The (Non)Liberalization of Trade in Legal Services in the EU under the WTO GATS and FTAs

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ABSTRACT

This article explores the extent to which the European Union has opened up its lucrative legal services market, noting that there are several aspects of the delivery of legal services which are missing from international commitments, either at the multilateral level through the World Trade Organization's General Agreement on Trade in Services (GATS) or through bilateral Free Trade Agreements (FTAs). This incomplete liberalization can be contrasted with that which is available to legal professionals within the EU itself as a feature of the Single Market and the Lawyers Establishment Directive. The reasons for the incomplete liberalization of legal services to international providers is the result of a number of factors, including the de-centralized nature of the regulation of the legal profession across the EU and the reality that many matters of crucial interest to the legal profession are not included in FTAs, such as rights of audience before the EU courts. The approach to legal services by the EU illustrates both the advantages engendered by the Single Market and the limits of FTAs as instruments of economic liberalization.

KEY WORDS

Legal services, WTO, GATS, FTAs, MRAs

I Introduction

Legal services are a sector of significant economic size and importance in many countries. It is also one of the most tightly controlled, both for domestic and international suppliers. The EU's legal services market had total revenues of US $169.3bn in 2018 with a compound annual growth rate of 2.6 per cent between 2014 and 2018. The legal services market across the EU is largely driven by the UK, Germany and France, all of which are dominated by large multinational law firms.[1] This aspect of the market, coupled with the international nature of so

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[1] 'Legal Services in Europe' Market Research, www.marketresearch.com (accessed August 2019)

many aspects of legal services, especially those which relate to commercial issues,[2] is one of the reasons that access to the EU legal services market for foreign legal services providers should be a vital objective of states seeking to establish or enhance international commitments from the EU in trade agreements.

The vital role that legal services play in underpinning economic activity in general is tempered by the fact that the legal services industry is among the most restricted of all sectors of the economy in many jurisdictions, primarily due to the vital role lawyers are perceived to play in the proper functioning of democratic societies governed by the rule of law. Some indication of the extent of these constraints may be seen in the OECD's Trade Restrictiveness Index.[3] The regulation of the legal profession has historically been the purview of national, and in many cases sub-national governments. The enabling legal framework with which lawyers establish an expertise is the responsibility of the state, much as it is implemented and enforced by an independent and competent judiciary, effective counsel and diligent investigative authorities.[4] Together these laws establish a monopoly for individuals qualified under each jurisdiction's rules, prohibiting unqualified suppliers from offering legal services and crucially for the purposes of this article, delineating the extent to which individuals from outside the jurisdiction can enter the domestic market to supply legal services.

The EU's common internal market provides the most liberalized regime for trade in legal services in the world for those within it, far exceeding that of the World Trade Organization (WTO)'s General Agreement on Trade in Services (GATS) and indeed any other preferential arrangement established under a Free Trade Agreement (FTA) in effect anywhere in the world. Indeed it would appear as though the liberalization of legal services has played an important role in the integration of the EU's internal market as expressed in Article 26(2) of the Treaty on the Functioning of the European Union, and indeed of the larger EU project of economic integration itself. The capacity of legal practitioners qualified in one EU Member state to practice, essentially unhindered, in another one, has led to the fluidity of commerce across borders and further, to the transmission of legal concepts which are embedded within what has become EU law as understood by the EU Commission and interpreted by the Court

[2] See further, D Collins, *The Public International Law of Trade in Legal Services* (Cambridge University Press, 2018)

[3] MG Grosso, H Nordås, F Gonzales, I Lejárraga, S Miroudot, 'OECD Trade Policy Papers: Services Trade Restrictiveness (STRI) Legal and Accounting Services' Paris, Iss. 171, (4 November 2014)

[4] N Katangaza and C Thurston Smith, 'Lawyers Without Borders: The Case for Legal Services Liberalisation' 20:3 International Trade Law and Regulation 45 [2014] at 46

of Justice of the EU (CJEU). However, legal services providers from outside of the EU seeking access to this market face extensive barriers. Even where FTAs covering legal services have been concluded by the EU, access for foreign lawyers is limited. This non-liberalization is partially due to the heavily regulated nature of the legal profession itself, meaning the qualification and registration requirements expected of legal professionals found in any society. It is also the result of the manner in which the regulation of legal services has been approached across the EU, with no centralized framework or even direct harmonization of professional rules in the sector.

This article will set out the nature and extent of trade in legal services commitments which the EU has made multilaterally in general, through its Member States, pursuant to the GATS, noting that this coverage, while complex, is far from complete. The next section of this article will explore how the EU has approached the liberalization of legal services through various recent FTAs, observing that the coverage here is also limited. Flowing from this the article will explain how the principle of mutual recognition is applied to enhance market access commitments in the legal services sector, with modest effect, through Mutual Recognition Agreements (MRAs) which are often associated with FTAs. The article will draw attention to the key gaps in coverage for foreign legal professional seeking access to the EU's market, despite international treaties which notionally cover this sphere of economic activity.

II The Regulation of Legal Services in the European Union

The EU's legal framework governing legal services is based on the principle of mutual recognition, an aspect of EU law which guarantees that a product sold in one EU country can be sold in any other one, a concept which applies equally to services. Mutual recognition in the context of professional qualifications means that the qualifications and diplomas obtained in one Member State have to be recognised as such in another member state. The principle has been set out with regard to services by the CJEU, notably in *Vlassopoulou*.[5] It is also reflected in the Directive on Mutual Recognition of Professional Qualifications (MRPQ).[6]

For legal services, there is no common rule or regulator at the EU level, unlike for example in sectors such as financial services. EU Member States retain the sovereignty to

[5] C-340/89 Vlassopoulou (7 May 1991)
[6] Directive 2005/36/EC (7 September 2005)

regulate domestically on the provision of legal services in their territory. In attempt to create a single internal legal services market, however, the EU established two directives concerning the requirements for legal professional qualifications. The first authorized legal services providers to provide their services under their home country law in all other EU countries without the need to register with the host state.[7] The second directive is more comprehensive.[8] Adopted in 2006 and implemented by all EU Member States in 2009, the Lawyer's Establishment Directive encourages Member States to develop pan-European codes of conduct for the professions.[9] This Directive also establishes a mechanism for the mutual recognition of professional titles of migrant lawyers who seek to practice under their home country professional qualification in another EU Member state. This directive further provides that a European lawyer must comply not only with the rules of professional conduct applicable in their home Member State, but also with those of the host Member State. While registration is still required in the relevant host EU state, these rules have resulted in a legal service market which has been substantially liberalized, to the benefit of consumers across the continent. Legal professionals registered in one EU Member State are permitted to practise domestic law in another EU Member State with no limits on scope of practise and no requirements to be supervised by a domestic lawyer. Such professional hold the title Registered European Lawyer (REL). There is a requirement that such practice must be under a foreign lawyer's home title for the first three years, but after this time a foreign lawyer is free to practise host country law without any need to re-qualification in that jurisdiction. From that point onward, unlike Foreign Legal Consultants (FLC), a category of legal professional found in countries like the US where foreign qualified lawyers are highly circumscribed in terms of scope of practice despite formal registration with state bars,[10] the REL maintains the same status as domestically qualified lawyers.

The Lawyers Establishment Directive contains additional provisions covering the free movement of lawyers from European Economic Area (EEA) countries (the EU along with Norway, Iceland, Liechtenstein and Switzerland, which is neither in the EU or the EEA). This

[7] EC, 'Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services' EEC 77/249, OJ L 78, 26 March 1977, at [17]

[8] EC, 'Council Directive 98/5/EC to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained', [1998] OJ L 77; EC, 'Directive 98/5/EC of the European Parliament and of the Council of 16 Feb 1998' OJ L 77, (14 March 1998)

[9] Directive 2006/123/EC (12 December 2006)

[10] A Pardiek, 'Foreign Legal Consultants: The Changing Role of the Lawyer in a Global Economy' 3:2 Indiana Journal of Global Studies (1996)

permits legal professionals from the EEA to establish and provide legal services in host as well as home country and international law and to requalify as a host country lawyer inside the territory of the EU and the EEA respectively. Rules regarding the establishment of foreign lawyers (meaning from outside the EU and EEA) are approached differently, with each EU member state applying its own rules, with varying degrees of restrictiveness.

III Trade in Legal Services under GATS

The GATS is a multilateral trade agreement concluded amongst the WTO's 164 Members as part of the Uruguay Round of trade negotiations in 1994. It was intended to liberalize trade in services across the broad WTO Membership but to do so selectively, based on the market and regulatory needs of each Member. In that sense it must be sharply contrasted with the aims of the EU's internal market and the EU's project of regional economic and political integration. The WTO specifies the classifications for legal services used in GATS negotiations. These specifications were based on the United Nations Central Product Classification (CPC) Group 181 for legal services, which is divided into four categories:

8611- Legal advisory and representation services in the different fields of law
8612- Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.
8613- Legal documentation and certification services
8619- Other legal advisory and information services.[11]

The CPC definition is geared towards domestic law and does not capture the complexity of trade in legal services. This is one reason why it has not been possible for WTO Members negotiating for legal services liberalization under the GATS to agree on a common format and terminology. Furthermore, WTO Members have scheduled their commitments for legal services in a variety of ways across the four Modes of Supply of Services: Mode 1 (cross-border), Mode 2 (consumption abroad), Mode 3 (commercial presence) and Mode 4 (movement of natural persons), as specified in Article I of the GATS. This inconsistency has led to a lack of clarity and a sense of incoherence in terms of the types of legal services activities which are permitted in an international context, further undermining the efficacy of treaty

[11] (WTO) Document W/120, Services Sectoral Classification List (July 1991)

commitments for this sphere of economic activity. Moreover, the fragmented nature of the legal services sector in countries like the UK where there are multiple licensing regimes for solicitors, barristers, and conveyancers creates further problems in terms of GATS classification. Varying degrees of liberalization may be permitted within 'legal services' which tends to be viewed more holistically elsewhere.[12] Making sense of the precise scope of legal services activities which are permitted in each jurisdiction, including sub-central jurisdictions, can be complicated, leading organizations such as the International Bar Association to create databases in order to provide some clarity for their members.[13]

Specific commitments for National Treatment (Article XVII) and Market Access (XVI) for services are undertaken by WTO Members through the GATS on an optional, opt-in (positive list) basis, with each Member listing the relevant sector by mode of supply along with any restrictions or limitations. Unlike goods for which there is an EU-wide set of tariff commitments, each EU Member State lists its own commitments in this regard as part of the EU's GATS Annex. While space does not permit a discussion of each of the 28 (27) EU Member States' specific commitments for legal services, it may be said that generally speaking, the EU Member States' GATS specific commitments for legal services are restricted to advice on international public law and home country law and include some provisions on movement of natural persons and establishment.[14] This means that a foreign (non-EEA) lawyer that wishes to provide legal services within the territory of the EU based exclusively on GATS will have to be mindful of national regimes of EEA countries, each of which with varying scope of restrictions for non-EEA lawyers or law firms. These typically include restrictions or additional regulations on legal form and name of law firms, minimum qualification requirements, equity caps and residency requirements. Needless to say such rules can constrain the ability of foreign legal practitioners to practice in the EU on a competitive basis.

In a number of EU Member States, foreign lawyers from WTO Members (but outside of the EU or EEA) may practice international and home country law on a temporary basis. As with practice on a permanent basis, short-term practice under home qualification normally requires that the individual must use their professional tile from their home state, comply with the local lawyers' code of conduct and maintain adequate professional indemnity insurance. It

[12] See, Collins, above n 2

[13] IBA Legal Regulators Directory: <https://www.ibanet.org/Legal_Regulators_Directory.aspx> (accessed August 2019)

[14] European Union – Schedule of Specific Commitments, GATS/SC/157 (7 May 1995)

is common for such individuals to be also required to obtain a business visa. Some EU Member States, including Italy, France, Germany, the Netherlands and Spain which have large legal services markets are signatories of the Schengen Agreement. This allows non-EEA nationals to obtain a visa to enter for business purposes for visits of up to 90 days or multiple entries over a 180-day period. Foreign lawyers from non-WTO Members must apply for permission from the relevant bar or governmental department. Individuals from outside the EEA/EFTA and Switzerland are not permitted to appear in court at all in most EU Member States. Again, these are rightly seen as major restrictions on access to the EU's legal services market.

Several EU Member States do not permit the temporary practice of law by foreign legal professionals under any circumstances. This kind of legal activity is sometimes described as Fly-In-Fly-Out (FIFO), which would fall under GATS Mode 4 supply of service, and can be very important for practitioners in the field of international commercial arbitration. FIFO is only allowed in France for nationals of jurisdictions which have concluded bilateral conventions with France covering this issue. The provision of temporary services in Germany by a lawyer from a non-EU Member State under their home qualification is not permitted whatsoever. Likewise, the provision of temporary services in the Netherlands by a lawyer from a non-EU Member State under their home qualification is forbidden. These restrictions clearly disadvantage legal practitioners from other countries seeking to participate in hearings or other short term matters on an as-needed basis.

Apart from these extensive restrictions on the rights to practice and establishment, dealing with a patchwork of national regulations across the EU creates a considerable compliance burden, especially in the case of small and medium sized firms and sole practitioners. This is precisely why foreign states may seek to enhance market access for their legal services firms wishing to establish clients in the EU through the preferential treatment available under FTAs.

III Legal Services under EU FTAs

Preferential treatment which breaches the Most Favoured Nation guarantee of equality specified under Article II of the GATS is permitted under Article V of the GATS which sets out the requirements for economic integration arrangements in the form of FTAs for services. International agreements like FTAs are negotiated and signed by the EU, its Member States, or in some cases both. Again it is important to keep in mind that the EU's approach to its trade

relations with other states, which might be loosely characterized as one which seeks to remove, where possible, unnecessary obstacles to trade, and that of the EU's own internal market which is predicated upon fundamental economic and political integration. Treaties which fall under the EU's exclusive competence may be signed only by the EU. Exclusive competence indicates that for certain spheres of activity, listed in Article 3(1) of the Treaty on the Functioning of the European Union (TFEU), the EU alone has decision-making power. The list includes the EU's Common Commercial Policy (CCP) which covers international trade relations with non-EU countries. Some treaties address matters which fall within the EU's exclusive competence as well as that of the Member States. Crucially for legal services, in Opinion 1/94 the European Court of Justice ruled that although trade in goods is an exclusive competence of the EU, certain aspects of trade in services are shared with Member States, which meant that their approval was required to conclude the GATS.[15] In Opinion 2/15 the CJEU further clarified EU and Member State competences over the EU's Free Trade Agreements with investment chapters, resulting in the splitting of the EU-Singapore FTA into a separate trade and investment agreement.[16] It is important to recognize that the process of concluding these so-called 'mixed' agreements involving matters such as trade in services is complicated and time-consuming, with each Member State signing and ratifying the FTA in accordance with its own constitutional requirements.

The EU has consistently maintained that it views the multilateral system under the WTO as the venue through which trade liberalization should be pursued and which disputes should be resolved. Still given ongoing difficulties in making progress at the multilateral level, the EU has concluded a number of FTAs, roughly half of which cover services.[17] EU FTAs tend to be structured with a view to achieving the goal of progressive liberalisation for trade in services with limited enforceability in terms of bright line rules. Encouragingly, it would seem as though incrementally liberalizing global trade in services is viewed by the EU Commission as an essential component of economic progress. Indeed the Commission has urged that the EU must negotiate for the liberalization of trade in services with key economic partners particularly where market access is poor or where other countries have made few commitments

[15] Opinion 1/94 of the Court of Justice (15 November 1994)

[16] Opinion 2/15 of the Court of Justice (16 May 2017). Later in *Slovak Republic v Achmea* (Case C-284/16) (6 March 2018), the CJEU held that investor-state dispute settlement (ISDS) clauses in intra-EU BITs were incompatible with EU law, result in the termination of almost 200 intra-EU BITs and the non-enforcement of ISDS awards.

[17] European Services Forum, List of EU FTAs (February 2019) <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-andagreements/#_being-negotiated> (August 2019)

under GATS. The liberalization of legal services along with other professional services appears to be one of the EU Commission international trade strategy priorities.[18]

Most EU FTAs include various restrictions of non-EEA/Swiss firms and nationals, including lawyers and law firms. These include equity caps, authorisations for purchasing land or leasing of real estate, restrictions on legal form for non-EU/EEA/Swiss law firms, or restrictions on the use of firm's name. Under the EU-Japan FTA and CETA, for example, companies or firms formed in accordance with the law of a Member State and having their registered office or principal place of business within the EU can trade across the EU on the same conditions that are afforded to Member State nationals. Additional conditions regarding establishment vary by member state.

Taking a closer look at the nature of provisions for legal services in modern EU FTAs, the EU-Ukraine FTA provides as follows in relation to legal services:

The commitments undertaken by the Parties are subject to the following conditions:
(a) the natural persons must be engaged in the supply of a service on a temporary basis as self-employed persons established in the other Party and must have obtained a service contract for a period not exceeding 12 months;
(b) the natural persons entering the other Party must possess, at the date of submission of an application for entry into the other Party, at least six years professional experience in the sector of activity which is the subject of the contract;
(c) the natural persons entering the other Party must possess:
(i) a university degree or a qualification demonstrating knowledge of an equivalent level (1) and
(ii) professional qualifications where this is required to exercise an activity pursuant to the laws, regulations or other legal requirements of the Party where the service is supplied;
(d) the entry and temporary stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxembourg, 25 weeks in any 12-month period or for the duration of the contract, whichever is less;
(e) access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract and does not confer entitlement to exercise the professional title of the Party where the service is provided.[19]

CETA contains similar material on Contractual Service Providers and Independent Professionals in Chapter X on Temporary Entry and Stay of Natural Persons for Business Purposes which could be relevant for lawyers.[20] As suggested earlier, FIFO provisions are usually included in the commitments on temporary movement of natural persons (GATS Mode 4) such as service suppliers (independent professionals) or those who work for service suppliers, who are temporarily resident in a country. The EUs FTAs with Japan, Singapore and

[18] G Muller, The EU's Global Europe Strategy and the Liberalization of Trade in Legal Services: The Impact of the EU Free Trade Agreements in Asia' 14 Journal of World Investment and Trade 727 (2013) at 730
[19] Art 92.2
[20] Art 10.8

Vietnam FTA all provide for the temporary movement of highly qualified professionals for specific business purposes during a specific period and under specific conditions, which are included in the treaty provisions. The main reservations in this regard (which are also found in GATS) refer to: the type of services of activities allowed; definition of the duration of temporary stay; limits on the possibilities for extension of temporary stay; conditions on the type / legal form of juridical person whose employees can enter and stay in the EU; conditions on the length of prior work for the juridical person; conditions for qualifications to provide services; conditions for entry and stay linked to commercial presence; conditions on the source of remuneration; limitations on the length of contract to be executed. Clearly these do not achieve the level of access available to EU lawyers through the single market.

The most comprehensive EU FTA created to date for legal services is the EU-Korea FTA. It contains a number of commitments which exceed those of the GATS, including many of those noted above. This agreement allows law firms established in the EU to set up a commercial presence in Korea, share profits with Korean law firms and form joint ventures. Lawyers qualified in an EU Member state can also offer advisory services concerning their home state law and public international law. EU lawyers are allowed to use their domestic job titles such as Solicitor, Avocat or Rechtsanwalt. Crucially however, the agreement does not provide rights of audience before the CJEU for Korean lawyers, a framework to requalify in the host jurisdiction or any provisions on legal privilege, the latter of which is arguably the defining feature of legal services, giving it special status among the professions. These omissions could significantly impair the ability of Korean lawyers to function effectively inside the EU.

To be sure there are some elements of EU FTAs which are beneficial to legal services as compared to what is available under GATS. These include more categories of persons under Mode 4, limited provisions on FIFO services, disciplines on domestic regulation, transparency, regulatory cooperation, and mutual recognition of qualifications, albeit subject to reservations. It is important to note also that most of the EU's recently concluded FTAs also include chapters on e-commerce and data flows which are vital for international trade in services conducted on-line.

IV Mutual Recognition Agreements for Legal Services

The practical relevance of market access commitments for legal services under either the GATS or FTAs is enhanced through formal commitments on mutual recognition, known as Mutual Recognition Agreements (MRAs). Article VII of GATS encourages WTO Members to adopt measures, by way of bilateral agreements or autonomously, in order 'to recognise the education or experience obtained, requirements met, or licences or certification obtained in a particular country.' The GATS Council for Trade in Services must be informed as far in advance as possible of recognition negotiations before they enter a substantive phase. Where appropriate, recognition should be based on multilaterally agreed criteria and Members shall work in cooperation with relevant intergovernmental and non-governmental organisations towards the establishment and adoption of common international standards and criteria for recognition. Put more plainly, such arrangements work to smooth access for services suppliers which has been notionally opened through formal commitments, but which may be effectively closed due to non-recognition of qualifications held by suppliers.

MRAs tend not to be concluded at the same time as the FTA of which they form part. The provisions that govern the negotiation of the MRA under an FTA must come into force before the MRA can be finalized. This typically requires that advisory bodies informing the contents of the agreement are set up in order to approve the commitments undertaken by the relevant professional bodies. These bodies would then monitor their negotiation and their compatibility with the FTA. For example, the services chapter CETA between Canada and the EU establishes of a committee responsible for the implementation of the MRA to be composed of representatives of Canada and the EU in conjunction with relevant authorities and professional bodies.[21] The EU-Korea FTA provides that relevant representative professional bodies in the parties' respective territories will jointly develop recommendations on mutual recognition to a designated trade committee for the fulfilment of criteria applied by each party for the authorization, licensing operation and certification of service suppliers and investors, including professional services.[22] Most MRAs require substantial technical preparatory to set out common standards and outcomes specific to the given sector.

Article VII of the GATS and many FTAs set out the suggested structure, content and guidelines for MRAs, such as those which could be used for legal services. The key difference between MRAs under the GATS and those pursued via an FTA is that under an FTA an MRA would need to cover all legal professions in both parties, meaning all EU legal professions

[21] Art 11.3
[22] Art 7.21(2)

would need to sign up for an MRA with the UK, or at least a critical mass, otherwise there will be insufficient political will to conclude the agreement. In contrast, under GATS an MRA can be concluded between two countries or regions and not necessarily cover the entire EU as each country can specify its own level of recognition individually under a schedule or annex. Article VII of GATS encourages WTO Member States to adopt measures, by way of bilateral agreements or autonomously, meaning without expectation of reciprocity, in order 'to recognise the education or experience obtained, requirements met, or licences or certification obtained in a particular country.' The WTO Council for Trade in Services must be informed as far in advance as possible of such recognition negotiations before they enter a substantive phase. Recognition should be based on multilaterally agreed criteria where possible and Members shall work in cooperation with relevant intergovernmental and non-governmental organisations towards the establishment and adoption of common international standards and criteria for recognition. In the case of legal services this would likely contemplate the International Bar Association, amongst other bodies such as local law bars and law societies. The WTO published guidelines for mutual recognition agreements in the accountancy sector but there are no other sector specific multilateral guidelines for MRAs. These guidelines are non-binding and are intended to be used by Members on a voluntary basis. The Accounting guidelines specify that the MRA should state the rules and procedures to be used to monitor and enforce the provisions of the agreement; the means of arbitration for disputes; the focal point of contact in each party for information on all issues relevant to the application (name and address of competent authorities, licensing formalities, information on additional requirements which need to be met in the host country etc.); and the procedures of appeal to or review by the relevant authorities.[23]

The IBA set forth a set of criteria to feature in MRAs for legal services with a view to standardizing these documents to facilitate their conclusion in conjunction with FTAs or autonomously under GATS Article VII. The IBA suggests first that such agreements should include provisions ensuring the home jurisdiction's capacity to regulate and provide discipline. It should also address the character and fitness of the legal practitioner. The IBA further advises that the MRA should outline that education and practical training should be taken into account when evaluating the qualifications of the applicant, depending on the nature of the professional activities they choose to undertake. This will include a consideration of the level and duration of legal education as well as the quality of the program and the institution of learning. The

[23] S/L/64 (17 December 1998)

degree of similarity of legal systems between the home and host state should be relevant when assessing equivalence. Where the differences are more marked (as between common and civil law countries), the host jurisdiction may legitimately require the completion of supplemental education or training by the applicant. The IBA recommends that states entering into legal services MRAs should be entitled to require that recognition may be conditioned upon the completion of a specified period of experience in the practice of law which should be no be longer than necessary to establish the ability of the individual to practice law in a competent manner and in accordance with the rules of professional responsibility. Most crucially from the perspective of accessing EU markets, the IBA advises that MRAs should include material on scope of practice limitations for foreign qualified lawyers. Such limitations should be set out as clearly as possible, with details regarding whether practice of home or host state law as well as international law are permitted, along rights of audience in courts or participation in arbitration, whether domestic or international. The MRA should indicate what forms of association are permitted for foreign lawyers, including whether they can practice with local lawyers in firms or can be hired by them. Lastly, disciplinary matters and rules of professional conduct should be covered by the MRA along with a clear explanation of the competent authorities in charge of regulating legal services.[24]

In addition to the mutual recognition provisions found in the Canadian and Korean FTAs noted above, the EU-Moldova Association Agreement, the EU-Georgia Association Agreement and the EU-Ukraine Association Agreement require that each party shall encourage the relevant professional bodies to provide recommendations on mutual recognition for the purpose of the fulfilment by service suppliers of the criteria applied by each party for the authorisation, licensing, operation and certification of service suppliers, with particular focus on professional services. Additionally, an MRA for legal services was signed in 2009 between the National Bar Council (France) and the Québec Bar (Canada).[25] Perhaps the most well-known example of an MRA covering legal services is the Trans-Tasman MRA (TTMRA). A professional registered to practise an occupation in one country is entitled to practise the

[24] D Collins, 'The International Bar Association and Trade in Legal Services: Meta Law-Making in International Economic Law?' 11:3 Indian Journal of International Economic Law [forthcoming, 2019]

[25] Full text (in French): <http://www.barreau.qc.ca/pdf/organisation/2009-arm.pdf> (accessed August 2019)

equivalent occupation in the other country, without further testing or examination. The TTMRA is one of the broadest mutual recognition schemes outside the EU.[26]

It is important to understand that the success of MRAs in liberalizing trade in services has been mixed. Some studies suggesting that they are more effective for goods than for services, possibly due the regulatory complexity of the latter.[27] The effectiveness of MRAs or lack thereof depends on the schedule of commitments in an FTA which establish the level of market access. If this is limited to begin with then an MRA cannot help. MRAs are advantageous in that they allow for the possibility for professional bodies to be involved in negotiating the content of such agreements, subject to commitments scheduled in the framework of the WTO or an FTA.[28] This means that sensitive matters concerning the legal profession are discussed separately from other topics that would be discussed in trade negotiations. MRAs also have a number of drawbacks as tools of liberalization, especially for legal services. This is because bar associations and law societies may not be the only organizations who are responsible for admitting foreign lawyers to the profession. They do not have authority over all aspects of free movement, such as immigration rules. Furthermore, if the MRA is not linked to an international treaty, it may be subject to changing politics of the legal professional body's leadership. Negotiating MRAs, regardless of whether autonomously or on the basis of an integrational agreement, requires substantial effort and commitment from the part of the professional bodies, which is not always forthcoming.

V The Limits of FTAs for Legal Services

Even the most ambitious FTA, supplemented by an MRA containing elements noted above would not guarantee foreign legal practitioners the level of market access to the EU legal services market which is currently available to lawyers from EU Members States. Rights of

[26] See T Epps, 'The Trans-Tasman Mutual Recognition Agreement between New Zealand and Australia' The UK Law Societies' Joint Brussels Office (28 March 2018) <http://www.lawsocieties.eu/news/in-focus/trade-in-professional-services/the-trans-tasman-mutual-recognition-agreement-between-new-zealand-and-australia/5064504.article> (accessed August 2019)

[27] A Correia de Brito, C Kauffmann and J Pelkmans, 'The Contribution of Mutual Recognition to International Regulatory Co-operation,' OECD Regulatory Policy Working Papers, No. 2, OECD Publishing, (Paris, 2016)

[28] 'Mutual recognition agreements in professional services and CEFTA services integration' World Bank (Washington, DC) January 2014 <http://documents.worldbank.org/curated/en/634221468023337913/pdf/637230PUB00pub00ID0187990BOX361521B.pdf> (accessed August 2019)

audience in front of the EU courts, and the possibility to directly resolve disputes in domestic and then EU courts would be lacking, as would the possibility to provide advice on EU law and the possibility to provide temporary legal advice (FIFO). The recognition of practice vehicles / legal forms by various EU Member States would also be uncertain. An FTA would almost certainly not include access to an EEA-wide mutual recognition of qualifications regime, as contained in the MRPQ. Nor would such an agreement contain provisions on cooperation between competent authorities, for example in relation to disciplinary actions. It is doubtful that lawyers from third countries would be able to benefit from the protection of lawyer-client communications by the legal professional privilege at EU level.

These key rights underpinning trade in legal services have never been included in any of previous EU FTAs for several important reasons. First and most obviously is the willingness of a sufficient number of individual member states to liberalise parts of their legal services markets. This could make it difficult for the EU to offer a comprehensive package which will be attractive to treaty partners, particularly if the largest legal services markets, Germany and France, maintain extensive restrictions. As mentioned earlier, the EU's regime for mutual recognition of qualifications is a national, or in some cases even a sub-national competence, where EU Member States mutually recognise qualifications obtained within the EU but not outside of it. This system depends on several legislative instruments, notably the MRPQ, as well as EU Treaty principles such as non-discrimination and proportionality. There are EU FTAs which in general seek to open mutual recognition but leave this in practice to the Member State authorities or competent authorities, such as professional bodies. This means that there is no built-in guarantee that the mutual recognition for legal services will be achieved. Foreign lawyers hoping to practice in the EU would find the parameters of the work available to them rather narrow and uninviting.

It must be emphasized that the rights of audience in front of EU courts, including the CJEU, are set out in the Court's statute[29] which cannot be changed by a trade agreement. The only existing example where rights of audience have been extended to legal practitioners from outside the EU can be found in an Association Agreement with the lawyers qualified from EEA countries, Norway, Iceland and Liechtenstein granted audience rights before the CJEU. Moreover, the protection of lawyer-client communications by the legal professional privilege is not set out in legislation and therefore unlikely to be included in an FTA. Instead it is

[29] Article 19

contained in the case law of the CJEU.[30] This also cannot be changed by an international treaty. Furthermore, most EU Member State bars and law societies regard EU law as domestic law rather than international law and thus restrict the right to practise EU law to their full membership. This may involve additional requirements such as EEA nationality and / or commercial presence in the relevant Member State.

It also needs to be recognized that most of the EU's recent FTAs include MFN clauses for services.[31] These MFN clauses in FTAs are designed to lock in the preferential treatment negotiated between the parties. This means that any preferential treatment afforded by the EU in a future FTA with a third country would automatically result in the extension of such treatment in existing FTAs as well. When considering the EU's willingness to include some of the missing elements noted above in future FTAs, the precise scope of application of the forward MFN clauses in the EU's existing FTAs may vitiate against this course of action, restricting the EU's enthusiasm to offer further liberalization of legal services without granting the same treatment to other countries as free riders. This could make it more difficult for the EU to agree on an FTA that would approach the level of market access for legal services currently available through the Single Market, in particular in issues such as giving advice in EU law, establishment, FIFO, or affording preferential treatment in recognition of qualifications. It may be feasible to avoid the MFN extension problem through Association Agreements covering legal services rather than conventional FTAs. The deeper relationship contemplated by Association Agreements might not trigger MFN provisions in other FTAs because they would satisfy the conditions of creating an internal market, approximating legislation and adopting measures for recognition.[32] It is arguable, however, that services suppliers under such agreements would be considered 'like' for the purposes of MFN whereas they would not be in the case of a conventional FTA, precluding the application of a forward focused MFN at all. The in-depth relationship contemplated by an Association Agreement might also need to include provisions on dispute resolution, possibly accepting jurisdiction of the CJEU, which would be unusual for an FTA and likely unacceptable to most treaty partners.

Finally, it should also be mentioned in terms of the functionality of the legal services profession generally that FTAs covering legal services would not likely address judicial

[30] E.g. AM&S (C-155/79) at [25] and Akzo Nobel (C-550/07) at [190]

[31] E.g. CARIFORUM, EU-South Korea FTA, CETA, EU-Vietnam and EU-Japan EPA

[32] J Magntor, 'Most Favoured Nation clauses in EU trade agreements: one more hurdle for UK negotiators' Briefing Paper 25 (November 2018) <http://blogs.sussex.ac.uk/uktpo/publications/most-favoured-nation-clauses-in-eu-trade-agreements-one-more-hurdle-for-uk-negotiators> (accessed August 2019)

cooperation on civil or criminal justice, as captured by the automatic recognition of judgments from courts of EU Member States, a key element underpinning access to justice. There is no earlier example where civil and commercial matters or criminal justice cooperation are included in an EU FTA with a third country.

Enhanced access for foreign lawyers seeking to practice in the EU would need the removal of economic needs tests for contractual service suppliers and independent professionals. It would also have to include more extensive commitments in terms of activities covered for short-term business visitors. Removal of strict time limits for the duration of stay would be advantageous as would the possibility of fast-track business visa process along with the removal of the residency / commercial presence requirement in order to provide legal services in some EU jurisdictions. An obligation for EU Member states to introduce FLC status (in jurisdictions that do not yet have it) without unduly onerous bureaucratic requirements could also help foreign lawyers access the EU market. These improvements would at least give greater practical effect to the existing GATS commitments of the EU and would address the situation of third-country lawyers in jurisdictions whose regulations are unclear or absent.

VI Conclusion

The EU legal services market represents a lucrative opportunity for legal services providers however it is a sector which is largely available to legal services providers from within the EU itself. It is arguable that the EU was designed specifically with this objective in mind – the advantages of the Single Market are intentionally available only to those enterprises which are situated within the EU. As with many countries, the EU has not opened its legal services sector substantially through the GATS. So far there has been limited progress in achieving significantly greater liberalization through EU FTAs. Negotiations for the currently moribund Trade in Legal Services Agreement (TiSA) among 23 WTO Members, including the EU, may ultimately yield greater progress in this area should they ever resume.

This article has outlined several important aspects of trade in legal services which have not been enshrined in EU FTAs and for which future progress is uncertain. These include the rights of audience in front of the EU courts and authorities, such as the EU Commission, the possibility of providing advice on EU law and the protection of lawyer-client communications by legal professional privilege at an EU level. The absence of coverage of these spheres of the delivery of legal services in the GATS and via FTAs raises important issues for third countries

seeking to use multilateral or bilateral trade agreements with the EU as a means of accessing this high value component of the EU's internal market.

These features of EU FTAs should lead to a reflection on the significance of legal services from the perspective of economic integration, and more specifically that degree of liberalization of legal services which may be required by different levels of linkages across notionally international boundaries. Given the importance of legal services to many facets of the modern economy (business transactions of all kinds) as well as society (e.g. family issues, criminal defence) comprehensive liberalization of legal services may be essential in the special circumstances envisioned by deep economic and social integration such as conceived uniquely by the EU project. In contrast, conventional FTAs and multilateral treaties like the GATS are predicated on a much stronger degree of regulatory autonomy, precluding the need for unfettered market access for legal practitioners to advise and advocate on behalf of their internationally mobile clients. Indeed it may be expected that legal services, given their highly jurisdictionally-specificity and associated sensitivities, may remain among the most restricted forms of commercial activity in such contexts.

In one respect the circumscribed nature of the EU's approach to trade in legal services in its FTAs reflects the continent's approach to its internal market, full access to which is reserved for those actors which are within its sphere of regulatory control. Of course, the same could be said of the legal services sectors of other advanced economies, such as the US, and those which are highly protectionist, such as China or India.[33] Perhaps a more important lesson is that while the provision of legal services is singularly linked to a given jurisdiction for obvious reasons, the comparative non-liberalization of this important sphere of economic activity may reflect the often under-appreciated shortcomings of FTAs as tools of certain kinds of services liberalization, at least in the EU context, where greater emphasis has been placed on internal integration.

[33] Collins, above n 2