforcement of judgments originating from Austria, Belgium, France, Germany, Italy, The Netherlands, Norway, Guernsey, Jersey, Isle of Man, Australia, Canada, Israel, India

[496] Article 10 Choice of Court Convention.
[497] Articles 14 *juncto* 18 Choice of Court Convention; Masters and McRae (n 476) 496.
[498] Article 13 Choice of Court Convention.
[499] Article 12 Choice of Court Convention.
[500] Neil Newing and Lucy Webster, 'Could the Hague Convention bring greater certainty for cross-border disputed post-Brexit? And what would this mean for international arbitration?' (2016) 10 Disp Resol Int'l 105, 115.
[501] Article 14 Choice of Court Convention; Masters and McRae (n 476) 496; Newing and Webster (n 500) 115.
[502] See *supra* 46.
[503] Masters and McRae (n 476) 496-498; Deschuyteneer and Verhellen (n 219) 436.
[504] Adrian Briggs, *Private International Law in English Courts* (OUP 2014) 406-407.

and Pakistan.[505] In other words, the Act was aimed at the enforcement of judgments of foreign countries that gave British judgments a reciprocal treatment on the basis of concluded treaties with the UK.[506] It is unclear whether this Act could be revived after Brexit for matters previously regulated by the EU.[507] After all, the Convention of Brussels stated that it 'superseded' the previously concluded Conventions between the Member States regarding civil and commercial matters.[508] It is not entirely clear whether this statement actually terminated these agreements for good as some seem to suggest.[509] That is to say, BRIGGS states that this Act is still applicable to matters outside of the scope of the Brussels regime.[510] Thus, the agreements were not made entirely obsolete and this could be viewed as an argument in favour of the revival of such arrangements. This view was recently confirmed by a guidance published by the UK Government.[511]

In any case, the Act itself is still rather limited. Not only does it only apply to a limited number of EU Member States, this Act only concerns monetary judgments which have become final.[512] The Act further includes arbitral awards in the definition of 'judgments' which will thus become equally enforceable.[513] To recognise and/or enforce a foreign judgment under this Act, the judgment must be registered in the High Court, Court of Session or the High Court in Northern Ireland.[514] This can then be declined by an order on the basis of the grounds for refusal listed in sections 4 and 5 of the 1933 Act which largely reflect the common law at the time of the adoption and thus provide for a thorough defence.[515] Furthermore, these refusal grounds are generally viewed as being more extensive than those provided under the EU framework.[516] Still, a judgment must be registered within six years of the date of the last judgment in the proceedings for it to be recognisable or enforceable under this regime. Thus, this possibility of enforcement is not unlimited.[517] Lastly, it must be noted here that if a judgment is enforced under this Act, it is the foreign judgment itself which is the subject of the enforcement and not any British homologation judgment.[518]

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[505] Foreign Judgments (Reciprocal Enforcement) Act 1933; Briggs (n 504) 407-408.
[506] Section 9 1933 Act.
[507] Aikens and Dinsmore (n 469) 908; Deschuyteneer and Verhellen (n 219) 435-436.
[508] Article 55 Brussels Convention; 69 Brussels I Regulation; 69 Brussels Ibis Regulation.
[509] Masters and McRae (n 476) 497-498; Deschuyteneer and Verhellen (n 219) 436.
[510] See *supra* 43-49; Briggs (n 504) 407, 459.
[511] Ministry of Justice (n 472).
[512] Section 11 1933 Act; Masters and McRae (n 476) 498
[513] Section 10A 1933 Act; Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edition, Informa 2015) 762.
[514] Sections 6 *juncto* 12 and 13 1933 Act; Judgment of the Supreme Court, *Rubin v. Eurofinance SA, New Cap Reinsurance Corp v. Grant* (joined cases) [2012] UKSC 46 [2013] 1 AC 236, paras. 170-176.
[515] Briggs (n 504) 456; Briggs (n 513) 762; Masters and McRae (n 476) 498.
[516] Sections 4-5 1933 Act; Article 34-35 Brussels I Regulation; Article 45 Brussels Ibis Regulation; Masters and McRae (n 476) 498.
[517] Section 2 1933 Act.
[518] Briggs (n 504) 416, 456.

90. When this Act and the Agreements hereunder concluded do not revive after Brexit, and for the Member States not covered by this regime, the British common law on the recognition and enforcement of foreign judgments will become applicable in case of a no-deal Brexit. While a substantive consideration of British private international law is outside the scope of this dissertation, the basic principles underlying this regime will be pointed out to understand the effect of a no-deal Brexit on the recognition and enforcement of judgments in the UK. The three jurisdictions have each developed their own common law with regard to foreign judgments and these will thus be examined separately.

In England and Wales, the following principles can be found. When the defendant was present within the territorial jurisdiction of the foreign court at the moment the proceedings were started, a judgment from that court can be recognised. This judgment must be final, and the recognition will oblige a defendant to accept the foreign judgment.[519] If the defendant was, however, not within the territorial jurisdiction of the adjudicating court, the jurisdiction may be recognised as binding, and even be granted the force of *res judicata*[520], when the parties agreed between themselves to recognise and enforce the foreign judgment. The basis for this recognition will then be the agreement to accept the foreign judgment. Furthermore, English courts occasionally accept arbitral awards on the same basis.[521] These grounds for recognition can, however, be rejected by a defence in name of the defendant that could be raised by the English court itself. Nevertheless, if there is no such defence, the judgment can be given *res judicata* and no reconsideration in England will be possible anymore.[522] Then, the party who 'won' the judgment has two options. Firstly, he/she can opt to just have the judgment recognised in the UK and prevent further litigation and can thus influence ongoing legal proceedings in England and Wales.[523] Secondly, this party can also choose to have the judgement enforced against the losing party. This means that the defendant would have to do what he was ordered to do by this judgment, as he has not done so yet. However, this procedure requires an *English* judgment and thus requires the party in whose favour the judgment was granted to start litigation in front of a court in England or Wales. So, here it is actually the English judgment containing the obligation laid down in the foreign judgment, that is being enforced.[524] Even more, as the parties have to go through an entirely new procedure, the defendant gets the chance to have a more thorough

[519] Judgment of the Court of Appeal (Civil Division), *Adams v Cape Industries plc* [1990] Ch 433; Briggs (n 504) 462.
[520] *Res judicata* is the doctrine that indicates that a judgment is final and can no longer be appealed. The term is also used to prohibit further litigation between the parties on the same subject. Briggs (n 504) 464. See also Frits Gorlé and others, *Rechtsvergelijking* (Kluwer 2007) 239.
[521] See also Judgment of the Court of Appeal, *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 and Judmgent of the Court of Appeal, *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ. 1668 [2004] 1 Lloyd's Rep. 67; Briggs (n 504) 462-463.
[522] Briggs (n 504) 464.
[523] *Ibid*. 464-465.
[524] *Ibid*. 416, 464.

defence against the enforcement of the judgment as opposed to the EU regime.[525] Still, the defence against the enforcement of the judgment in England and Wales is not unlimited and the available grounds for refusal of enforcement mostly concern manifest invalidities of the foreign judgments, such as breach of the UK's public policy and denial of fair trial.[526]

In essence, the same principles can be found in both Scotland and Northern Ireland and thus do not need an extensive assessment. In short, foreign judgments cannot be directly enforced into Scotland or Northern Ireland either and hence need to be converted into a Scottish or Northern Irish judgment first.[527] In Scotland, the party wishing to request for recognition and/or enforcement of a foreign judgment must apply for a "*decree conform to the decree in the foreign court*".[528] The 'losing' party can, however, still raise a defence against this decree conform, by relying on, for example, the absence of jurisdiction, fraud or a breach of public policy. Other grounds for refusal include the judgment not being final and conclusive, the judgment not being for a definite amount, breach of natural justice, the denial of fair trial and the judgment being contrary to an agreement between the parties.[529] In Northern Ireland, the procedure is more streamlined with the 1933 Act as the judgments can be registered here under common law, provided they abide by similar conditions as in Scotland and England and Wales.[530] The enforcement of the judgments through new proceedings is assessed in light of equal conditions, but it must be kept in mind here that the actual substance of the foreign decision can be checked under these grounds for refusal.[531]

3.2.2. The fate of UK legal documents in the EU after Brexit

91. While the assessment of the national legislation of each of the Member States is outside the scope of this dissertation, it must be clear that, in the other way around, UK judgments will be subject to even greater obstacles. To be more specific, the judgments, acts and court settlements originating from the UK will have to fulfil possibly different conditions in each Member State depending on where they want to be recognised and enforced.[532] As this could entail not only a lengthy preparation to such a procedure, but also include multiple *exequatur* procedures, it is obvious that this could hamper the export of UK documents to the EU as well.[533] Furthermore,

[525] Briggs (n 513) 721-740; Masters and McRae (n 476) 498.
[526] Richard Fentiman, *International Commercial Litigation* (2nd edition, OUP 2015) 628-637.
[527] Douglas Blyth, 'Scotland' in Louis Garb and Lew Julian (eds), *Enforcement of Foreign Judgments – Suppl. 36* (Kluwer Law International 2015) (3) 3; Dispute Resolution Department Cleaver Fulton Rankin Solicitors, 'Northern Ireland' in Louis Garb and Lew Julian (eds), *Enforcement of Foreign Judgments – Suppl. 43* (Kluwer Law International 2018) (3) 4.
[528] Blyth (n 521) 3.
[529] *Ibid*. 7-8.
[530] Dispute Resolution Department Cleaver Fulton Rankin Solicitors (n 521) 4.
[531] *Ibid*.
[532] Deschuyteneer and Verhellen (n 219) 436.
[533] After all, to make UK legal documents enforceable throughout the EU, the parties would have to start 27 different proceedings for enforceability in the different Member States.

as stated above, it makes the UK a less attractive choice of court in jurisdiction agreements and thus makes the UK legal market lose its allure as 'international hub for legal services'.[534]

3.3. What are the main PIL issues a future EU-UK agreement should address?

92. It is clear that a return to national legislation in case of Brexit would be disastrous for the free movement of judgments and acts. That is to say, the UK's legal framework on the recognition and enforcement of foreign judgments is much more restrictive than the free movement created by the EU.[535] Where the EU regime abolished nearly every procedure in the process of recognising and enforcing judgments, authentic instruments as well as court settlements, the UK's regime has been shown to do quite the opposite.[536] To be more specific, not only does the 1933 Act require the registration of a judgment before it can be recognised/enforced, the British common law also requests the issuing of entirely new proceedings.[537] So, there is actually no question of an enforcement of foreign judgments under common law at all, as only the English judgment confirming the foreign judgment will be enforced.[538] Besides these procedural hurdles, the UK's national legislation on the recognition and enforcement of foreign judgments has a rather limited scope. More specifically, only (monetary) judgments can be recognised under the 1933 Act and common law.[539] Moreover, there is no similar national framework for authentic instruments nor for court settlements.[540] In the other way around, equally problematic obstacles to the free movement of legal documents can be noted. To be more specific, in case of a no-deal Brexit, UK judgments will now have to go through 27 different national procedures when the parties want them to be recognisable and enforceable throughout the entire EU.[541]

These restrictive consequences are, however, mitigated by certain international agreements which the UK has ratified (or at least intends to). Both the New York Convention on Arbitration and the Choice of Court Convention show a great mutual trust in the judicial systems of each of the signatories.[542] Hence, the included refusal grounds only concern the most flagrant violations of certain core values, such as the rule of law and right to a fair trial, similar to the EU while the UK's national system allowed for a substantive review of the foreign judgment.[543] Still, these instruments are subject to significant limitations as well. In other words, both regimes do not

[534] See *supra* 2; Ahmed (n 10) 990; Masters and McRae (n 476) 498.
[535] See *supra* 88-90.
[536] See *supra* 43-49, 88-90.
[537] See *supra* 88-90.
[538] See *supra* 90.
[539] See *supra* 88-90.
[540] *Ibid.*
[541] See *supra* 91.
[542] See *supra* 85-87.
[543] See *supra* 45, 48, 86-87, 88-90.

mention authentic instruments and only regulate very specific parts of the free movement of legal documents.[544] Consequently, although these instruments already implement a far-reaching type of mutual recognition, their limited scope only allows them to be temporary or partial solutions with regard to the free movement of legal documents after Brexit.[545]

93. In line with the procedural simplification advocated above, it must be clear that the central notion here, again, is mutual recognition.[546] Any future agreement wishing to at least partially continue the EU regime, must install certain mutual recognition obligations for both the EU and the UK. This way, the UK can maintain its status as 'international legal market' by allowing the EU to export legal documents to the UK 'in an orderly fashion' and *vice versa*.[547] Moreover, this would have the added bonus of creating uniform rules throughout the UK, as the common law is now divided into three different jurisdictions with each their own divergent rules.[548] Still, it is folly to believe that the UK will continue to enjoy the 'fifth freedom' as the EU has repeatedly rejected the idea of 'cherry picking' by the UK.[549] Otherwise put, the EU will not allow the UK to retain its access to some parts of the Single Market, while discarding others. However, as can be deduced from the 2007 Lugano Convention, some watered-down version of free movement of legal documents with an *exequatur* procedure must remain possible.[550] If not, the backlog on the British judicial system could be so tremendous that the recognition and enforcement of EU judgments in the UK might come to a complete halt. Accordingly, the fate of UK judgments within the EU might become equally endangered as 27 different procedures with each their own procedural hurdles and delays will have to be pursued. Consequently, there are enough incentives to implement some type of mutual recognition with regard to judgments, authentic instruments and court settlements.

IV. What are the main obstacles a potential future agreement should tackle?

94. From the assessment made above, it is clear that the UK is somewhat prepared with regard to a no-deal Brexit as there are several regulations in place that have shown to be quite favourable toward foreign legal service providers.[551] Furthermore, the UK has become a signatory to certain agreements that address some specific areas in the free movement of legal documents

[544] See *supra* 86-87.
[545] Masters and McRae (n 476) 496; Newing and Webster (n 500) 115.
[546] See *supra* 53.
[547] See *supra* 2; Tauwhare (n 5) 90.
[548] See *supra* 88-90.
[549] European Parliament Resolution of 14 March 2018 on the framework of the future EU-UK relationship, 2018/2573(RSP), n 12; European Council Guidelines (Art. 50) of 23 March 2018, EUCO XT 20001/18, 3.
[550] See *supra* 51; *infra* 132-134.
[551] See *supra* 68, 75-80.

through a far-reaching mutual trust between the signatories.[552] Nonetheless, these instruments only partially regulate the free movement of legal services *sensu lato* and are thus inadept to continuing the current 'free movement of legal services' existing in the EU.[553] In other words, large areas of the free movement of legal services are not covered by any instruments and remain subject to rather restrictive national regulations. As these uncovered areas concern rather significant parts of the free movement of legal services, it is of the utmost importance that these issues are addressed in a future EU-UK trading deal. Hence, this agreement should at least cover issues such as the ability to practise in reserved areas, the possibility of simplified requalification procedures, the recognition and enforcement of legal documents which are not the result of choice of court or arbitration agreements, and the free movement of persons.[554]

95. Most of these rules were contingent upon a comprehensive system of mutual recognition, so any future agreement must include at least some type of mutual recognition that allows European legal professionals to maintain their current rights and continues the free movement of legal documents.[555] Still, certain issues were addressed through other rules of economic integration. To be more specific, European legal practitioners can move freely throughout the EU without any procedural requirements under the free movement of persons created by the Union while the WTO system contains no such guarantees.[556] Consequently, requirements with regard to entry, stay and work will become applicable to the European legal services suppliers once again, as confirmed by the UK's recently submitted Services Schedule.[557] Any future EU-UK deal should, therefore, also address these issues with regard to European legal service providers currently active in the UK and those wishing to enter the UK after Brexit, besides the implementation of a far-reaching mutual recognition system with regard to legal services that is.

[552] See *supra* 85-87.
[553] See *supra* 81-83, 92-93.
[554] *Ibid.*
[555] *Ibid.*
[556] See *supra* 15-17, 28, 81.
[557] See *supra* 72.

CHAPTER 3. TO WHAT EXTENT HAS THE EU ENABLED TRADE IN LEGAL SERVICES IN OTHER AGREEMENTS WITH THIRD COUNTRIES?

I. Introduction

96. As mutual recognition, along with some other specific problems, has been identified as the missing link in the liberalisation of trade in legal services under the WTO regime, it must now be examined whether these issues can be addressed through an international agreement with the EU.[558] To assess the probability of such a solution, the EU's existing agreements with third countries must be considered in relation to trade in legal services. In other words, as the UK is leaving the Single Market, it will have to conclude an international agreement as a third country when it wants to structure its future trading relations with the EU in a more favourable environment than under the rules of the WTO.[559] As remarked above, the central question here must therefore be how the EU has exported its mutual recognition system to third countries and how legal services benefit from the agreement.[560] The EU's more recent trade agreements have undergone an interesting trend. That is to say, these trade agreements with third countries can now be described as 'deep and comprehensive Free Trade Agreements'.[561] It is exactly those agreements which could facilitate trade in legal services and must therefore be examined.

97. Finally, with regard to trade in legal documents, the EU has put great trust in the judicial systems of some countries through the Lugano Conventions, as discussed above.[562] There are some authors who believe that the UK could ask to be granted the same mutual recognition as those countries after Brexit.[563] Besides this ground-breaking agreement, the EU has also become a signatory to a number of international treaties regulating very specific parts of private international law which are believed to be solid alternatives to an EU-UK agreement.[564] Lastly, there are some who also mention the 2005 Denmark Agreement and its subsequent notices as a valid model for Brexit as well.[565] To the extent that this could help liberalising trade in legal services, including the (free) movement of legal documents, these agreements will be discussed.

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[558] See *supra* 94-95; see also Klamert (n 342) 258-264.
[559] Peter Van Elsuwege, 'Tussen interne markt, douane-unie en vrijhandelszone: op zoek naar een model voor de toekomstige economische relaties tussen de EU en het Verenigd Koninkrijk' (2017) 5 SEW 182, 182.
[560] See *supra* 94-95.
[561] Thystrup and Ünüvar (n 292) 44; Van Elsuwege (n 559) 186.
[562] See *supra* 51.
[563] Masters and McRae (n 476) 488-492; Fitchen (n 469) 430-431; Deschuyteneer and Verhellen (n 219) 434-435.
[564] Fitchen (n 469) 429-430; Deschuyteneer and Verhellen (n 219) 434-435, 436.
[565] Masters and McRae (n 476) 485-488, Aikens and Dinsmore (n 469) 914-915.

II. Trade in legal services regulated by Free Trade Agreements

2.1. The Comprehensive Economic and Trade Agreement concluded with Canada

2.1.1. General remarks

98. As the Comprehensive Economic and Trade Agreement concluded with Canada (CETA) is not only a perfect example of a 'deep' FTA concluded by the EU, but Canada itself is also an example of an advanced economy that applies "*comparable high regulatory standards*", this agreement could be extrapolated to the UK when organising trading relations with the EU after Brexit.[566] The negotiations on this agreement started back in 2009, it was then signed on 30 October 2016 and provisionally entered into force on 21 September 2017.[567] The adoption has, however, not been without its controversies.[568] For instance, this is a mixed agreement where both the European Parliament and the parliaments of each of the Member States have to ratify the instrument. While the Agreement was approved by the European Parliament and entered into force provisionally, Belgium lodged an application for an Opinion of the CJEU on the compatibility of the Investment Court System with EU law.[569] Still, both the Advocate General Bot and the CJEU itself stated earlier this year that this part of CETA's Investment chapter is, in fact, compatible with EU primary law.[570]

99. CETA is an enormous agreement covering most of the aspects of trading relations between the EU and Canada in thirty chapters and several protocols.[571] CETA has not only created an extensive framework regulating the liberalisation of trade in services between the Parties but also regulates certain flanking areas relevant to trade in legal services.[572] In essence,

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[566] Michael Emerson, 'Which model for Brexit?' in Nazaré da Costa Cabral, José Renato Gonçalves and Nuno Cunha Rodrigues (eds), *After Brexit: Consequences for the European Union* (Palgrave Macmillan 2017) (167) 174; Thystrup and Ünüvar (n 292) 44.

[567] Thystrup and Ünüvar (n 292) 42; European Commission, 'Press release – EU-Canada trade agreement enters into force (*Press Release Database*, 20 September 2017) <http://europa.eu/rapid/press-release_IP-17-3121_nl.htm> accessed 2 April 2019.

[568] Thystrup and Ünüvar (n 292) 42-43.

[569] 'Minister Reynders submits request for opinion on CETA' (*Kingdom of Belgium – Foreign Affairs, Foreign Trade and Development Cooperation*, 6 September 2017) <https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta> accessed 2 April 2019.

[570] Opinion of Advocate General Yves Bot of 29 January 2019, *Accord ECG UE-Canada*, Opinion 1/17, ECLI:EU:C:2019:72, para. 272; Opinion of 30 April 2019, *Accord ECG UE-Canada*, Opinion 1/17, ECLI:EU:C:2019:341, para. 245; Court of Justice of the European Union, 'Press Release No 6/19' (*Curia*, 29 January 2019) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-01/cp190006en.pdf> accessed 2 April 2019.

[571] See Comprehensive Economic and Trade Agreement concluded with Canada, *OJ* L 11/23 of 14 January 2017 (CETA); Nanette Neuwahl, 'CETA as a potential model for (post-Brexit) UK-EU relations' (2017) 22 EFAR 279, 283; 'Blind spot: how CETA overlooks legal services' (*The Law Society of England and Wales*, 29 January 2018) <https://www.lawsociety.org.uk/news/documents/ceta-policy-document/> accessed 2 April 2019, 4.

[572] See *supra* 29-36, *infra* 101-108; Thystrup and Ünüvar (n 292) 45.

the four modes of services supply discussed above[573] are dealt with a little differently by CETA. That is to say, CETA deals with the first two modes of Article I:2 GATS in its ninth chapter on cross-border trade in services.[574] So, this chapter deals with the supply of services where only the service moves or where consumers move to another country to receive services.[575] This while CETA creates a separate chapter for the temporary cross-border provision of services, *i.e.* Chapter Ten on Temporary Entry and Stay of Natural Persons for Business Purposes.[576] Issues dealing with establishment, otherwise known as the third mode of supply of services described in Article I:2 GATS, can be found in Chapter Eight on Investment.[577]

100. A general remark which can already be made here, is that the services regulation laid down in CETA already has a significant advantage in comparison to the GATS. More specifically, where most of the important obligations could only be enforced to the extent that WTO Members had taken up commitments in their respective schedules, CETA turned this system around.[578] In CETA, all of the obligations can be enforced between the parties, unless they have made a reservation in the Annexes to the agreement, otherwise known as the 'negative list' approach.[579] Thus, the obligations laid down herein should have a much stronger hold over the Parties than GATS.[580] However, this is all relative to how many and which reservations are laid down concerning legal services, which will be discussed with regard to each of the relevant chapters for legal services.[581] On the point of these reservations, it should also be noted that a difference can be made between the reservations prescribed in Annex I and Annex II. Whereas the reservations made in Annex I are subject to both a standstill and a ratchet clause, those in Annex II are only subject to a standstill clause.[582] This means that besides the reservations made in Annex I no other restrictive measures can be implemented *and* when the Parties do decide to

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[573] *I.e.* cross-border supply of services, consumption abroad, commercial presence/establishment and temporary movement abroad; see *supra* 10, 58.
[574] Chapter Nine CETA; Thystrup and Ünüvar (n 292) 45-46; Julia Magntorn and Alan Winters, 'Can CETA-plus solve the UK's services problem?' (*UK Trade Policy Observatory*, March 2018) <http://blogs.sussex.ac.uk/uktpo/files/2018/03/BP18-10.209199781912044559.pdf> accessed 4 April 2019, 2.
[575] Article I:2 GATS; 'CETA chapter by chapter' (*European Commission*, 24 August 2018) <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 2 April 2019.
[576] Chapter Ten CETA; Magntorn and Winters (n 574) 2; 'CETA chapter by chapter' (n 575).
[577] Article I:2 GATS; Chapter Eight CETA; Thystrup and Ünüvar (n 292) 46; Magntorn and Winters (n 574) 2; 'CETA chapter by chapter' (n 575).
[578] See *supra* 57, 63-65; Pascal Kerneis, 'Le commerce des services et l'AECG: une nouvelle approche pour les engagements des Parties – la liste négative' in Christian Deblock, Joël Lebullenger and Stéphane Paquin (eds), *Un Nouveau Pont sur l'Atlantique: l'Accord économique et commercial global entre l'Union européenne et le Canada* (PUQ 2015) (225) 234-235.
[579] Kerneis (n 578) 234-239; Wilhelm Schöllmann, 'Briefing: international agreements in progress: Comprehensive Economic and Trade Agreement (CETA) with Canada' (*European Parliament*, October 2016) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593491/EPRS_BRI%282016%29593491_EN.pdf > accessed 2 April 2019, 4; Thystrup and Ünüvar (n 292) 48-49; Dominic Webb, 'CETA: the EU-Canada free trade agreement' (*House of Commons*, 20 July 2018) <http://researchbriefings.files.parliament.uk/documents/CBP-7492/CBP-7492.pdf> accessed 2 April 2019, 11-12.
[580] See *supra* 63-65.
[581] The Law Society (n 571) 5.
[582] Articles 8.15, 9.7 CETA; Schöllmann (n 579) 4-5.

liberalise certain aspects falling under the reservations of Annex I they cannot take these liberalisation measures back. Thus, the *status quo* of services liberalisation is "*locked in*".[583] However, with regard to Annex II, no other restrictions can be made besides the reservations listed herein, but the Parties are allowed to revoke certain liberalising measures and thus leaves some "*policy space*" for the Parties.[584] Interestingly, CETA also clarifies certain issues either in its articles of the main Agreement or in the relevant Annexes to each of the Chapters which, in turn, ensures greater legal certainty.[585]

2.1.2. CETA's framework on trade in services

101. With regard to the general framework for the provision of legal services, three chapters of CETA mentioned above must be examined along with the relevant Annexes.[586] Thus, with regard to the establishment of European Lawyers into the UK under a CETA-like agreement concluded with the UK after Brexit, the provisions on investment must be examined.[587] The scope of the Chapter is prescribed in Article 8.2 and lists a few exceptions.[588] The most relevant exception for legal services is the one concerning public services which is rather similar to the WTO-exception and must be interpreted restrictively.[589]

The provision on Market access is also quite similar to the one discussed above under the WTO rules, with the difference that here, these obligations can be enforced in any situation, except those where exceptions were made in the Annexes to the Agreement.[590] As mentioned above, the EU and Canada also provide some clarifications on which measures are viewed consistent with these provisions.[591] CETA further includes a prohibition on performance requirements that hinder the establishment of investments within the territory of the Parties which includes requirements concerning the result that a commercial presence may achieve with regard to exports or the "*level of domestic content*" and some behavioural requirements.[592] With regard to the National treatment between the Parties in Investment, the provision is, again, structured quite similar to Article XVII of the GATS, besides some clarifications.[593] One significant difference here, is the different wording to express 'likeness'. Where GATS uses a general notion of "*like services and service suppliers*", CETA mentions treatment in "*like situations*" concerning "*its own investors and to their investments*" with regard to certain listed investment subjects.[594] Still, it is not clear

[583] Kerneis (n 578) 237-238; Schöllmann (n 579) 4-5; Thystrup and Ünüvar (n 292) 49.
[584] Schöllmann (n 579) 4-5; Thystrup and Ünüvar (n 292) 49.
[585] See *e.g.* on Chapter 9 Article 9.3(2) CETA; Annexes 9-A through C CETA; Thystrup and Ünüvar (n 292) 48.
[586] See *supra* 99-99.
[587] Article I:2 GATS; Chapter Eight CETA; Thystrup and Ünüvar (n 292) 46; 'CETA chapter by chapter' (n 575).
[588] Article 8.2 CETA.
[589] See *supra* 11, 58; Article 8.1 CETA; Schöllmann (n 579) 5.
[590] See *supra* 100; Article 8.4(1) CETA; Kerneis (n 578) 234-239.
[591] Article 8.4(2) CETA; Thystrup and Ünüvar (n 292) 48.
[592] Article 8.5(1)-(2) CETA.
[593] See *supra* 64; Article XVII GATS; Article 8.6 CETA.
[594] Article XVII GATS; Article 8.6(1) CETA; Thystrup and Ünüvar (n 292) 46-47.

whether this wording will give a different connotation to the obligation laid down herein nor whether this will give more clarity with regard to the 'likeness' of services and service suppliers.[595] The same can be said for the MFN treatment laid down in Article 8.7 CETA which ensures that undertakings from the EU or Canada get "*the best available treatment in the partner area*".[596] Furthermore, both obligations are now a sector-wide obligations, except for the reservations made in the annexes and exceptions listed in Articles 8.15 through 8.17.[597] Moreover, the parties are forbidden from requiring undertakings of a Party to appoint a natural person with a prescribed nationality to senior management or as a director on the board of directors.[598]

Chapter Eight also ensures that foreign investors are treated "*fair and equitable*" as well as protects them from unjustified expropriation and allows unobstructed transfers by the covered investors.[599] Additionally, the Chapter on Investment foresees an extensive framework for the resolution of investment disputes between investors and states.[600] An in-depth discussion of Section F of the eighth Chapter of CETA is outside the scope of this dissertation, but is should be noted that the controversy stirred by the Wallonia Parliament concerns exactly this part of the investment chapter.[601] Nevertheless, it should be reminded here that both the Advocate General Bot and the CJEU believe this chapter to be compatible with EU law.[602]

102. In any case, it is clear that the reservations are of the utmost importance for the regulation of services under CETA as these determine the exact scope of the obligations taken up by the Parties, especially with regard to legal services.[603] As this dissertation deals with the export of legal services to the UK, the UK's reservations with regard to CETA will be examined more closely. It must also be noted that besides the reservations made in the Annexes, certain benefits may be denied when the undertaking investing into one of the parties is mainly controlled by a Third Country National or to uphold certain measures with regard to third countries maintaining international peace and security.[604]

When assessing Annex I of CETA, there are first some reservations for all Member States of the EU.[605] Relevant for legal services is the remark that companies formed in accordance with the law of a Member State of the EU and having their registered office, central administration or

[595] Thystrup and Ünüvar (n 292) 47.
[596] Article 8.7 CETA; Thystrup and Ünüvar (n 292) 47; Schöllmann (n 579) 4.
[597] Kerneis (n 578) 234-239; Schöllmann (n 579) 4.
[598] Article 8.8 CETA.
[599] See Articles 8.9-8.14 CETA.
[600] See Articles 8.18-8.45 CETA.
[601] See *supra* 98.
[602] Opinion of Advocate General Yves Bot, *Accord ECG UE-Canada* (n 570) para. 272; Opinion 1/17 of the CJEU, *Accord ECG UE-Canada* (n 570) para. 245.
[603] The Law Society (n 571) 5.
[604] Articles 8.16-8.17 CETA.
[605] Annex I CETA, *OJ* L 11/722-728 of 14 January 2017.

principal place in the EU can enjoy the freedom of establishment while no such treatment is granted to branches/agencies of undertakings established outside the EU. Still, these companies enjoying the freedom of establishment still have to abide by the provisions of Chapter Eight on Investment.[606] Further, the UK has also stated that it wishes to preserve the above-discussed legislation on legal services, as well as the requirements set by professional and regulatory bodies.[607] Moreover, with regard to investment and cross-border trade in services, the UK specifies that commercial presence may be required to practise some UK domestic legal services. Furthermore, when service providers want to offer legal services concerning EU law or the law of the Member States of the EU, they might have to structure their commercial presence into one of the legal forms permitted by national law on a non-discriminatory basis for legal service providers. Additionally, the organisation of the permitted legal forms may be regulated by national law on a non-discriminatory basis as well.[608] It should also be remembered here that these reservations are subject to both a standstill and a ratchet clause.[609] The federal and regional reservations made by Canada remain equally restrictive and often include nationality or residence requirements.[610]

While the UK has made no specific reservations relevant for legal services within Annex II, the EU did.[611] The EU has implemented the same public services exception for investment as discussed under the UK's Services Schedules.[612] Thus, public services can still be subject to public monopolies or to exclusive rights granted to private operators.[613] Besides this exception, the EU also preserves its right to grant more favourable treatment in investment and cross-border trade in services to countries which are a part of the EU internal market or are granted a right of establishment or that have approximated their legislation in economic sectors to the EU's legislation and *vice versa*.[614] To be more specific, the EU preserves this right with regard to the EEA, its Stabilisation Agreements and the EU-Swiss Confederation bilateral agreements.[615] Furthermore, the EU preserves the same right regarding the right of establishment granted to certain microstates through existing or future bilateral agreements with some Member States, including the UK.[616] With regard to legal services provided by notaries or bailiffs, the EU has made a reservation for investment and cross-border trade in services. That is to say, the EU "*reserves the right to adopt or maintain any measure*" with regard to the supply of legal advice,

[606] *Ibid*. *OJ* L 11/722 of 14 January 2017.
[607] See *supra* 68-80; Annex I CETA, *OJ* L 11/864 of 14 January 2017.
[608] *Ibid*.
[609] See *supra* 100; Kerneis (n 578) 237-238; Schöllmann (n 579) 4-5; Thystrup and Ünüvar (n 292) 49.
[610] Annex I CETA, *OJ* L 11/594-722 of 14 January 2017.
[611] Annex II CETA, *OJ* L 11/920-936 of 14 January 2017.
[612] See *supra* 70.
[613] Annex II CETA, *OJ* L 11/920 of 14 January 2017.
[614] *Ibid*. *OJ* L 11/921 of 14 January 2017.
[615] *Ibid*.
[616] *Ibid*.

legal "*authorisation and certification services provided by legal practitioners entrusted with public functions*", including notaries and bailiffs appointed by the government.[617] Here, again, it must be kept in mind that these reservations are only subject to a standstill clause.[618]

103. Chapter Nine of the Agreement covers trade in services where only the service itself crosses borders and where consumers travel abroad to receive such services.[619] In this Chapter, there is a similar exception concerning public services as under Chapter Eight on Investment. Hence, the same remarks as under Chapter Eight can be made here.[620] Furthermore, this Chapter is explicitly excludes the movement of workers between the two parties from its scope.[621] The National treatment and MFN obligations are worded quite similar to the ones discussed under the Investment Chapter, so reference can be made to the remarks on that Chapter.[622] Article 9.6 on Market Access looks similar to the ones discussed under GATS and Chapter Eight but is slightly less extensive as it only contains those quantitative restrictions which are relevant to the market access of cross-border services and consumption abroad.[623] This Chapter does have, however, a more substantive Article on formal requirements. To be more specific, Article 9.4 allows for certain requirements including those requiring a licence, a local agent or address, a driver's license or to speak the national language and certain financial guarantees.[624] Except for the reservation made by the EU concerning the freedom of establishment of EU companies established by Canadians, all of the exemptions in Annex I discussed above also apply to the cross-border trade in legal services.[625] The same can be said for the reservations made by the EU in Annex II, except for those concerning public services and the rights of establishment for certain microstates.[626] Thus, the UK pretty much maintains its existing legislation applicable to legal services covered by this Chapter developed under GATS.

104. Chapter Ten of CETA regulates the temporary provision of services. A first observation that can be made here, is that this chapter largely incorporates the division between the different temporary service providers as foreseen in the EU's and UK's Services Schedules, with some alterations such as the use of the term 'key personnel' and independent professionals.[627] In short, the chapter aims for the facilitation of trade by not refusing or otherwise unreasonably restricting

[617] *Ibid*. *OJ* L 11/922-923 of 14 January 2017.
[618] See *supra* 100; Schöllmann (n 579) 4-5; Thystrup and Ünüvar (n 292) 49.
[619] See *supra* 99; Article I:2 GATS; Article 9.2(1) CETA; Thystrup and Ünüvar (n 292) 45-46; 'CETA chapter by chapter' (n 575).
[620] See *supra* 101.
[621] Article 9.2(4) CETA.
[622] See *supra* 101.
[623] See *supra* 63, 101; Article 9.6 CETA.
[624] Article 9.4 CETA; Panagiotis Delimatsis, 'The evolution of the EU external trade policy in services – CETA, TTIP and TiSA after Brexit' (2017) 20 JIEL 583, 596-597.
[625] See *supra* 102.
[626] *Ibid*.
[627] See *supra* 72; Articles 10.1-10.10 CETA.

the entry of natural persons for business purposes who comply with the relevant immigration requirements.[628] It must be noted here that this Chapter also explicitly excludes the movement of workers between the Parties.[629] Contiguous hereto, the Parties have to provide transparent information on relevant legislation for temporary service providers as well as create clear contact points.[630] It should also be noted that Article 10.6 declares certain reservations from the three annexes as well as some market access, national treatment, MFN and formal requirements obligations to be applicable to this Chapter.[631] Here, a reference can be made to the statements made above on those obligations.[632] In short, subject to certain reservations and other conditions, such as holding the necessary qualifications, laid down in Chapter Ten, the Parties are prohibited from obstructing the temporary entry and stay of the listed professionals.[633] Additionally, the Parties cannot prohibit the temporary employment of intra-corporate transferees and investors of the other Party.[634] Furthermore, no numerical restrictions or economic needs tests are allowed with for key personnel, contractual service suppliers and independent professionals, nor are certain permits for business visitors for investment purposes and short-time business visitors.[635] Moreover, this chapter also significantly prolongs the allowed period of stay for temporary providers of services.[636]

105. Accordingly, these obligations are subject to reservations made in the Annexes to Chapter Ten, which will be reviewed 5 years after the entry into force of the agreement.[637] In short, Articles 10.7 and 10.9 CETA essentially confirm the EU's and UK's Services Schedules as discussed above. In other words, for these Articles to be applicable to business visitors for investment purposes, they must be employed by an organisation which is not a non-profit and can only stay for 90 days within a twelve-month period.[638] Further, the categories of investors and short-term business visitors are not recognised and thus the UK takes up no commitments regarding these temporary service providers.[639] Concerning intra-corporate transferees, including specialists, senior personnel and graduate trainees, these need to be employed by an undertaking which is not a non-profit organisation for the obligations laid down in Articles 10.7 and 10.9 CETA to be applicable.[640] As for Article 10.8 CETA, Annex 10-E expressly allows certain qualification requirements with regard to contractual service suppliers or independent professionals, as long

[628] Articles 10.2-10.3 CETA.
[629] Article 10.2(2) CETA.
[630] Articles 10.4-10.5 CETA.
[631] Article 10.6 CETA.
[632] See *supra* 101-103.
[633] Articles 10.7(1), 10.8(1)-(2), 10.9(1) CETA.
[634] Article 10.7(4) CETA.
[635] Articles 10.7(2)-(3), 10.8(3), 10.9(2) CETA.
[636] See *supra* 72; Articles 10.7(5), 10.8(4), 10.9(3) CETA.
[637] Articles 10.7(1), 10.8(1), 10.9(1), 10.10 CETA.
[638] Annex 10-B CETA, *OJ* L 11/285 of 14 January 2017.
[639] *Ibid*. *OJ* L 11/285, 286 of 14 January 2017.
[640] *Ibid*. *OJ* L 11/285-286 of 14 January 2017.

as these are not a restriction as defined by said Article.[641] Annex 10-E also states that Article 10.8 only applies to legal advisory services "*in respect of public international law and foreign law*" and not EU nor domestic law.[642] When the UK leaves the EU and opts for a CETA-like agreement with the EU for future trading relations, it could be that the reservation for EU law disappears, just as it did in its Services Schedule.[643] In any case, the UK has limited the period of stay for contractual service suppliers and independent professionals to maximum six months per year, unless the contract stipulates a shorter period.[644] With regard to legal services provided by contractual service suppliers or independent professionals under Article 10.8 CETA, the UK adds no extra limitations.[645]

2.1.3. Other relevant chapters for legal services

106. Another relevant chapter for legal services, is Chapter Eleven on the Mutual Recognition of Professional Qualifications. However, this is a quite limited chapter as it does not make the mutual recognition of professional qualifications obligatory. In fact, it only provides for a framework under which eventual Mutual Recognition Agreements (MRAs) must be concluded.[646] This could lead to further delays and less than optimal access to the UK legal market.[647] Furthermore, these MRAs are negotiated at the level of the relevant professional bodies and thus large portions of regulations relevant to legal services will not be addressed due to the government's sole competence on matters such as immigration and company law.[648] Hence, this framework for future MRAs is not a very viable alternative to the EU's current framework on the mutual recognition of professional qualifications.

107. Chapter Twelve on Domestic Regulation ensures that all of the domestic regulations of the parties are "*available, easily understandable and reasonable*".[649] Where the Parties enact licensing or qualification requirements and procedures, they must comply with certain conditions such as transparency and objectiveness.[650] Furthermore, there must be appeal possible where an administrative decision hinders the supply of a service.[651] This is quite similar to the GATS provision on domestic regulations, although the Parties are not obliged to create certain principles.[652] Further, Chapter Sixteen on Electronic Commerce aims to ensure swift e-commerce flows, that is no custom duties or other charges on online services. However, it also pursues a

[641] Annex 10-E CETA, *OJ* L 11/290 of 14 January 2017.
[642] *Ibid*. *OJ* L 11/291, 292 of 14 January 2017.
[643] See *supra* 73.
[644] Annex 10-E CETA, *OJ* L 11/293 of 14 January 2017.
[645] *Ibid*.
[646] Articles 11.1-11.7 CETA; 'CETA chapter by chapter' (n 575).
[647] Neuwahl (n 571) 287; The Law Society (n 571) 6.
[648] The Law Society (n 571) 6.
[649] 'CETA chapter by chapter' (n 575).
[650] Article 12.3(1) CETA.
[651] Article 12.3(6) CETA.
[652] See *supra* 67.

safe online environment, including some guarantees for data protection rights.[653] Also, while CETA does have a Chapter on Competition Policy, this does not seem to include decisions taken by association bodies.[654] Hence, it is unlikely that this will affect codes of conduct regarding legal services in a way that it could streamline these.[655] On the topic of state aid, CETA states that the Parties will ensure that state enterprises, monopolies and enterprises with special rights will not affect competition with private parties negatively nor discriminate against private parties.[656]

108. Furthermore, the Agreement also foresees in regulatory cooperation and consultations with private entities.[657] Here, the legal services sector could try to appeal to both regulators in the EU and UK to create a trade flow across the Channel simulating the free movement of legal services discussed in Chapter 1.[658] The Agreement also ensures that the Parties will promptly publish and provide information on all relevant regulations concerning matters that are covered by CETA.[659] Some transparency obligations are also laid down with regard to administrative proceedings and to possibility to appeal certain decisions.[660] Additionally, the EU and Canada will cooperate to promote transparency in international trade and investment.[661] Finally, CETA also allows the Parties maintain certain measures contrary to CETA when this is necessary for certain public interests which largely correspond with those foreseen under WTO rules.[662]

2.1.4. CETA's suitability as a model for trade in legal services after Brexit

109. While CETA is a clear step forward in comparison with WTO-rules and the respective Schedules of both parties with regard to trade in goods and some services, it just does not manage to live up to the hype for trade in legal services.[663] Although CETA tries to come off as a significantly stronger international agreement than GATS because of its 'negative' list approach, the extensive reservations made to the Agreement invalidate this impression.[664] Especially with regard to legal services, the Agreement does nothing more than to set the current *status quo* in stone.[665] While the reservations made by the UK specifically are subject to a ratchet clause, meaning that any subsequent liberalisation cannot be taken back, it is unclear whether the UK will further liberalise its legal market.[666] Moreover, the EU keeps a tight lid on legal services

[653] The General Agreement on Tariffs and Trade concluded in 1994 in Marrakesh containing the provisions of the General Agreement on Tariffs and Trade of 1947 (GATT); Articles 16.1-16.7 CETA.
[654] Article 17.1 CETA.
[655] Chapter Seventeen CETA.
[656] Articles 18.1-18.5 CETA; 'CETA chapter by chapter' (n 575).
[657] Article 21.8 CETA.
[658] See *supra* 5-53.
[659] Articles 27.1-27.2 CETA.
[660] Articles 27.3-27.4 CETA.
[661] Article 27.5 CETA.
[662] Article 28.3 CETA; Delimatsis (n 624) 598.
[663] Neuwahl (n 571) 290-292; Magntorn and Winters (n 574) 1, 7, 10.
[664] See *supra* 100-105.
[665] See *supra* 102, 105.
[666] See *supra* 100, 102, 105.

provided by notaries or bailiffs by taking this up in its reservations in Annex II which are not subject to a ratchet clause.[667] Other Chapters do not impact legal services any more than GATS already did.[668] More importantly, the Chapter on mutual recognition, while essential for legal service suppliers, holds no hard obligations and only constructs a framework to negotiate future MRAs in. As mentioned above, these types of obligations will only further delay the Brexit process and will most likely hamper access to the UK legal market for European legal professionals.[669] Furthermore, the Agreement does not cover the international movement of labour nor does it simplify any immigration procedures for services providers coming from the EU to Canada or *vice versa*, except for certain limited exceptions in Chapter Ten.[670] Thus, all service providers wishing to provide services on a temporary or permanent basis within the territory of the UK when a CETA-like deal is struck, will still have to comply with extensive immigration requirements.

110. In any case, it is clear that a CETA-like agreement would not add much to the WTO-framework on legal services and might thus not be the most suitable model for a future trade deal between the EU and UK with regard to legal services. Still, it must be kept in mind that the UK legal market is already considered one of the most 'open' markets in the world, so, while there is no free movement of legal services, European legal practitioners are not completely prohibited from providing legal advice within the UK, even in case of a no deal scenario.[671] Furthermore, as the reservations made by the UK retaining the *status quo* are subject to ratchet clause, any decision on account of the UK to further liberalise the English legal market cannot be taken back.[672] Thus, while CETA is overall not suited for legal services after Brexit, the ratchet clause is an interesting instrument to hold the English professional bodies to their promises of liberalisation that they made after the announcement of Brexit.[673]

2.2. The Transatlantic and Investment Partnership negotiated with the United States of America

2.2.1. General remarks

111. Further, the Transatlantic Trade and Investment Partnership (TTIP) with the United States of America (US/USA) must also be examined as it was intended to have the same characteristics as CETA.[674] Still, the negotiations on TTIP have been troublesome to say the least. That is to say, the negotiations started in 2013, but were halted until further notice in 2016 after the fifteenth

[667] See *supra* 102.
[668] See *supra* 106-108.
[669] See *supra* 106; Neuwahl (n 571) 287; The Law Society (n 571) 6.
[670] See *supra* 103-104.
[671] See *supra* 68-80.
[672] See *supra* 100, 102.
[673] See e.g. The Law Society (n 411) 4.
[674] Thystrup and Ünüvar (n 292) 44.

and subsequently last round of negotiations took place in New York.[675] The agreement received further criticism over certain environmental and public health issues, which has been the topic of severe disagreement between the two Parties.[676] All controversies aside, the US still houses the largest market for legal services in the world, so it is interesting to see how this Agreement would have potentially dealt with legal services and if it shows any significant differences compared to CETA, which was discussed above.[677] The Agreement was intended to institutionalise the trading relationship between the EU and US as well as to dramatically liberalise world-wide trade and was eventually split into four sections, *i.e.* Sections on Market Access, Regulatory Cooperation and Rules and a final Institutional Section. [678]

112. Most of the general remarks made regarding CETA can be repeated here as well.[679] More specifically, TTIP is also supposed to contain at least two different Annexes containing reservations made by the Parties where Annex I is subject to a ratchet clause and Annex II is not.[680] However, whereas these Annexes are the consequence of a 'negative list' approach, the EU seems to be more in favour of a 'hybrid' approach to trade in services with the US.[681] Under this approach, the Parties would combine both positive and negative lists.[682] Hence, the EU is proposing a 'negative list' approach for all obligations other than market access and thus creating Annex I and II.[683] Here, the obligations will be enforceable in all cases, except those where

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[675] 'Negotiations and agreements' (*European Commission*, 15 February 2019) <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated> accessed 8 April 2019; Ignacio Garcia Bercero, 'Final press conference of the TTIP 15th round of negotiations' (*European Commission*, 7 October 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1553> accessed 8 April 2019; see also 'Report of the 15th round of negotiations for the Transatlantic Trade and Investment Partnership' (*European Commission*, 21 October 2016) <http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155027.pdf> accessed 8 April 2019.

[676] See 'TTIP leaks' (*Greenpeace*, May 2016) <https://trade-leaks.org/ttip/> accessed 8 April 2019; Arthur Neslen, 'Leaked TTIP documents cast doubt on EU-US trade deal' *The Guardian* (Brussels, 1 May 2016) <https://www.theguardian.com/business/2016/may/01/leaked-ttip-documents-cast-doubt-on-eu-us-trade-deal> accessed 8 April 2019; 'Greenpeace leaks secret TTIP documents as US-EU trade talks spark protest' *Euronews* (*s.l.*, 2 May 2016) <https://www.euronews.com/2016/05/02/greenpeace-leaks-secret-ttip-documents-as-us-eu-trade-talks-spark-protest> accessed 8 April 2019.

[677] See *supra* 2.

[678] Marija Bartl and Elaine Fahey, 'A postnational marketplace: negotiating the Transatlantic Trade and Investment Partnership (TTIP)' in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014) (210) 210-211. See 'EU negotiating texts in TTIP' (*European Commission*, 14 July 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> accessed 7 April 2019.

[679] See *supra* 99-100.

[680] 'Reading guide: publication of the EU proposal on services, investment and e-commerce for the Transatlantic Trade and Investment Partnership' (*European Commission*, 31 July 2015) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153668.pdf> accessed 8 April 2019, 3-4 (EU Reading Guide TTIP).

[681] Articles 2.2, 3.2, 4.2-4.4 'EU's proposal for a text on trade in services, investment and e-commerce' (*European Commission*, 31 July 2015) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf> accessed 5 May 2019 (EU Services Proposal TTIP); EU Reading Guide TTIP (n 680) 2-4; 'Services and investment in EU trade deals: using 'positive' and 'negative' lists' (*European Commission*, April 2016) <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf> accessed 8 April 2019, 6.

[682] Kerneis (n 578) 238-239; 'Services and investment in EU trade deals: using 'positive' and 'negative' lists' (n 681) 6.

[683] EU Reading Guide TTIP (n 680) 3-4.

reservations were made by the parties.[684] Yet, with regard to market access, the EU seems to prefer a positive list just as established under GATS.[685] This would mean that only when the EU and the US have taken up commitments concerning market access of services, this obligation would be enforceable for trade in services between the two Parties.[686] These commitments would then be taken up in Annex III to the Agreement.[687] Still, it should be remarked here that the US does not agree with this approach. In the leaked TTIP documents concerning cross-border trade in services, it is clear that the US wants a 'negative list' approach across the board and does not want to include a positive list for market access.[688]

2.2.2. TTIP's framework on trade in services

113. When the proposed provisions are examined more closely with regard to legal services, it is clear that these do not differ that much from what is laid down in CETA. To be more specific, the general chapter of TTIP regarding definition and scope also explicitly states that the Agreement does not cover the movement of workers or persons and the simplification thereof.[689] With regard to investment little differences can be observed in the EU's proposal besides the 'positive list' approach in the Market Access provision.[690] In other words, not only does the EU propose the same wording in the National Treatment and MFN obligations as under CETA, these obligations essentially have the same scope under TTIP as under CETA, even though the provisions show a slightly different structure.[691] The EU has also proposed several rules on investment protection and a dispute settlement systems for investors in a separate document similar to CETA.[692] In any case, it is clear that, just as under CETA, the actual relevance of these obligations for legal services will be determined by the relevant positive and/or negative lists on the matter.[693] The reservations for investment relevant to legal services in Annex I and II greatly resemble those adopted under CETA and thus also the EU's Services Schedules.[694] In essence, this means that with regard to legal services the *status quo* as established under GATS is maintained by the UK.[695] With regard to the positive list submitted by the EU regarding market

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[684] Kerneis (n 578) 234-239; Thystrup and Ünüvar (n 292) 48-49.
[685] EU Reading Guide TTIP (n 680) 3.
[686] *Ibid.*; 'Services and investment in EU trade deals: using 'positive' and 'negative' lists' (n 681) 3.
[687] EU Reading Guide TTIP (n 680) 3.
[688] 'Transatlantic Trade and Investment Partnership Cross-Border Trade in Services Test Consolidation' (*Greenpeace*, May 2016) <https://trade-leaks.org/ttip/ttip-leak-3/> accessed 5 May 2019, 6.
[689] Chapter 1; Article 1.1(2) EU Services Proposal TTIP (n 681).
[690] Which the US did not agree to in the 12th round of negotiations, as mentioned above. Chapter Eight; Article 8.4 CETA; Chapter II, Article 2.2 EU Services Proposal TTIP (n 681); 'Transatlantic Trade and Investment Partnership Cross-Border Trade in Services Test Consolidation' (n 688) 6.
[691] See *supra* 101; Articles 8.6-8.7 CETA; Articles 2.3-2.4 EU Services Proposal TTIP (n 681).
[692] See Article 8.9-8.45 CETA; 'EU's proposal on investment protection and investment court system' (*European Commission*, 12 November 2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 7 May 2019.
[693] See *supra* 100, 102, 105.
[694] See *supra* 102; 'Services and investment offer of the EU' (*European Commission*, 31 July 2015) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf> accessed 7 May 2019, 3-116.
[695] See *supra* 68-80; 'Services and investment offer of the EU' (n 694) 7-8, 13, 23, 60, 65, 114-115.

access, these seem to copy the EU's Services Schedule *verbatim* with regard to the commitments and reservations relevant for legal services.[696] Thus, even with this hybrid list, TTIP seems to aim for no more liberalisation in the legal market than was already achieved under GATS.

114. As for cross-border trade in services, the EU's proposal on TTIP does not differ much from CETA either, besides its 'hybrid' approach with regard to market access of course.[697] Still, it should also be noted here that, whereas the EU proposes the same wording as under CETA regarding National Treatment and MFN, the US would like to see the wording "*in like situations*" changed to "*in like circumstances*".[698] As these will most likely have the same meaning, this change does not seem all that significant.[699] This chapter does not, however, contain a provision on formal requirements but the issue of licensing and qualifications requirements is dealt with later on in TTIP.[700] The reservations and commitments for market access, again, take a central role and do not seem to differ much than those adopted under CETA.[701] Similarly, the reservations on cross-border trade in services are near-exact copies of those adopted under CETA and the commitments for market access are the same as those adopted by the EU in its Services Schedules under GATS.[702] Hence, these do not manage to liberalise the legal markets of the Parties any further than the GATS either.

115. The chapter on the temporary provision of services is, however, much more limited at this stage.[703] The EU has reserved its right to add more proposals on the matter, so the scope of this chapter is not set in stone (yet).[704] Still, this Chapter greatly resembles the provisions as stipulated in CETA, as it incorporates the same divisions with regard to these service professionals.[705] Nevertheless, it must be noted that the entry and employment of these professionals is subject to the Market Access commitments made for investments and cross-border trade in services.[706] Similar to CETA, this chapter contains prohibitions on numerical quotas and economic needs tests.[707] Furthermore, the Parties reaffirm their commitments under GATS with regard to contractual service suppliers, fashion models and speciality occupations for the US.[708] It is clear that the scope of these obligations are dependent on the commitments and reservations made in

[696] See *supra* 73-74; EU Services Schedule (n 409) 2-13; 'Services and investment offer of the EU' (n 694) 119-122, 126-128.
[697] Article 9.1-9.7 CETA; Articles 3.1-3.6 EU Services Proposal TTIP (n 681).
[698] 'Transatlantic Trade and Investment Partnership Cross-Border Trade in Services Test Consolidation' (n 688) 7.
[699] Thystrup and Ünüvar (n 292) 47.
[700] Article 9.4 CETA; Chapter V EU Services Proposal TTIP (n 681).
[701] See *supra* 102-103; Article 3.5 EU Services Proposal TTIP (n 681).
[702] See *supra* 102; 'Services and investment offer of the EU' (n 694) 7, 13, 23, 60, 65, 114-115, 119-122, 126-128.
[703] Articles 10.1-10.10 CETA; Chapter IV EU Services Proposal TTIP (n 681).
[704] EU Services Proposal TTIP (n 681)14.
[705] See *supra* 104.
[706] Articles 4.2(1)(a)-(b), 4.3(1)(a) EU Services Proposal TTIP (n 681).
[707] See *supra* 104; Articles 4.2(1)(c)-4.2(2), 4.3(1)(b) EU Services Proposal TTIP (n 681).
[708] Article 4.4 EU Services Proposal TTIP (n 681).

Annex III.[709] Here, reference can be made to the remarks made on the previous chapters of the EU's proposal for TTIP.[710] To be more specific, Annex III seems to be a copy of the obligations under both CETA and GATS.[711] Thus, TTIP does not seem to be able to liberalise the market for temporary legal services providers any more than GATS and CETA do.

2.2.3. Other relevant chapters for legal services

116. Furthermore, TTIP contains a separate chapter on regulatory framework.[712] Herein, certain disciplines concerning licensing and qualification requirements and procedures that affect trade in services are instated.[713] These only apply, however, when the Party has undertaken specific commitments.[714] These requirements and procedures must abide by certain conditions which are reminiscent of those that can be found in CETA.[715] At any rate, these conditions ensure greater transparency with regard to licensing and qualification requirements as well as guarantee the possibility of appeal.[716] This chapter also foresees a framework under which a future MRA can be concluded.[717] As this would still need to be concluded, it gives cause for delays and hampered access to the legal market similar to those for legal services under CETA.[718]

117. Chapter VI on Electronic Commerce differs from CETA quite a bit.[719] While CETA also does not allow for custom duties on electronic transmissions, the EU's proposal for TTIP introduces a number of new rules.[720] For instance, it establishes the principle of no prior authorisation which should allow for a swifter electronic commerce between the two Parties.[721] Moreover, the proposal allows for contracts to be concluded via electronic means and ensures legal effect to electronic trust and authentication services.[722] Additionally, the EU also proposes a ban on unsolicited direct marketing communications as well as closer dialogue regarding regulatory issues in e-commerce.[723] Finally, the EU's proposal also foresees in general exceptions to the Chapters discussed above which resemble the exceptions permitted by the GATS and CETA.[724]

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[709] See *supra* 112; Articles 4.2(1), 4.3(1) EU Services Proposal TTIP (n 681).
[710] See *supra* 69-74, 102, 105.
[711] See *supra* 70-74, 104-105; 'Services and investment offer of the EU' (n 694) 119-122, 126-128.
[712] Chapter V EU Services Proposal TTIP (n 681).
[713] Article 5.1(1) EU Services Proposal TTIP (n 681).
[714] Article 5.1(2) EU Services Proposal TTIP (n 681).
[715] Article 12.3 CETA; Articles 5.2-5.3 EU Services Proposal TTIP (n 681).
[716] Articles 5.2-5.3 EU Services Proposal TTIP (n 681).
[717] Articles 5.5-5.12 *juncto* Annex X-A (Guidelines for MRAs) and X-B (Concluded MRAs) EU Services Proposal TTIP (n 681).
[718] See *supra* 106.
[719] Chapter Sixteen CETA; Chapter VI EU Services Proposal TTIP (n 681).
[720] Article 16.3 CETA; Article 6.3 EU Services Proposal TTIP (n 681).
[721] Article 6.4 EU Services Proposal TTIP (n 681).
[722] Articles 6.5-6.6 EU Services Proposal TTIP (n 681).
[723] Articles 6.7-6.8 EU Services Proposal TTIP (n 681).
[724] See *supra* 60, 108; Chapter VI EU Services Proposal TTIP (n 681).

118. Equally, the EU has also made several proposals with regard to regulatory cooperation which could potentially become relevant to legal services in the future.[725] Otherwise put, this could potentially get rid of unnecessary regulatory differences between the two Parties as well as ensure high levels of protection of public policy goals.[726] Besides regulatory cooperation, the EU also proposes certain Good Regulatory Practices which involve the publication of information on the regulatory agenda, consultations of private parties, assessing the impact of a regulation before implementing it and evaluating already issued regulations.[727] This should allow for a better understanding of the Parties' respective regulations and a more effective cooperation.[728]

119. The EU has also made numerous suggestions with regard to competition law.[729] Interestingly, these proposals include the notion of 'decisions by associations of enterprises' which could mean that the rules of conduct adopted by the several professional bodies regulating the legal profession could be caught by these provisions.[730] While this addresses anticompetitive regulations by such bodies, the EU does not propose to harmonise competition law in both Parties' territories.[731] Hence, the provisions could still be given effect differently in either Party and thus not necessarily have the same streamlining effect as described in Chapter 1.[732] In any case, these rules as well as the rules on State-Owned Enterprises and subsidies in essence aim toward an open and effective competition in the markets of both Parties to avoid adverse effects on trade and investment relationships.[733]

2.2.4. TTIP's suitability as a model for trade in legal services after Brexit

120. It is clear from the assessment made above that CETA and TTIP are quite similar, especially with regard to legal services.[734] Thus, the remarks made above on CETA can be repeated here.[735] In other words, TTIP does nothing more than maintain the *status quo* of GATS

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[725] 'EU's proposal on regulatory cooperation' (*European Commission*, 21 March 2016) <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf> accessed 7 May 2019.
[726] 'Regulatory cooperation in TTIP: The benefits' (*European Commission*, 21 March 2016) <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154379.pdf> accessed 7 May 2019, 2.
[727] 'EU's proposal on good regulatory practices' (*European Commission*, 21 March 2016) <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf> accessed 7 May 2019; 'Good regulatory practices (GRPs) in TTIP: An introduction to the EU's revised proposal' (*European Commission*, 21 March 2016) <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154381.pdf> accessed 7 May 2019, 2.
[728] 'Good regulatory practices (GRPs) in TTIP: An introduction to the EU's revised proposal' (n 727) 2.
[729] See 'EU's proposal on competition' (*European Commission*, 7 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153029.pdf> accessed 7 May 2019; 'EU's proposal on state enterprises and enterprises granted special or exclusive rights or privileges' (*European Commission*, 7 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf> accessed 7 May 2019; 'EU's proposal on subsidies' (*European Commission*, 7 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153031.pdf> accessed 7 May 2019.
[730] See *supra* 32-33; Article X.2(1)(a) 'EU's proposal on competition' (n 729).
[731] Article X.5 'EU's proposal on competition' (n 729).
[732] See *supra* 32-33.
[733] Article X.1 'EU's proposal on competition' (n 729); 'EU's proposal on state enterprises' (n 729) 1; 'EU's proposal on subsidies' (n 729) 1.
[734] See *supra* 98-110.
[735] See *supra* 109-110.

and will thus not be a very viable model for any potential deal concerning trade in legal services between the EU and UK after Brexit. Furthermore, the existing trade in legal services does not have the time to wait for the EU and UK to negotiate a new MRA from scratch. Still, the UK legal market is a very flexible one and the applicable ratchet clause could be a possible temporary solution for European legal professionals in the UK after Brexit wanting to act upon the promises made by the relevant professional bodies.[736]

2.3. The Free Trade Agreement and Investment Protection Agreement concluded with Singapore

2.3.1. General remarks

121. While many have discussed the appeal of a trade agreement with Singapore, it is clear that a deep and comprehensive trade deal with Singapore will have significant economic benefits for both Parties.[737] Still, the adoption of the trade and investment agreements with Singapore was not without controversy.[738] Due to the CJEU's findings in *Opinion 2/15* the original Agreement was split into two agreements, namely a Free Trade Agreement and an Investment Protection Agreement (Singapore Agreements).[739] That is to say, the CJEU stated that the EU did not possess exclusive competence with regard to some investment issues.[740] This 'mixed' nature gives rise to the need for ratification by the parliaments of each of the Member States and not just the European Parliament.[741] Accordingly, the European Parliament has ratified both Agreements on 13 February 2019 and the necessary ratifications from the Member States are underway. This allows the FTA to enter into force once Singapore has concluded all necessary formalities.[742] The Investment Protection Agreement will enter into force when all EU Member

[736] EU Reading Guide TTIP (n 680) 3-4.
[737] Deborah Elms, 'Understanding the EU-Singapore Free Trade Agreement' in Annmarie Elijah and others (eds), Australia, *The European Union and The New Trade Agenda* (ANU Press 2017) (35) 40-42; 'Guide to the EU-Singapore Free Trade Agreement and Investment Protection Agreement' (*European Commission*, April 2018) <http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156711.pdf> accessed 10 April 2019, 4-5; 'Strategic benefits: building bridges, shaping globalisation' (*European Commission*, April 2018) <http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156713.pdf> accessed 10 April 2019.
[738] Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore, *OJ* L 267/1 of 25 October 2018.
[739] Directorate-General for External Policies – Policy Department, 'Free Trade Agreement between the EU and the Republic of Singapore – Analysis' (*European Parliament*, 16 March 2018) <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603864/EXPO_STU(2018)603864_EN.pdf> accessed 13 May 2019, 71; Krisztina Binder, 'Briefing: International Agreements in Progress: EU-Singapore trade and investment agreements closer to conclusion' (*European Parliament*, October 2018) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628256/EPRS_BRI(2018)628256_EN.pdf> accessed 10 April 2019, 1.
[740] Opinion of 16 May 2017, *Accord de libre-échange avec Singapour*, Opinion 2/15, ECLI:EU:C:2017:376.
[741] DG for External Policies – Policy Department (n 739) 71.
[742] 'EU-Singapore Agreement' (*European Commission*, 25 February 2019) <http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/> accessed 10 April 2019.

States have consented to the Agreement following their own national procedures of ratification.[743] In any case, the EU-Singapore agreements is an interesting topic to discuss as model FTA for future trading EU-UK trading relations after Brexit. To clarify, while it is a similar deep and comprehensive trade agreement to TTIP and CETA, it differs just enough from those agreements to be treated as a separate issue in this dissertation.[744]

122. The most significant difference to be noted relevant to trade in legal services is the 'positive list' approach the EU utilises in this Agreement.[745] Where CETA uses a 'negative list' approach and TTIP a 'hybrid' one, the EUSFTA opted for the same approach as GATS to structure trading relations between the EU and Singapore.[746] In other words, the obligations regarding trade in services will only be enforceable to the extent that the Parties have taken up commitments to uphold these obligations with regard to certain services sectors.[747] Consequently, whether this agreement includes more liberalisation for trade in legal services than GATS will hugely depend on the commitments laid down in those positive lists. Another remarkable difference is the lack of a MFN obligation. Thus, when the EU gives more favourable treatment to another country, this does not need to be extended to Singapore.[748]

2.3.2. The Singapore Agreements' framework on trade in services

123. Firstly, it should be remarked that the Chapter on services, again, excludes the movement of workers and persons from its scope.[749] Secondly, with regard to the first two modes of supply of services as defined by Article I:2 GATS the provisions largely reflect those under GATS and CETA.[750] To be more specific, its scope is rather similar to CETA and TTIP.[751] Further, the Market Access provision, aside from the 'positive list' approach, appears to be a *verbatim* copy of the one laid down in CETA which also largely drew inspiration from GATS.[752] Interestingly, the EU did not change the language of the National Treatment provision as laid down in Article XVII GATS.[753] In other words, where CETA and TTIP used the wording 'treatment in like situations/circumstances', the EUSFTA still refers to like services and service suppliers.[754] This

[743] 'Press release – Agreement with Singapore set to give a boost to EU-Asia trade' (*European Commission*, 13 February 2019) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1980> accessed 10 April 2019.
[744] See *supra* 96, *infra* 122.
[745] DG for External Policies – Policy Department (n 739) 7, 25.
[746] See *supra* 57, 100, 112; 'Services and investment in EU trade deals: using 'positive' and 'negative' lists' (n 681) 3, 5; Elms (n 737) 47.
[747] Kerneis (n 578) 234-239; Thystrup and Ünüvar (n 292) 48-49; 'Services and investment in EU trade deals: using 'positive' and 'negative' lists' (n 681) 3, 5.
[748] DG for External Policies – Policy Department (n 739) 13-14.
[749] Article 8.1(4) European Commission, 'Annex 1 to the Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore' of 18 April 2018 COM(2018) 196 final (EUSFTA).
[750] See *supra* 57-67, 103.
[751] See *supra* 103, 114; Article 8.3 EUSFTA (n 749).
[752] Article XVI GATS; Article 9.6 CETA; Article 8.5 EUSFTA (n 749).
[753] Article XVII GATS; Article 8.6 EUSFTA (n 749).
[754] See *supra* 101, 114; Article 8.6 EUSFTA (n 749).

will most likely result in the same issues as to the vagueness concerning 'likeness' as under GATS.[755] Further, the Article includes both *de jure* and *de facto* discrimination and describes 'treatment less favourable' as the modification of conditions of competition in favour of the Party's own services and suppliers.[756] The section on cross-border supply of services concludes with a remark on the Schedule of Specific Commitments of the respective Parties.[757] This Article also subjects the Schedules to a stand-still obligation, but not a ratchet clause.[758] This means that the liberalisation of trade in services is 'locked-in', but future liberalisations can be taken back by the Parties.[759]

Thirdly, the same remarks can be made regarding establishment, albeit that the list of prohibited measures for market access is considerably longer. Furthermore, this list seems to be a near-exact copy of the one laid down in Article XVI GATS. Where CETA and TTIP also included certain investment issues in the chapter regulating the third mode of supply from Article I:2 GATS, these issues can be found in the Investment Protection Agreement concluded with Singapore.[760] This Agreement should allow EU investors to establish themselves more easily in Singapore and *vice versa*.[761]

Finally, the general framework on trade in services also includes the temporary provision of services by nationals of one Party in the territory of the other Party.[762] This section reflects those discussed under CETA and TTIP and thus largely incorporates the division of temporary service providers as laid down in the EU's Services Schedule.[763] In short, when the Parties have undertaken commitments with regard to establishment, the investors of the other Party must be allowed to employ certain key personnel and graduate trainees. These employees are allowed to provide services for the period established in Article 8.14.[764] Further, the Parties are prohibited from establishing numerical quotas or economic needs tests by way of discriminating against these temporary services providers.[765] Subject to the commitments and reservations made concerning cross-border provision of services and the establishment of service providers, must

[755] See *supra* 59, 64.
[756] Articles 8.6(2)-(3) EUSFTA (n 749).
[757] Article 8.7 EUSFTA (n 749).
[758] Article 8.7(2) EUSFTA (n 749).
[759] See *supra* 100.
[760] European Commission, 'Annex to the Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part' of 18 April 2018 COM(2018) 194 final (EUSIPA).
[761] 'Guide to the EU-Singapore Free Trade Agreement and Investment Protection Agreement' (n 737) 13-14.
[762] See Articles 8.13-8.15 EUSFTA (n 749).
[763] See *supra* 104-105, 115; Articles 8.14-8.15 EUSFTA (n 749).
[764] Article 8.14 EUSFTA (n 749).
[765] Article 8.14(2) EUSFTA (n 749).

the Parties allow the temporary entrance and stay of business services sellers for a period of maximum ninety days per year.[766]

124. Still, it is clear that once again the Schedules of Specific Commitments are of the utmost importance to determine the exact scope of the obligations under the EUSFTA.[767] When comparing the three different annexes (cross-border supply, establishment and temporary provision of services) with the EU's and UK's existing Schedules under GATS, the text of the Agreement should be taken into account as well. From this assessment, it is clear that the framework for legal services as established by the EUSFTA does not differ that much from what was established under GATS. More specifically, the horizontal section largely locks in the current *status quo* of services liberalisation under GATS as foreseen by the EU's Services Schedule.[768] Focusing more on legal services across all of the modes of supply, the UK's commitments are largely kept intact as well, aside from the slightly different layout regarding temporary provision of services that is.[769] Yet, it must be noted that while there are no qualification requirements stipulated regarding legal services, these nonetheless apply.[770] As for the commitments made by Singapore, significant concessions were made with regard to legal services, but the existing UK rules under GATS are still more flexible than Singapore's commitments.[771] Thus, the rather restrictive rules discussed above will most likely remain applicable, even when a EUSFTA-like agreement is concluded after Brexit.[772]

2.3.3. Other relevant chapters for legal services

125. Additionally, the EUSFTA also provides for a framework on the recognition of qualifications that allows the Parties to require certain qualifications, but the relevant professional bodies are encouraged to negotiate recommendations on the mutual recognition of professional qualifications.[773] These recommendations could then be transformed into an MRA concluded between the Parties.[774] In any case, the Parties engage themselves to provide any information on this Chapter upon request as well as to create certain enquiry points to do so.[775] Just as under CETA and TTIP, it takes time to negotiate such MRAs and thus could possibly cause extra delays and less favourable access to the UK legal market after Brexit.[776] Similarly, the EUSFTA also has

[766] Article 8.15 EUSFTA (n 749).
[767] See *supra* 57, 63-65, 68.
[768] EU Services Schedule (n 409) 2-11; European Commission, 'Annex 5 to the Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore' of 18 April 2018 COM(2018) 196 final, 6-9, 74-85, 158-160 (EUSFTA Annex).
[769] See *supra* 73-74; EUSFTA Annex (n 768) 10-11, 95-97, 161-163.
[770] EUSFTA Annex (n 768) 3.
[771] See *supra* 68-80; EUSFTA Annex (n 768) 196-203.
[772] See supra
[773] Article 8.16 EUSFTA (n 749).
[774] Article 8.16(4) EUSFTA (n 749).
[775] Article 8.17 EUSFTA (n 749).
[776] See *supra* 106, 106, 116.

a separate chapter on domestic regulation ensuring that licensing and qualification requirements and/or procedures do not constitute barriers to trade by subjecting them to certain disciplines and conditions.[777] Further, the section on Electronic Commerce in EUSFTA is a little bit more limited than those of CETA and TTIP but essentially aims for a swift e-commerce and more cooperation on the matter between the two parties.[778] In other words, this does not affect trade in legal services as the e-Commerce Directive does.[779] Finally, the EUSFTA foresees in similar exceptions based on certain overriding interests to the rules on services as GATS, CETA and TTIP.[780] The Agreement also includes a chapter on competition and related matters. Here, the EUSFTA lays down certain principles on antitrust (including decisions taken by associations of undertakings), mergers and undertakings granted exclusive rights or public monopolies.[781] As the WTO does not regulate competition law, this could be seen as an improvement.[782] Furthermore, the Chapter also tackles certain trade-related issues of subsidies.[783] Still, it must be noted that this chapter is not as strong as it seems, because it is not enforceable. To be more specific, it is excluded from dispute settlement and mediation mechanism and can thus not be forcibly imposed upon either of the Parties.[784] Finally, it can be noted here that the Parties have also included transparency obligations similar to the previously discussed agreements.[785]

2.3.4. The Singapore Agreements' suitability as models for trade in legal services after Brexit

126. Regrettably, it seems that the EUSFTA is not able to accommodate the UK's need for a swift transition and seemingly "*frictionless*" trade in legal services with the EU and *vice versa* after Brexit either.[786] While the EUSFTA does foresee in a possibility to negotiate mutual recognition between the relevant professional bodies and subsequently the Parties, it remains highly focused on discriminatory measures.[787] As shown above, this approach still allows a lot of restrictions with regard to trade in legal services, even if such requirements abide by the rules laid down in the EUSFTA.[788] Additionally, as the timetable of Brexit is rather limited, there might not be enough time for the relevant professional bodies regulating the legal profession within the EU and UK to negotiate a satisfactory recommendation and have it converted into a MRA. This can further

[777] Articles 8.18-8.20 EUSFTA (n 749); DG for External Policies – Policy Department (n 739) 13.
[778] See *supra* 107, 117; Articles 8.57-8.61 EUSFTA (n 749).
[779] See *supra* 36.
[780] Article 8.62 EUSFTA (n 749).
[781] Articles 11.1-11.4 EUSFTA (n 749).
[782] DG for External Policies – Policy Department (n 739) 15.
[783] Articles 11.5-11.10 EUSFTA (n 749).
[784] Article 11.14 EUSFTA (n 749); DG for External Policies – Policy Department (n 739) 15.
[785] Articles 13.1-13.8 EUSFTA (n 749).
[786] See *supra* 109-110, 120, 123-125; Tauwhare (n 5) 89.
[787] See supra 123-125.
[788] See *supra* 14.

impede access to the UK legal market for European legal service providers.[789] Moreover, the Agreement explicitly excludes the movement of workers and persons between the Parties from its scope and thus does not provide for simplified immigration rules.[790] Hence, a EUSFTA-like agreement would come nowhere near the desired continuation of mutual recognition.[791]

2.4. Other relevant agreements concluded by the EU

127. The Law Society of England and Wales also mentions the FTA the EU concluded with South Korea as the "*only example of an EU FTA that pushed for further opening of the legal services markets*".[792] While it is true that the EUKFTA foresees in additional commitments regarding legal services from South Korea, the UK's regulation of the legal profession remains more open to FLC's.[793] Accordingly, the Law Society also mentions the regulatory changes in several EU Member States due to the Agreement.[794] Admittedly, the regulatory changes regarding FLC's in, for example, France are interesting for UK lawyers wishing to emigrate to the EU after Brexit, but it implies little change for the European legal service suppliers wishing to enter the British legal market.

Another agreement that could be relevant after Brexit is the Trade in Services Agreement which is currently being negotiated by no less than 23 WTO Members, including the EU.[795] This copies GATS to a large extent but aims to improve the liberalisation of trade in services.[796] In essence, the Agreement would contain key provisions such as a standstill obligation and a ratchet clause and it would adopt a 'hybrid' approach where a positive list is used for market access and a negative list for national treatment.[797] The documents which have been published so far largely resemble those in CETA and TTIP.[798] Nonetheless, the future of this Agreement is still uncertain as the negotiations were put on hold after 21 negotiation rounds in November 2016.[799] Moreover, while the outline of the Agreement has been established, the level of services liberalisation has so far not been settled upon by the Parties.[800] With regard to legal services, it is clear that the EU

[789] See *supra* 106.
[790] Article 8.1(4) EUSFTA (n 749).
[791] See *supra* 94-95.
[792] The Law Society (n 571) 5.
[793] Korea's Schedule of Specific Commitments, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *OJ* L 127/6 of 14 May 2011, 1254-1256 (EUKFTA).
[794] The Law Society (n 571) 5.
[795] Delimatsis (n 624) 620.
[796] 'In focus: Trade in Services Agreement (TiSA)' (*European Commission*, 14 July 2017) <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 11 April 2019.
[797] Delimatsis (n 624) 621.
[798] 'The EU publishes TiSA position papers' (*European Commission*, 22 July 2014) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1133> accessed 11 April 2019; 'TiSA leaks' (*Greenpeace*, September 2016/November 2016) <https://trade-leaks.org/tisa/> accessed 11 April 2019; Delimatsis (n 624) 621.
[799] 'In focus: Trade in Services Agreement (TiSA)' (n 796); Eeckhout (n 21) 14.
[800] Delimatsis (n 624) 622.

at least wants to keep a tight lid on legal services intertwined with public functions such as those provided by notaries and bailiffs.[801]

128. Still, the EU has not kept its favourable regulation of legal services limited to its own Member States. As shown above, there are some states that enjoy the same legal regime as the EU Member States. These states all participate in the EU Single Market and thus show a large level of convergence with EU legislation.[802] This framework is successful as it tackles procedural divergence regarding the regulation of trade in services *and* utilises mutual recognition to make movement across borders to provide services as easy as possible. Furthermore, it includes the much-contested free movement of persons as well as flanking policies such as competition law. To date, these are the only countries which enjoy this regime. As the EU previously indicated, it will not allow cherry picking in the internal market, so it seems unlikely that the UK will be able to conclude an FTA as discussed above while combining it with the same access to the internal market for legal services as the EEA-countries and Switzerland.[803] If the Parties wish to continue their current trade in legal services, they must either choose one of the current options available, *i.e.* EEA or the Swiss agreements, or make a *sui generis* agreement that includes a ready-made recognition/convergence component which none of the above discussed agreements contain.[804]

III. Extending mutual recognition of legal documents to third countries

129. An area where mutual trust is, however, indispensable to facilitate trade in legal services, is the recognition and enforcement of judgments, authentic acts and court settlements in civil and commercial matters. Over the years, the EU has aimed to create a 'free movement of judicial acts' between its Member States which, in turn, boosted the UK's legal market attractiveness as an international hub for legal services.[805] That is to say, as mentioned above, the British legal market is an interesting choice for Choice of Court Agreements, as UK judgments, due to the UK's membership of the EU, enjoy a 'free movement' within the EU.[806] Furthermore, the EU legislation on this type of mutual recognition also allows citizens to pursue legal proceedings in their own Member States and have those EU judgments executed against persons established within the UK, without any form of additional proceedings.[807]

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[801] 'TiSA - Schedule of specific commitments and list of MFN exceptions' (*European Commission*, 21 October 2016) <http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155096.pdf> accessed 11 April 2019, 6.
[802] See *supra* 50.
[803] European Parliament Resolution of 14 March 2018 on the framework of the future EU-UK relationship, 2018/2573(RSP), para. 12; European Council Guidelines (Art. 50) of 23 March 2018, EUCO XT 20001/18, 3.
[804] For EUSFTA this was confirmed in *Opinion 2/15*.
[805] See *supra* 2; Ahmed (n 10) 990.
[806] *Ibid*.
[807] See *supra* 43-49.

The EU has exported some form of this mutual recognition to a limited number of third countries through some international agreements, widening the scope of legal services that can be offered within the UK.[808] The two foremost examples on this matter are the 2007 Lugano Convention and the Hague Convention on Choice of Court Agreements. Both are concluded by the EU with third countries and extend some type of mutual recognition of judgments to these countries. These are interesting to discuss as potential models, but they both have an interesting advantage over the FTAs discussed above. To be more specific, the UK can choose to become an independent signatory to both treaties where it could not do so with CETA, TTIP and EUSFTA.[809] Besides these agreements, there are some other agreements that the different EU Member States have concluded themselves. A prominent and relevant example here is the (already discussed) Convention of New York on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958.

3.1. Relevant international agreements

130. Both the New York Convention on Arbitration and the Choice of Court Convention have been discussed above, so reference can be made to the remarks made there.[810] Now that the UK has, on the one hand, ratified the Choice of Court Convention and will implement it as an independent Party from 1 November 2019 on, it is absolutely certain that the provisions herein will apply between the EU and UK, even if they are not able to conclude a deal by 31 October 2019.[811] The New York Convention on Arbitration, on the other hand, already applies between the EU Member States besides the EU instruments, as most of these exclude arbitration from their scope.[812] Still, both of these instruments only partially address the issue of 'free movement of legal documents' and can thus be no more than partial or interim solutions.[813]

131. It should be remarked here that a new international agreement is being negotiated on the recognition and enforcement of judgments in civil and commercial matters within the auspices of the Hague Conference on Private International Law (HCCH).[814] The draft convention currently has a wider scope than the Choice of Court Convention as it does not exclude proceedings with consumers or employees and it is not limited to choice of court agreements.[815] The current draft of said agreement provides for recognition and enforcement of judgments of one Party in all other

[808] See *supra* 2; Ahmed (n 10) 990.
[809] Aikens and Dinsmore (n 469) 915; Fitchen (n 469) 429
[810] See *supra* 48, 86-87.
[811] See *supra* 86.
[812] See *supra* 48.
[813] See *supra* 92.
[814] Jhangiani and Amin (n 478); Deschuyteneer and Verhellen (n 219) 436.
[815] Article 2 'Draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters' (*HCCH*, May 2018) <https://assets.hcch.net/docs/9faf15e1-9c36-4e57-8d56-12a7d895faac.pdf> accessed 7 May 2019 (Draft Judgments Convention).

Parties to the convention on the basis of the grounds listed in Article 5.[816] Furthermore, the recognition and/or enforcement of a judgment can only be refused on the basis of the grounds which greatly resemble the overriding interests from the Choice of Court Convention and Brussels regime.[817] Similarly, court settlements should fall under the same regime as judgments.[818] Procedurally, the draft agreement seems to copy the provisions of the Choice of Court Convention.[819] In any case, it is clear that when the UK and EU do not manage to implement an agreement continuing the current Brussels regime between them after Brexit, this Convention could potentially create an acceptable fall-back position for both parties, provided that it is concluded in the near future.

3.2. The 2007 Convention of Lugano

132. Besides these agreements, the EU has concluded another, much more far-reaching agreement providing for a similar mutual recognition of legal documents to the Brussels regime. To be more specific, by concluding the 2007 Lugano Convention, the EU has extended the Brussels I Regulation to all of the EFTA states, except for Liechtenstein.[820] It is believed that this Convention would cease to apply to the UK after Brexit because it was concluded by the EU and not the Member States.[821] Still, it is suggested that, in principle, the UK could ascend to the agreement as an independent signatory after Brexit.[822]

133. While the 2007 Lugano Convention is not as flexible as the Brussels Ibis Regulation, it still aims to achieve a 'free movement' of judgments and authentic instruments, where the previously discussed agreements only concern a partial mutual recognition of judgments.[823] Furthermore, its scope is much wider than both of the discussed Hague Conventions.[824] Not only does the 2007 Lugano Convention have an extensive framework on jurisdiction in PIL cases, it provides for an extensive mutual recognition system with regard to judgments as well as authentic instruments.[825] The recognition of legal documents happens, in principle, *de plano* under the Lugano Convention and can only be refused in the situations where one of the listed grounds of refusal apply.[826] These grounds include, similar to the Hague Conventions, public policy, procedural fairness and reconcilability with previous judicial decisions between the same

[816] Article 5 Draft Judgments Convention (n 815).
[817] See *supra* 45, 87; Article 7 Draft Judgments Convention (n 815).
[818] Article 12 Draft Judgments Convention (n 815).
[819] See *supra* 87; Articles 13-15 Draft Judgments Convention (n 815).
[820] Lehmann and Zetzsche (n 477) 1025.
[821] Aikens and Dinsmore (n 469) 905.
[822] Articles 70(1)(c) *juncto* 72(3) 2007 Convention of Lugano; Aikens and Dinsmore (n 469) 912; Fitchen (n 469) 431; Deschuyteneer and Verhellen (n 219) 434-435.
[823] See *supra* 130-131; Domej and Oberhammer (n 255) 743.
[824] See *supra* 86-87, 130-131; Article 1 2007 Convention of Lugano.
[825] Title II-III 2007 Convention of Lugano.
[826] Article 33(1), 34 2007 Convention of Lugano.

parties.[827] Furthermore, when a decision is based on a jurisdiction found contrary to certain articles of the Convention, the Parties to the Lugano Convention are not obliged to recognise the judgment.[828] Unlike the Brussels regime, the Lugano Convention adds several more grounds to base the refusal of recognition of judgments upon.[829] In other words, the recognition or enforcement may be refused when the jurisdiction leading to the decision was based upon a ground that differs from those in the Convention.[830] Moreover, the recognition can also be refused when the State is not bound by the Convention on a particular matter and the defendant is domiciled in that non-EU State or an EU Member State, unless national law foresees in the recognition (or enforcement) for such legal documents.[831] Additionally, the Convention of Lugano prohibits the review of substance of the judgments just as the Hague Convention and Brussels regime do.[832] Finally, it also allows the staying of proceedings for recognition when a judgment is still open for appeal.[833] These grounds for refusal were generally interpreted quite restrictively by the CJEU under the Brussels regime.[834] Pursuant to Article 1(1) of Protocol 2 on the Uniform Interpretation of the Lugano Convention, the Parties must "*pay due account*" to the jurisprudence of the CJEU on the Brussels regime.[835] Thus, while there is no absolute obligation for non-EU Members to adhere to CJEU jurisprudence, it can still exert a significant influence on the application of the refusal grounds within the UK.[836] Furthermore, to preserve the free movement as established by the Brussels regime both the EU and UK would do well to continue a similar interpretation under the Lugano Convention as under the Brussels Regulations after Brexit, if the UK were to become an independent Party that is.

As for the enforcement of judgments under the Lugano Convention, the Parties must enforce enforceable judgments when these have been declared enforceable through *exequatur*.[837] Still, judgments must also be registered to be able to be enforced within the UK.[838] As found under the Brussels I Regulation stipulated above, the *exequatur* procedure is an extra procedural hurdle, but it runs quite smoothly in all EU Member States and is found not to completely obstruct the free movement of legal documents.[839] Moreover, the CJEU has tried to interpret the Brussels I

[827] Article 34 2007 Convention of Lugano.
[828] Article 35 2007 Convention of Lugano.
[829] Gaudemet-Tallon (n 221) 541-542.
[830] Article 64(3) 2007 Convention of Lugano.
[831] Article 67(4) 2007 Convention of Lugano.
[832] See *supra* 45, 87; Article 36 2007 Convention of Lugano.
[833] Article 37 2007 Convention of Lugano.
[834] See *supra* 45.
[835] Article 1(1) Protocol 2 2007 Convention of Lugano; Aikens and Dinsmore (n 469) 911; Ahmed (n 10) 990-991; Ahmed Al-Nuemat and Abdullah Nawafleh, 'Brexit, Arbitration and Private International Law' (2017) 10 J Pol & L 116, 117-118; Deschuyteneer and Verhellen (n 219) 434.
[836] Pascal Grolimund and Eva Bachofner, 'Protokoll 2' in Anton K Schnyder (ed), *Lugano-Übereinkommen zum internationalen Zivilverfahrensrecht: Kommentar* (Dike 2011) (1142) 1167-1168; Ahmed (n 10) 990-991; Deschuyteneer and Verhellen (n 219) 434-435
[837] Article 38(1) 2007 Convention of Lugano.
[838] Article 38(2) 2007 Convention of Lugano.
[839] See *supra* 46.

Regulation and the 2007 Lugano Convention as implementing a free movement of such documents.[840] The enforcement of such documents can only be refused based upon the same grounds (and interpretation thereof) as those for recognition.[841] In essence, authentic instruments and court settlements are to be treated the same.[842]

134. Anyhow, it should be clear that the Lugano Convention has more potential for continuing the mutual recognition forged by the Brussels regime than the other agreements. In other words, as it is based on the Brussels I Regulation, that already aimed for a free movement of legal documents, it creates a much more far-reaching and flexible framework than either one of the discussed Hague Conventions or the New York Convention on Arbitration.[843] Yet, it should be noted here that all of the Parties to the Lugano Convention are participants of the Single Market.[844] Thus, it is unclear whether the EU would extend such an agreement to the UK after it leaves the Union. Still, as soon to be ex-Member State, the UK is in a special position which could potentially allow them to join in on the agreement, even though they might not necessarily be a participant in the EU Internal Market. Another possible disadvantage for the UK's accession to the agreement is the continued influence by the CJEU.[845] While it is true that the UK is not exactly obliged to adhere to such jurisprudence, the CJEU's influence is undeniable.[846] Because the UK seems to be so desperate to get rid of the power of the CJEU, it is unclear whether they would be willing to consider an accession to the Lugano Convention. Furthermore, the UK has, as a common law country, some divergent instruments in its judicial system which can cause some issues with rights of defence that are taken in high regard within the Brussels and Lugano regime.[847] Accordingly, in absence of a uniform interpretation by the CJEU or an obligation to recognise English judgments, there is still a real risk of a consistent refusal to recognise or enforce certain English judgments.[848] A last hurdle the UK will have to face when deciding to ascend to the agreement, is the required unanimity between the current Parties to the Lugano Convention on the UK's accession. As stated above, the UK will have to make a convincing case

[840] See *supra* 45-46.
[841] Article 45 2007 Convention of Lugano.
[842] Articles 57-58 2007 Convention of Lugano.
[843] See *supra* 48, 86-87, 130-131.
[844] See *supra* 50-51.
[845] Masters and McRae (n 476) 491-492.
[846] See *supra* 133.
[847] *Gambazzi* case (n 235) para. 35; Opinion of Advocate General Juliane Kokott of 7 August 2018, *C.E. and N.E.*, Joined Cases C-325/18 PPU and C-375/18 PPU, ECLI:EU:C:2018:654, paras. 143-151; Judgment of 19 September 2018, *C.E. and N.E.*, Joined Cases C-325/18 PPU and C-375/18 PPU, ECLI:EU:C:2018:739, para. 90; David Ndolo and Margaret Liu, 'Revisiting anti-suit injunctions post Brexit: some lessons from the US' (*Kluwer Arbitration Blog*, 23 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/23/revisiting-anti-suit-injunctions-post-brexit-lessons-us/> accessed 7 May 2019; Margaret Liu and David Mwoni Ndolo, 'A departure from West Tankers after Brexit? Anti-suit injunctions in the UK directed to parties in EU national courts' (2018) 21(1) IJEL 55, 56-57.
[848] Deschuyteneer and Verhellen (n 219) 434.

for the existing Parties as to why it deserves to be granted such an extensive mutual recognition of legal documents.[849]

3.3. The 2005 Denmark Agreement

135. Finally, this assessment cannot be concluded without mentioning the 2005 Denmark Agreement. As Denmark has opted out from the home affair and justice pillar of the EU, the Brussels regime was made applicable in its territory through an international agreement, namely the 2005 Denmark Agreement.[850] The changes made by the Brussels Ibis Regulation were subsequently implemented on the basis of a notice given by Denmark to the EU in 2012.[851] For the continuation of the free movement of legal documents after Brexit, this seems to be the most favourable option. More accurately phrased, not only does it ensure great legal certainty as to the continuation of the EU PIL regime, but it also incorporates the significant changes made by the Brussels Ibis Regulation which the 2007 Lugano Convention does not contain.[852] Furthermore, the existing Denmark arrangements could be used as a model to create an equally flexible arrangement for the UK.[853] Still, this kind of far-reaching mutual recognition also has some significant drawbacks. In other words, not only would this also require a continuation of the CJEU's influence over PIL matters in the UK, it would also prohibit the UK from concluding international agreements which may alter the Brussels Ibis Regulation without the EU's approval.[854] Moreover, the UK might not get access immediately to subsequent alterations of the EU regime on the free movement of legal documents, nor can it take part in the legislative process.[855] Lastly, there are some political disadvantages to this regime as well, as this agreement could be used to force the UK to agree to other concessions.[856] Thus, while this is clearly the best option for the UK when it wishes to retain its access to the free movement of legal documents after Brexit, the significant disadvantages to this regime make it uncertain whether this can even become a realistic option for the UK. Similar to the Lugano Convention, this Agreement concerns a participating Member of the EU Single Market, thus it is unclear whether the EU would even be willing to grant the UK such favourable treatment.[857]

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[849] Article 72(1)(c) 2007 Convention of Lugano; Masters and McRae (n 476) 489.
[850] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 299/62 of 16 November 2005 (2005 Denmark Agreement); Masters and McRae (n 476) 485-486.
[851] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 79/4 of 21 March 2013.
[852] See *supra* 44-46; Masters and McRae (n 476) 486.
[853] *Ibid*.
[854] Aikens and Dinsmore (n 469) 914-915; Masters and McRae (n 476) 487-488.
[855] *Ibid*.
[856] Masters and McRae (n 476) 487.
[857] See *supra* 134.

IV. Can the European legal service providers retain their access to the British legal market under the discussed agreements?

136. A short answer to this question would be no, they cannot as the EU (including the UK) seems to be unwilling to extend mutual recognition with regard to legal services to these third countries any more than under GATS. Still, if the EU and UK manage to conclude an MRA under such a framework for legal services, the assessment of such agreements could become more favourable.[858] Brexit's timeframe is therefore of the absolute essence to discuss whether such an agreement could be feasible at all.[859] Furthermore, it must be kept in mind that the UK legal market is already quite flexible and open.[860] Still, even with a Mutual Recognition Agreement, none of the discussed FTAs even comes remotely close to the free movement of legal services created by the EU. That is to say, none of the agreements regulate the international movement of labour beyond guarantees for labour standards nor do they regulate more flexible immigration procedures for services providers.[861] As stated above, the only agreements to come close to the EU's framework on legal services are those concluded with third-country-participants of the Single Market. These agreements, *i.e.* the EEA and the numerous bilateral agreements concluded with Switzerland, do have the significant advantage that they give the exact same access to the EU's legal market to citizens originating from these countries as EU citizens.[862]

137. The same cannot be said with regard to the mutual recognition of legal documents. While it is clear that the EU has been more generous with extending mutual trust to third countries here, the most favourable options also concern participants of the Single Market and thus the EU never truly extends the Brussels Ibis Regulation to actual third countries.[863] Furthermore, where the UK has made the definitive decision to ascend to the Hague Convention, a British accession to the 2007 Lugano Convention or the conclusion of a Denmark-like agreement are not certain at all.[864] After all, both agreements are accompanied by significant drawbacks such as the CJEU's far-reaching influence, the risk of having British judgments refused more easily by EU Member States and continued political influence from the EU.[865] Finally, it should be noted that none of the agreements include the other instruments, such as the European Enforcement Order.[866] Thus, even for the recognition and enforcement of legal documents, nothing is certain yet and it seems to be impossible for the current EU regime to be continued without EU membership.

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[858] See *supra* 98-128.
[859] See *infra* 146.
[860] See *supra* 68-80.
[861] See *supra* 98-128.
[862] See *supra* 128.
[863] See *supra* 129-135.
[864] See *supra* 86, 132-135.
[865] See *supra* 134-135.
[866] See *supra* 47.

CHAPTER 4. TO WHAT EXTENT HAVE THE BREXIT NEGOTIATIONS ACCOMODATED TRADE IN LEGAL SERVICES?

I. Introduction

138. Pursuant to Article 50 TEU, the UK notified the EU of its intention to withdraw from the Union on 29 March 2017, meaning that the UK was to leave the Union with or without a deal on 29 March 2019.[867] At the time of writing this dissertation, that plan has been put to bed as the UK has been granted an extension until 31 October 2019.[868] The negotiations are still on-going and were split into two different agreements, *i.e.* the actual withdrawal agreement and an agreement on the future relationship between the EU and the UK.[869] So far, the EU and UK have only managed to provisionally conclude a withdrawal agreement and a fourteen-page long political declaration on the future relations.[870]

139. It must be noted here, however, that the Withdrawal Agreement and political declaration have been rejected twice by meaningful votes in the British House of Commons and the Withdrawal Agreement alone was dismissed a third time by the British Parliament at the end of March.[871] To solve this deadlock, the British Parliament has held two rounds of indicative votes on the future relationship they wished to pursue with the EU. Here, all of the proposals were, once again, defeated by the Member of Parliaments, making it unclear what kind of an agreement Britain wishes to pursue with the EU.[872] Yet, most of the majorities in the second round had only very small margins, showing the division between the Members of Parliament on what is best for the country.[873] As these might still receive enough support in subsequent votes, the options with the closest margins will be assessed to the extent of their relevance. Additionally, while there is still considerable uncertainty on Brexit's future, Prime Minister May seems adamant to keep her deal as is and negotiate with the opposition on the current form of the withdrawal deal without renegotiating with the EU.[874] It is therefore still relevant to look at the Withdrawal Agreement and Political Declaration.

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[867] May (n 1); Koutrakos (n 1) 475; DG Justice and Consumers (n 472) 1.
[868] Special meeting of the European Council (Art. 50) Conclusions of 10 April 2019 (n 3) para. 2.
[869] EU Select Committee (n 8).
[870] See the Withdrawal Agreement (n 19); Political Declaration (n 19).
[871] 'Brexit: MPs reject May's EU withdrawal agreement' *BBC News* (*s.l.*, 30 March 2019) <https://www.bbc.com/news/uk-politics-47752017> accessed 7 May 2019; Wheeler and Seddon (n 19).
[872] 'What's next for Brexit? No Commons majority in indicative votes' (*UK Parliament*, 27 March 2019) <https://www.parliament.uk/business/news/2019/march/whats-next-for-brexit-house-of-commons-holds-indicative-votes/> accessed 8 May 2019; 'House of Commons holds second round of indicative votes' (n 32).
[873] *Ibid.*
[874] Wheeler and Seddon (n 19).

II. Withdrawal Agreement

140. It should first be noted that the Withdrawal Agreement foresees a transitional period to be implemented after the withdrawal of the UK, starting on the date of the entry into force of the Withdrawal Agreement and ending on 31 December 2020.[875] In this period, all EU legislation will remain applicable to the UK, except for several instruments listed in Article 127 of the Withdrawal Agreement.[876] Further, the Withdrawal Agreement regulates not only the actual withdrawal issues for the UK, but also some other hot topic issues such as citizen's rights, separation issues such as the free movement of goods placed on the market before the withdrawal and intellectual property issues.[877] Moreover, the Withdrawal Agreement also contains protocols on Northern Ireland and Gibraltar which have proven to be contentious issues in the UK.[878]

141. The Withdrawal Agreement also aims to regulate the rights of EU citizens within the UK and *vice versa*.[879] As pointed out above, the European 'free movement' of legal services is closely related to citizen's rights, especially the aspects dealt with in the Withdrawal Agreement.[880] Hence, a discussion of the relevant provisions herein can show how Brexit will exactly affect this free movement of legal services. This part of the Withdrawal Agreement basically extends the free movement of persons for EU citizens already residing in the UK to movements made after the withdrawal date and hence, extensively simplifies their movements between the UK and EU after Brexit.[881] This also includes the respective family members of EU or UK citizens wishing to continue making use of their right of residence.[882]

Besides the free movement of persons, the Withdrawal Agreement also preserves the freedom of establishment for self-employed persons from the UK in the territories of other Member States and *vice versa* that have established themselves in EU/UK territory before the end of the transition period.[883] Moreover, the EU and the UK have taken up a standstill obligation with regard to the professional qualifications. To be more specific, any recognition and ongoing procedure for recognition of such qualifications will remain valid under EU law, as long as the procedure was started, or recognition was given, before the end of the transition period.[884] With regard to legal services, this concerns any recognition of professional qualifications given in lieu of the

[875] Article 126 Withdrawal Agreement (n 19).
[876] Article 127 Withdrawal Agreement (n 19).
[877] See the Withdrawal Agreement (n 19).
[878] See the Withdrawal Agreement (n 19), 293-498; John Campbell, 'Brexit: What is the Irish border backstop?' *BBC News* (s.l., 5 April 2019) <https://www.bbc.com/news/uk-northern-ireland-politics-44615404> accessed 14 May 2019.
[879] Part 2 Withdrawal Agreement (n 19).
[880] See *supra* 8-42.
[881] Articles 10 *juncto* 13-23 Withdrawal Agreement (n 19).
[882] Article 10(e) Withdrawal Agreement (n 19).
[883] Articles 10 *juncto* 27 Withdrawal Agreement (n 19).
[884] Articles 27-29 Withdrawal Agreement (n 19).

Recognition of Professional Qualifications Directive as well as the admission to the profession of lawyers pursuant to Article 10 of the Lawyers' Establishment Directive.[885] Accordingly, these rights are lifelong or until the citizens involved cease to meet the conditions for said rights.[886] With regard to the other three modes of services supply (*i.e.* cross-border provision, consumption abroad and temporary movement abroad), the Withdrawal Agreement does not contain any transitory provisions meaning that these will no longer enjoy free movement after 31 December 2020.[887] Additionally, the Withdrawal Agreement equally extends the free movement of workers and the accommodating rights to certain workers after the UK's withdrawal.[888] Finally, the Withdrawal Agreement addresses the future coordination of social security systems for EU citizens in the UK and *vice versa* after Brexit.[889]

The Withdrawal Agreement also contains certain transitory provisions concerning the free movement of certain legal documents within the EU. That is to say, as long as the judgment is given in legal proceedings initiated before the end of the transition period, or the authentic instruments or court settlements are drawn up or registered before the end of the transition period, they will continue to be recognised and enforced according to the various EU instruments.[890]

142. What does this mean for the EU's export of legal services to the UK after Brexit? In essence, it means that certain acquired rights cannot be undone by the UK's withdrawal from the EU. Hence, already established legal practitioners will be able to maintain their establishment within the UK.[891] Furthermore, European legal service providers who had their qualifications recognised or started the proceedings pursuant to the Recognition of Professional Qualifications Directive before 1 January 2021, can still rely on such qualifications within the UK.[892] Likewise, European lawyers who have been admitted as a lawyer to one of the professional bodies within the UK pursuant to Article 10 of the Lawyers' Establishment Directive, can remain admitted as fully qualified UK lawyers.[893] Additionally, legal services providers who already exercised their right to free movement to the UK, can continue making use of the favourable EU provisions on the free movement of persons after 1 January 2021.[894] Legal practitioners who provide legal services in the UK through the free movement of workers can also continue to make use of the EU provisions after Brexit.[895] Thus, legal services providers already providing legal services

[885] Article 27(1)(a)-(b) Withdrawal Agreement (n 19).
[886] Article 39 Withdrawal Agreement (n 19).
[887] See Withdrawal Agreement (n 19); Articles 126-127 Withdrawal Agreement (n 19).
[888] Article 24 Withdrawal Agreement (n 19).
[889] Articles 30-36 Withdrawal Agreement (n 19).
[890] Article 67(2) Withdrawal Agreement (n 19).
[891] Articles 10 *juncto* 27 Withdrawal Agreement (n 19).
[892] Article 27(1)(a) Withdrawal Agreement (n 19).
[893] Article 27(1)(b) Withdrawal Agreement (n 19).
[894] Articles 10 *juncto* 13-23 Withdrawal Agreement (n 19).
[895] Article 24 Withdrawal Agreement (n 19).

within the UK on a permanent basis either as a qualified self-employed person or as a worker can continue to do so. Also, legal documents created before the end of the transition period, or judgments from proceedings predating 1 January 2021, will still be recognised and enforced pursuant to the Brussels regime and other relevant instruments discussed in Chapter 1.[896] In any case, it is clear that the temporary provision of legal services, the cross-border provision of legal services or consumption abroad of legal services, will no longer be possible under the flexible EU regime after 31 December 2020.[897] After this date, the provision of legal services will be governed by the WTO rules or any potential deal concluded between the EU and the UK.[898] Moreover, the provision of reserved legal services by EU lawyers established in the UK who did not requalify as a UK lawyer will no longer be possible after the transitional period, as no transitional arrangements were foreseen with regard to these lawyers.[899] Still, all of these acquired rights are contingent on the ratification of the Withdrawal Agreement, which, at the moment, cannot be guaranteed.

III. The Political Declaration

143. Besides the Withdrawal Agreement, the EU and UK have also published a "*political declaration setting out the framework for the future relationship*".[900] Herein, both Parties commit themselves to conclude an "*ambitious, broad, deep and flexible partnership*" across several listed issues in the near future.[901] Yet, any future agreement is not necessarily limited to the subjects discussed in the Political Declaration. More specifically, other areas of cooperation may be added, but it must at least be based on a "*balance of rights and obligations*" with respect for the principles of each of the Parties.[902] This means, for example, that the autonomy of the EU's decision-making process must be respected as well as its core principles, including the indivisibility of the four freedoms. Besides, any future agreement must also aim to respect the sovereignty of the UK as well as the protection of its internal market.[903] Further, the Political Declaration also recognises the high level of integration reached between the EU and the UK and although the UK cannot receive rights or obligations equal to those of EU membership in any future agreement, such an agreement must still remain ambitious and be open for evolution.[904]

144. Both Parties remain committed to safeguard certain core values such as the rules-based international order, the rule of law, workers' rights and consumer and environmental protection

[896] See *supra* 47; Article 67(2) Withdrawal Agreement (n 19).
[897] See *supra* CHAPTER 1, 141; Articles 126-127 Withdrawal Agreement (n 19).
[898] See *supra* 3, 53, 95.
[899] See *supra* 9-14, 23, 75-80; Withdrawal Agreement (n 19).
[900] See the Political Declaration (n 19).
[901] Point 3 Political Declaration (n 19).
[902] Points 3-4 Political Declaration (n 19).
[903] Point 4 Political Declaration (n 19).
[904] Point 5 Declaration (n 19).

as well as to effective multilateralism.[905] Likewise, the Parties intend to implement a framework allowing the UK to remain a participant in certain EU programmes and to continue dialogue with the Union.[906] With regard to their future trading relationship, both parties confirm their devotion to conclude an ambitious, far-reaching, but balanced deal, encompassing a free trade area and cooperation in sectors of mutual interest.[907] Still, they also reiterate that this deal should respect the integrity of the Single Market and the UK's internal market. Furthermore, the Parties retain the competence to regulate in accordance with certain public policy objectives and thus will foresee in adequate general exceptions.[908]

Focusing more on trade in (legal) services, the Parties intend to build on the recently concluded EU FTAs and accordingly, reflect some of the typical provisions used therein. Thus, the commitments of the Parties for a future trade deal mostly refer to the standard provisions discussed above.[909] Additionally, the Parties also address other issues relevant to legal services, such as professional qualifications, but these statements remain too general to make useful observations on the matter.[910] It must be noted here, however, that if the Parties would actually conclude an FTA in the likes of CETA, TTIP and the Singapore Agreements, the EU's export of legal services to the EU would not be accommodated at all.[911] Hence, a more far-reaching agreement is required to enable an export of legal services from the EU to the UK in a manner that somewhat resembles the current EU regime on the matter. Interestingly, the Political Declaration does foresee the establishment of mobility arrangements where the previously discussed agreements did not.[912] Thus, the Political Declaration already has a significant advantage over the discussed FTAs for legal services, as a simplified framework for the mobility of persons (and workers) is of the utmost importance for the export of legal services from the EU to the UK.[913] Lastly, the future relationship must also guarantee an open and fair competition between the two. Besides this statement, the Political Declaration contains no other clarifications on the matter, so that no observations can be made on its possible impact upon legal services.[914]

IV. Indicative votes

145. As mentioned above, the UK House of Commons has also held two indicative votes on the type of partnership they want with the EU. Although none of the options were able to gain a majority, most of the margins in the second vote were so small that some options remain pertinent

[905] Points 2 *juncto* 6-7 Political Declaration (n 19).
[906] Points 11-15 Political Declaration (n 19).
[907] Point 17 Political Declaration (n 19).
[908] *Ibid.*; Point 18 Political Declaration (n 19).
[909] See *supra* CHAPTER 2, CHAPTER 3; Points 29-36 Political Declaration (n 19).
[910] See Points 30, 36 Political Declaration (n 19).
[911] See *supra* 136.
[912] See *supra* 98-128; Points 50-58 Political Declaration (n 19).
[913] See *supra* 15-17, 28.
[914] Point 79 Political Declaration (n 19).

for this assessment.[915] Hence, this leaves two options that could possibly be relevant for a short assessment in light of legal services. Otherwise put, while the vote on the possibility to put the eventual Brexit deal to a public vote only had a close margin, it does not represent a separate option for Brexit that is relevant for this assessment.[916] Thus, this will not be discussed here.

The first option that had a rather close margin was a Customs Union, possibly in the likes of the one concluded with Turkey.[917] This is, however, not a satisfactory option for the EU's export of legal services to the UK as this does not cover services nor the free movement of workers.[918] As shown above, the regulations on both subjects are at the core of the EU's framework for legal services.[919] When this would not be continued or addressed in a Customs Union-like agreement, the export of legal services (and legal documents) would have to be conducted under WTO rules, which are not all that favourable towards legal services.[920]

The second option has been dubbed as 'Common Market 2.0' and this option would, contrary to the Customs Union, constitute a much more favourable solution for legal services than any of the previously discussed agreements.[921] To be more specific, in this option, the UK would become a part of EEA through an accession to EFTA and the proposal also includes the conclusion of a Customs Union.[922] Some arguments used in favour of this option, are the possibility for limited restrictions to free movement rights under the EEA 'Safeguard Clause', the end of the CJEU's jurisdiction as the UK would fall under the jurisdiction of the EFTA Court and the decrease in required payments.[923] Although an in-depth examination of the proposal is outside the scope of this dissertation, it is clear that it is an interesting option for the EU's export of legal services to the UK. In other words, while the Customs Union is not as relevant for legal services, the continued participation in the Single Market through EEA Membership is. After all, the EEA countries are the only third countries that have gained access to both the EU framework on legal services and the free movement of legal documents and are thus treated the same as EU Member States.[924] This option would therefore be satisfactory in ensuring that European lawyers maintain their rights and that the UK remains an interesting destination for legal services as its legal documents enjoy some form of free movement throughout the EU.

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[915] See *supra* 139; 'What's next for Brexit? No Commons majority in indicative votes' (n 872); 'House of Commons holds second round of indicative votes' (n 32).
[916] 'House of Commons holds second round of indicative votes' (n 32).
[917] *Ibid*.
[918] Emerson (n 566) 173-174; European Union Committee (n 21) 29, 32.
[919] See *supra* CHAPTER 1.
[920] See *supra* CHAPTER 2.
[921] 'House of Commons holds second round of indicative votes' (n 32).
[922] Reality Check team, 'Brexit: What is Common Market 2.0?' *BBC News* (*s.l.*, 25 March 2019) <https://www.bbc.com/news/uk-politics-47639946> accessed 9 May 2019.
[923] Better Brexit, 'Common Market 2.0: A Brexit deal everyone can support' <http://betterbrexit.org.uk/wp-content/uploads/2019/03/Common-Market-2.0.pdf> accessed 9 May 2019, 7-12.
[924] See *supra* 50-51, 128, 132-134.

V. To what extent have the Brexit negotiations accommodated trade in legal services?

146. In all honesty, the Brexit negotiations have not accommodated trade in legal services so far, as no deal has been accepted yet. Still, the proposals made by the Parties do have some potential. That is to say, the Withdrawal Agreement and certain documents published by the Parties contain interesting transitional provisions which maintain the respect for certain acquired rights in both the free movement of legal services and legal documents.[925] This, in turn, could allow for a smoother transition from the EU regime to the third country regimes discussed above. Moreover, some of these arrangements have been taken up on a unilateral basis, meaning that this will apply regardless of whether the Brexit deal is accepted or not.[926] Furthermore, the transitional period provided by the Withdrawal Agreement could give the EU and UK some much-needed time to negotiate certain MRAs as foreseen by the FTAs discussed above.[927] Regrettably, the Political Declaration remains too vague at this point to give definitive answers to this question. At any rate, it remains highly based on the FTAs concluded by the EU, which are not very accommodating for legal services, and does not mention the free movement of legal documents.[928] Finally, there are some interesting solutions being proposed in the British Parliament which could potentially maintain the current regime on legal services and documents, but thus far, these have also not been able to garner enough support with the Members of Parliament to become a viable solution for post-Brexit trade in legal services.[929]

[925] See *supra* 140-142; Regulation 92 The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479; DG Justice and Consumers (n 472) 2-3.
[926] *Ibid.*
[927] See *supra* 106, 116, 125, 140-142.
[928] See *supra* 98-128, 144.
[929] See *supra* 145.

CHAPTER 5. BREXIT: THE EU'S EXPORT OF LEGAL SERVICES TO THE UK IN JEOPARDY?

147. Although the EU has not managed to completely harmonise the regulation of the legal profession, it has significantly simplified the cross-border provision of legal services through the essential principle of 'mutual recognition'. After all, European legal practitioners are able to move across borders and provide legal services in any Member State of the EU with little procedural obstacles standing in their way. Moreover, cross-border litigation has been considerably facilitated as well due to the creation of the free movement of legal documents. By utilising these flexible regimes, the UK has been able to become a truly international centre for legal services and has likewise become an attractive destination for the EU's export of legal services.

148. Yet, by voting to leave the Union, the UK's position as the biggest European legal services market appears to be 'on the ropes'. That is to say, even though the UK somewhat mitigates the negative effects of the WTO rules by implementing a flexible framework for foreign legal services providers wishing to practise in the UK, the international rules on trade in legal services remain very weak and highly dependent on the will of the different States. Adding fuel to the flames, the national legislations applicable to the recognition and enforcement of legal documents appear to be so restrictive that cross-border litigation could come to a complete halt. Still, it should be noted here that both the EU and the UK have taken up some transitional commitments with regard to cross-border litigation, thereby preventing a cliff-edge scenario. Furthermore, the UK has started ratifying certain agreements as an independent Signatory, in addition to some already existing international agreements, which provide for partial solutions on the matter of free movement of legal documents. Nevertheless, this no-deal scenario could significantly hamper the EU's export of legal services to the UK, as most of these extenuating instruments only provide for partial solutions concerning the free trade in legal services and none of these rules incorporate an enforceable mutual recognition obligation.

149. Regrettably, the current Brexit negotiations do not seem that promising for the provision of legal services either. More specifically, while the transitional arrangements of the Withdrawal Agreement could give the parties some much-needed time to negotiate certain beneficial arrangements for legal services and guarantee the rights of lawyers already practising permanently in the UK, the Political Declaration remains rather restrictive. In other words, not only is the Political Declaration quite vague, it also remains highly based on the recently concluded Free Trade Agreements between the EU and certain third countries which do not accommodate trade in legal services any more than the WTO does. After all, the Free Trade Agreements which were discussed as models for a future Brexit deal do nothing more than

maintaining the *status quo* for legal services established under GATS. Still, it would be wrong to describe the Political Declaration as 'completely useless'. In other words, the Political Declaration does foresee in mobility arrangements where none of the discussed Free Trade Agreements did, even though these are essential to trade in legal services. Additionally, there are some proposals in the British Parliament which could be instrumental in securing the continuation of the current export of legal services from the EU to the UK. However, as these have not been able to garner enough support amongst the Member of Parliaments, it is unclear whether these will ever become realistic options for the future of Brexit.

With regard to the recognition and enforcement of foreign legal documents, there are similar transitional provisions to be found in the Withdrawal Agreement. Additionally, the international agreements already in force as well as the models for future negotiations paint a much more optimistic picture in comparison to those on legal services. To be more specific, while some agreements already in place only provide for partial solutions, other agreements already concluded by the EU are much more comprehensive and come very close to the current EU regime for the free movement of legal documents. Still, as these agreements also have significant disadvantages for the UK and omit certain EU arrangements, it is also unclear whether these could be realistic models for a future Brexit deal.

150. To conclude, Brexit will most definitely jeopardise the EU's export of legal services to the UK, but this does not necessarily equate to a 'flash knockdown' resulting in an eventual knock-out. In other words, while both the no-deal options and the current negotiations are not all that favourable towards legal services, they do provide for certain partial solutions with regard to exporting legal services or legal documents. Unfortunately, the discussed models for future negotiations are not that accommodating for the EU's export of legal services. Still, there are some other models which are promising for trade in legal services, *i.e.* the EEA, Swiss Agreements, 2007 Lugano Convention and 2005 Denmark Agreement, but all of these involve countries that are Members of the EU's Single Market. Thus, when the UK leaves the Single Market, it is unclear whether the UK would be granted access to such favourable agreements. Nevertheless, although the export of legal services from the EU to the UK will be affected by Brexit, some good preparation, such as the proposed transitional arrangements, can still ensure a somewhat smoother Brexit that maintains the rights of European legal service providers in the UK. Finally, it must be noted that this story is one filled with 'what if's', as the EU and UK have still not managed to conclude a deal. Hence, it must be kept in mind that this assessment is not definitive until a deal is struck on the future of Brexit.

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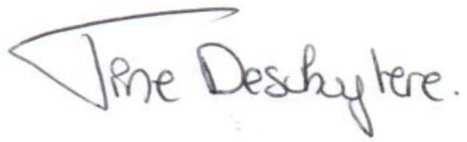

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