

6 February 2018

TF50 (2018) 28 – Commission to EU 27

Subject: Internal EU27 preparatory discussions on the framework for the future relationship: "Services"

Origin: European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

Remarks: These slides are for presentational and information purposes only and were presented to the Council Working Party (Article 50) on 30 January 2018. The contents are without prejudice to discussions on the framework of the future relationship.

In December 2017, the European Council invited the Council (Art. 50) together with the Union negotiator to continue internal preparatory discussions on the scope of the future EU-UK relationship. The slides support those discussions. They are based on the April European Council guidelines which continue to apply in their entirety.

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Internal preparatory discussions on
framework for future relationship

Services

AD HOC WORKING PARTY ON ARTICLE 50 (*Seminar mode*)

30/01/2018

Internal preparatory discussions on
framework for future relationship

Services

Services in the internal market

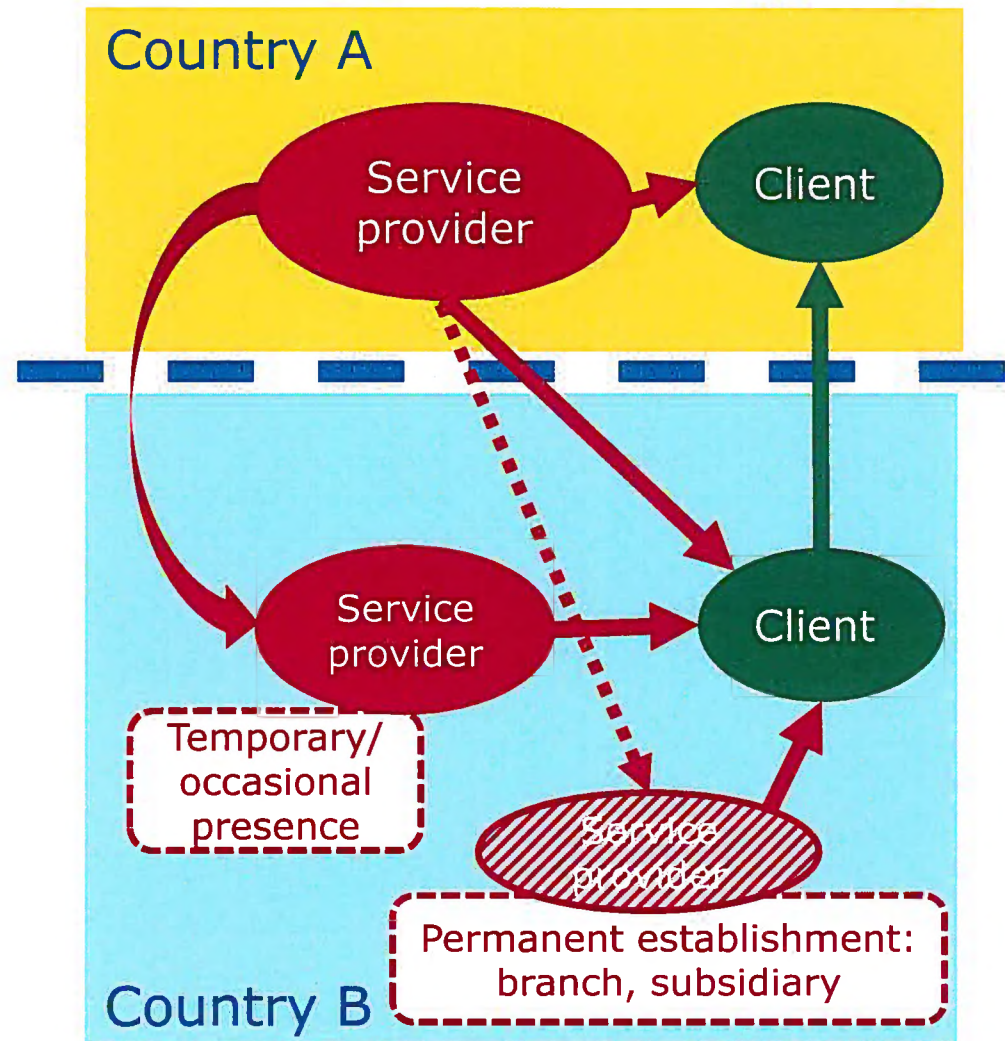
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The services market: complexity

Service providers (persons or companies) **subject to rules** on:

- The **service** itself;
- The **nature of the providers** (qualifications, legal form, shareholding, etc.);
- **Physical presence** of the provider or of the clients (immigration rules, social protection).



Single Market for services: an integrated regulatory area

Scope	Indivisible four freedoms: goods, services & establishment, capital, persons (all relevant to provision of services)
Integration method	Free provision of services / freedom of establishment but also free movement of capital and persons. Regulatory Union (pooled sovereignty) <ol style="list-style-type: none">1. Negative integration (prohibition of restrictions)2. Positive integration (harmonisation of rules)3. Mutual recognition by default Distinct legal order; Supremacy and direct effect of EU law
Decision-making	Mostly by qualified majority for secondary legislation but also development by CJEU case-law
Supervision & enforcement	<ul style="list-style-type: none">- Commission, EU regulatory agencies,- MS supervisory authorities, cooperation networks- CJEU, MS courts
Remedies	<ul style="list-style-type: none">- Compliance, lump sum/penalty payments, damages (to private parties)

Legal framework (1/2)

Prohibition of restrictions

EU Treaty freedoms + CJEU case-law

- **Freedom to provide services & freedom of establishment**
(also **free movement of capital** and **persons**);
- **All services approach.**

Member States' power to regulate, but their rules:

- **should not result in direct or indirect discrimination;**
- **should not hinder market access.**

However, national rules may restrict access and provision of services by EU providers only **if objectively justified by imperative requirements in the public interest and if the resulting restrictions are proportionate.**

Beneficiaries: EU natural persons and EU-formed legal persons

Legal framework (2/2)

Conditions for providing services

- **Regulatory convergence to lift regulatory barriers:**
 - Recognition of home country regulation and supervision, in principle ('country-of-origin' logic in some sectoral legislation);
 - Some harmonisation of procedural and substantive rules;
 - Interdependency of the rules.

Services-specific horizontal legislation

*Services Directive, Professional
Qualifications Directive, e-Commerce
Directive, Posting of workers Directive*

Profession-specific legislation

e.g. lawyers, statutory auditors.

Sector-specific policies and legislation

*e.g. financial services, telecommuni-
cations services, transport services.*

Wider horizontal rules

e.g. consumer protection

Substantive rules are part of a broader ecosystem

**Distinct/unified legal order;
Supremacy and direct effect of EU law;
Integration into national legal orders.**

Supervision and enforcement:

- **Administrative cooperation:** IMI, etc.;
- **Centralised oversight:** Commission + networks of national supervisors in some areas;
- **Judicial enforcement:**
 - **Commission as guardian of the Treaty:** initiates enforcement action;
 - **CJEU in cooperation with national courts.**

Consequences of becoming a third country for providing services (1/3)

UK no longer "part of" the Single Market:

- **no institutional role** for UK authorities;
- **end of mutual recognition**, host State rules apply.

UK providers = third country providers seeking "access to" the EU market:

Treaty freedoms & secondary EU law no longer applicable to them.

EU providers = third country providers seeking "access to" the UK market:

EU law does not apply in the UK anymore. Scope for the UK to change its rules (as long as GATS compliant).

Access under rules applicable to third countries (GATS as baseline).

BUT: no direct effect of GATS & limited guaranteed market access under GATS.

To note: market openness in practice may be greater than guaranteed commitments.

EU rules will apply in full to the provision of the service (**host State law**).

UK providers to benefit from EU rules on access by third country natural persons (beyond GATS): e.g. Blue Card, Long term residents Directive, Intra-corporate transfer Directive.

UK rules will apply in full to the provision of the service (**host State law**).

Future UK rules on access by EU natural persons: unknown as of today.

Consequences... (illustration) (2/3)

Establishment in a Member State:

- Host State rules apply fully;
- Foreign nationals may be subject to access limitations and more stringent conditions (e.g., on licences, authorisations, etc.).

Temporary and/or occasional cross-border provision of services:

- **Full application of host State rules:**
 - no mutual recognition of regulatory frameworks under EU law;
 - conduct rules (insurance requirements, joint partnership limitations etc.);
- **National access restrictions** in host Member State may apply (authorisations, quotas etc.).

Consequences... (illustration) (3/3)

Regulated professions (professional qualifications)

- **For establishment in a Member State:**
 - No longer automatic recognition regimes (e.g. doctors, nurses, architects) or general system of recognition under EU law;
 - National rules apply for recognition.
- **For temporary cross-border provision of services:**
 - No longer EU rights for provision of services under home country title;
 - Prior recognition of professional qualifications may be necessary (national rules apply for recognition).

Zoom-in: specific rules for provision of legal services

- No longer EU guaranteed freedom to establish or provide cross-border legal services (even on host State law) using home country title;
- No longer EU guaranteed freedom to set up law firms, agencies or branches in other MS;
- Activities reserved for EU lawyers: CJEU, EUIPO.

UK withdrawal implications

Phases/scenarios	Aspects to consider
TRANSITION	
FUTURE	<ul style="list-style-type: none">• Market Access• Regulatory matters• Level playing field• Enforcement & Supervision
PREPAREDNESS For the UK becoming a third country, including in a no deal scenario	

Transition (1/2)

If TRANSITION AGREEMENT WITH UK reached
(EUCO guidelines 15/12/2017 and negotiation Directives)

UK applies **all acquis and keeps participating in the Single Market** for a limited period.

- ✓ **Status quo** would be maintained, e.g.:
 - Treaty freedoms;
 - Harmonised standards (where provided for in EU law) and, in principle, mutual recognition of regulatory outcomes;
 - Level playing field (e.g. State Aid control);
 - Single supervision & enforcement (Commission, agencies, cooperation networks, CJEU).

Transition (2/2)

- **Assimilation of UK to EU Member State but need to specify precise perimeter:**
 - **UK no longer part** of the EU institutions, agencies and bodies;
 - UK invitation to EU expert groups and agencies/bodies meetings **only exceptionally on a case-by-case basis.**
- **External effects** of UK becoming a third country:
 - UK remains bound by the obligations stemming from EU agreements (including GATS);
 - UK should no longer participate in bodies set up by those agreements.

Future Relationship & preparedness

See next presentations

Internal preparatory discussions on
framework for future relationship

Services in EU trade policy

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Content

- Consequences of UK withdrawal
- Trade in services in the WTO – main concepts GATS
- Future relationship – FTAs in services
- Summary

Consequences of UK withdrawal – GATS as fall back

- UK becomes a third country: single market for services ceases to apply to UK
- UK no longer covered by EU trade agreements (e.g. FTAs)
- UK remains a member of the WTO, but has to establish its own services schedules of commitments under the GATS
- Fall-back for a cliff-edge scenario: WTO GATS
- During the transition, UK should remain bound by the obligations stemming from EU agreements

Main concepts – scope of GATS

GATS covers **almost all services sectors**

→ 155 defined sectors

Does not cover:

- Services supplied in the exercise of government authority
- Air transport services related to traffic rights
- Sensitive services specifically excluded through individual reservations by members (for EU: audiovisual services, public utilities, several other sectors mainly in modes 1 & 4), specific prudential carve-out for financial services
- Non-services (manufacturing, agriculture, fishing, forestry, mining)

Main concepts – main GATS disciplines

Market access

- Prohibition to introduce new quantitative limitations (e.g. monopolies, economic needs tests)
- Exhaustive list of barriers

National treatment

- No less favorable treatment than to own like services and service suppliers (but this does not mean extending single market treatment)
- No list of barriers

Most-Favoured-Nation (MFN) treatment

- No preferential treatment to any third country services and service suppliers
- Regional FTAs can be excluded if they comply with Article V of GATS (all modes of supply and major sectors covered, elimination of substantially all discriminations)

Domestic regulation

- Non-discriminatory regulation by members is subject to limited rules, both horizontal and in some sectors (financial services, telecoms)
- Possibility to recognise qualifications

Main concepts – 4 modes of supply

Mode 1: cross-border supply

→ only the service crosses the border (e.g. telecenters)

Mode 2: consumption abroad

→ consumer travels abroad (e.g. tourism)

Mode 3: commercial presence

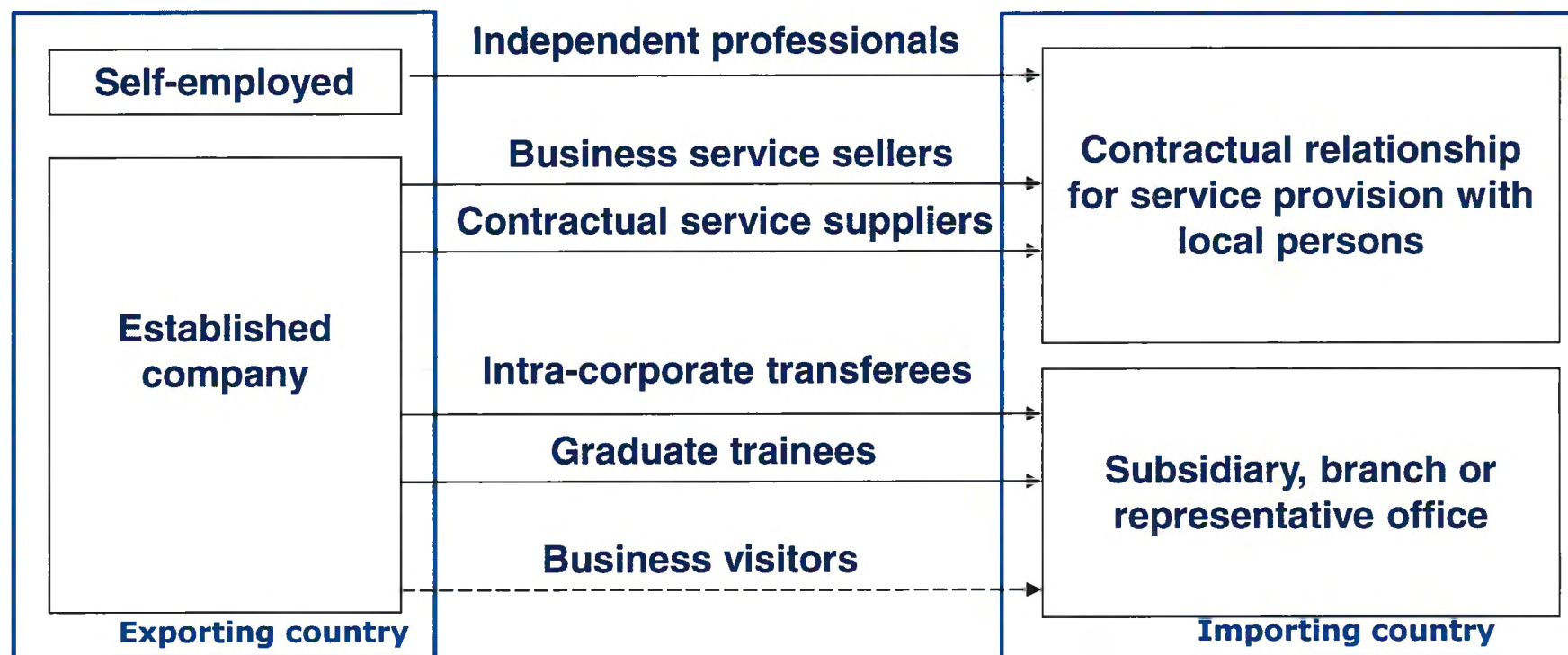
→ establishment of subsidiary/branch (e.g. investment abroad)

Mode 4: temporary presence of natural persons supplying a service

→ business travel (e.g. consultant attends a meeting abroad)

Main concepts – Mode 4 categories

- Does not cover immigration or access to labour market
- Temporary presence only



Future relationship – key parameters

The UK becomes a third country

UK red lines:

- Regulatory autonomy
- End of CJEU jurisdiction
- End of freedom of movement of people
- Independent trade policy

→UK leaves the EU Single Market and Customs Union

→UK position only consistent with an FTA

EU 27 guiding principles:

- Autonomy of the Union and its legal order (incl. role of CJEU)
- Integrity of the Single Market
- No "cherry-picking"
- Level playing field
- Consistent approach towards third country partners

Existing agreements



EEA: acceptance of single market rules + EFTA Court
→ consistent with European Council guidelines



DCFTA Ukraine: FTA + possible convergence in specific goods / services sectors (not applied in practice) + CJEU
→ not consistent with European Council guidelines



EU-Switzerland: Multiple agreements, no FTA in services + selective single market participation (goods, persons) - unsatisfactory governance - no CJEU
→ not consistent with European Council guidelines



EU – CANADA: FTA – no regulatory convergence – no CJEU
→ consistent with European Council guidelines

Main concepts: EU FTAs - scope

Access to markets: building on GATS

- Based on GATS: cross-border supply, investment/establishment, temporary movement of natural persons
- Substantial sectoral coverage: all major sectors covered, 4 modes
- Elimination of discrimination in majority of sectors
- Limits:
 - EU sectoral exclusions: audio-visual, services in the exercise of governmental authority, air transport
 - Limited commitments on financial services in mode 1, prudential carve-out
 - Reservations in a number of sensitive sectors, mainly in mode 1
 - Mode 4 commitments focused on highly skilled professionals (scope may be expanded); Parties can introduce visas

Main concepts: EU FTAs - scope

Regulatory pillar

- Need to distinguish "access to market" from applicable domestic "regulation"
- Host State (domestic) regulation applies
- Limited horizontal and sectoral regulatory disciplines going beyond GATS (e.g. financial services, telecommunications, digital trade)
- Limited, voluntary regulatory cooperation focusing on the exchange of information in a limited number of sectors
- Framework for the recognition of professional qualifications

Main concepts: CETA structure

Purple: Core services chapters

Blue: Other chapters & provisions relevant for services

1. Initial Provisions and General Definitions	2. Trade in Goods (national treatment & market access)	3. Trade Remedies	4. Technical Barriers to Trade (TBT)	5. Sanitary and Phytosanitary (SPS) Measures Rules of Origin	6. Customs and Trade Facilitation
7. Subsidies	8. Investment	9. Cross-Border Trade in Services	10. Temporary Entry of natural persons for business purposes	11. Mutual Recognition of professional qualifications	12. Domestic Regulation
13. Financial Services	14. International Maritime Transport	15. Telecommunications	16. Electronic Commerce	17. Competition Policy	18. State Enterprises, Monopolies and enterpr. Granted special rights
19. Government Procurement	20. Intellectual Property (&GIs)	21. Regulatory Cooperation	22. Trade and Sustainable Development	23. Labour	24. Environment
25. Bilateral Dialogue & cooperation	26. Administrative and Institutional Provisions	27. Transparency	28. Exceptions	29. Dispute Settlement	30. Final Provisions

Needs to be seen in conjunction with Annexes with horizontal and sector specific reservations for cross-border services, temporary entry, investment

Main concepts: EU FTAs - MFN

Scope of most-favoured-nation (MFN) treatment:

- Extends to old FTA partners certain preferential treatment EU grants to newer FTA partners
- Part of policy to 'future proof' EU FTAs and capture better treatment wherever and whenever it is available

Examples of **exemptions** to MFN treatment:

- Does not apply to recognition measures
- Reservation for regional economic integration organisations
- Sector-specific reservations

→ Limits the flexibility to offer better treatment to new negotiating partners

MFN – Illustration: CETA

Article 9.5 - Most-favoured-nation treatment

1. Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to service suppliers and services of a third country.
2. For greater certainty, the treatment accorded by a Party pursuant to paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, the treatment accorded, in like situations, by that government in its territory to services or service suppliers of a third country.
3. Paragraph 1 does not apply to treatment accorded by a Party under an existing or future measure providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of, or the results of, or work done by, those accredited services and service suppliers.

Services and investment Annex II reservations applicable in the EU (applicable to all Member States)

The EU reserves the right to adopt or maintain any measure which accords differential treatment to a country pursuant to any existing or future bilateral or multilateral agreement which:

- a. creates an internal market in services and investment;
- b. grants the right of establishment; or
- c. requires the approximation of legislation in one or more economic sectors.

Consequences of UK withdrawal: a future FTA in services

General principles apply:

- Trade would continue on FTA terms to be negotiated, consistent with WTO rules.
- EU has some margin ("quantitatively") to top-up commitments undertaken in existing FTAs; but the nature of FTAs cannot change ("qualitatively") → limited scope for additional regulatory disciplines; Parties retain regulatory autonomy ("right to regulate")
- GATS openness < FTA openness < Single Market openness
- GATS/MFN openness < actual openness
- EU FTAs essentially bind actual openness, but not fully
- EU and UK are very open economies but a number of restrictions in sensitive sectors apply
- Lack of recognition (e.g. of qualifications) may imply supply of a service only possible based on host state qualifications

Internal preparatory discussions on
framework for future relationship

Horizontal and regulatory issues in services in EU FTAs

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Illustration: Overview of relevant chapters in CETA

1. Initial Provisions and General Definitions	2. Trade in Goods (national treatment & market access)	3. Trade Remedies	4. Technical Barriers to Trade (TBT)	5. Sanitary and Phytosanitary (SPS) Measures Rules of Origin	6. Customs and Trade Facilitation
7. Subsidies	8. Investment	9. Cross-Border Trade in Services	10. Temporary Entry of natural persons for business purposes	11. Mutual Recognition of professional qualifications	12. Domestic Regulation
13. Financial Services	14. International Maritime Transport	15. Telecommunications	16. Electronic Commerce	17. Competition Policy	18. State Enterprises, Monopolies and enterpr. Granted special rights
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25. Bilateral Dialogue & cooperation	26. Administrative and Institutional Provisions	27. Transparency	28. Exceptions	29. Dispute Settlement	30. Final Provisions

Annexes with commitments & reservations including for sectors: cross-border services, temporary entry, investment

Regulatory provisions for services in EU FTAs

- Distinguish "access to market" from applicable domestic "regulation"
- Host State (domestic) regulation applies
- Horizontal disciplines on **domestic regulation**
- **Sectoral** regulatory disciplines: financial services, telecommunications, digital trade, maritime transport, delivery services
- Horizontal rules on **regulatory cooperation** apply to services:
 - voluntary mechanisms
 - exchange of information
 - taking into account other Party's regulatory approach
 - identify common approaches and cooperate in international fora
- Additional, limited, voluntary regulatory cooperation focusing on the exchange of information in a **limited number of sectors** (e.g. financial services, telecoms, digital trade)
- Framework for the recognition of **professional qualifications**

Domestic regulation – horizontal disciplines

- **Issue:** some measures are non-discriminatory in nature and do not constitute quantitative restrictions either (e.g. licence and authorisation requirements) but nevertheless affect trade in services and investment
- **Objective:** ensure that licencing and authorisation requirements and technical standards are objective, transparent, easily understandable, efficient, give right to an appeal
- Necessary **complement to market access** to avoid that markets are open "on paper" but *de facto* closed for foreign service suppliers
- **Scope:** all modes of supply and all sectors where commitments are undertaken

Financial services

Key provisions (based on GATS-principles):

- Scope and definition of financial services
- Provisions regarding financial services new to the territory of a party
- Access to payment and clearing systems
- Self-regulatory organisations
- Effective and transparent legislation
- Very wide prudential carve-out

Commitments vary by mode of supply:

- Limited EU commitments regarding cross-border supply of financial services (Mode 1) and consumption abroad (Mode 2)
- Establishment (Mode 3) the main mode of supply with openness due to EU's regulatory and supervisory powers over financial service suppliers inside EU

Main differences between FTAs and Single Market:

- FTAs create no 'passporting rights', as opposed to the Single Market
- FTAs offer very limited market access mostly via establishment but not comparable to the Single Market
- No prudential exception in the Single Market

Telecommunications services

Objectives

- **Guarantee access to telecommunications for service suppliers** from one party in the territory of the other party, so that they can provide their services in the territory of the other party
- **Setup the appropriate conditions for suppliers** of telecommunications service from one party to provide telecommunications services in the territory of the other party

Main provisions

- Basic regulatory principles: setup of the regulatory authority, authorisation provisions and dispute resolution;
- Articles concerning Major Suppliers, dealing with competitive safeguards, interconnection and access to essential facilities;
- Articles on various market aspects, such as universal service, allocation of scarce resources, number portability, confidentiality of telecommunications information, and prevention of foreign shareholding limitations.

Digital trade

Objective: Horizontal rules applying to any trade done by electronic means with the aim to :

- remove unjustified barriers
- bring legal certainty for companies
- ensure secure online environment for consumers
- ensure non-discrimination between online and offline activities.

Main provisions:

- no customs duties on electronic transmissions
- no prior authorisation for electronically supplied services
- conclusion of contracts by electronic means
- liability of intermediaries
- electronic authentication and electronic trust services
- online consumer trust
- unsolicited commercial electronic messages
- prohibition of mandatory source code disclosure
- cooperation on regulatory issues

Maritime transport

Objectives

- Ensure fundamental freedom of maritime transportation between countries
- Ensure free and non-discriminatory access to ports and port services
- Allow for the possibility to provide certain maritime operations and auxiliary services, depending on commitments

Maritime transport

FTA

- **Full** elimination of barriers to international maritime transportation (e.g. cargo preferences or cargo sharing agreements)
- Possibility of carrying out **some** specific marine related operations within the same country (e.g. "feederling", "dredging")
- Possibility to provide **certain** maritime auxiliary services in ports, depending on commitments

Single Market

- **Full** elimination of barriers to maritime transport between member States and between Member States and third countries (reg.4055/86)
- Possibility of carrying out **all** maritime cabotage operations in any Member State (reg.3577/92)
- Provision of maritime auxiliary services according to internal market services rules

Delivery services

Objective: Ensure fair competition between foreign and domestic companies in both postal and courier services

Main provisions:

- Ensuring any monopoly is clearly defined
- Preventing abuse by the incumbent of its dominant position, by targeting typical market-distortive practices such as cross-subsidisation between services and unjustified differentiation between customers
- Imposing independence of the regulator
- Dedicated provisions on licensing, transparency
- Defining universal service and its funding

Commitments are linked to the type of service, not to who performs it

Monopolies are not prohibited, but should be defined and should not affect the competitive segment of the market

Delivery services

FTA

- Covers all items up to 31.5 kg
- Applies to all delivery services, not just to committed sectors
- Does not prevent monopolies, but ensures the non-competitive segment of the market is clearly defined
- Restricts two types of typical anti-competitive behaviour by incumbents (cross-subsidisation and discrimination)
- Imposes basic, high-level principles on the transparency of licensing procedures and the independence of the regulator
- Terminal dues not regulated

Single Market

- Three successive Directives on postal services, encompassing 14 years of progressive liberalisation
- Full competition - monopolies are not allowed
- Sets out principles for licensing so as to allow transparent market access for all providers
- Universal service is guaranteed at EU-wide minimum standards, but supported through a market-based approach (universal service obligation and universal service fund)
- Governs setting of quality standards for national and intra-EU service
- Terminal dues are fixed related to costs

Recognition of professional qualifications

- FTAs include a framework providing an opportunity to the Parties to
 - negotiate Mutual Recognition Agreements
 - at any time after the FTA comes into force
 - in any profession
- FTAs do not oblige Parties to negotiate, nor shortlist professions, nor guarantee the conclusions of the MRAs in the future
- Two-tier approach:
 - professional association submit a joint recommendation to the relevant Body established under the FTA
 - Parties assess the recommendation in light of criteria defined in the FTA and either adopt an MRA or renegotiate
- So far, no concluded MRAs, but strong interest in the context of CETA and KOREU

Recognition of professional qualifications

FTA

- Possibility of recognition of third country qualifications
- By nature non-discriminatory
- Mode 4 commitments (GATS) may be relevant
- Framework to facilitate a regime for the mutual recognition of qualifications (e.g. CETA; but none so far)
 - Voluntary
 - Endorsement by Parties
 - e.g. architects

Single Market

- General (Directive 2005/36)
 - Temporary mobility: service provided under home State qualifications
 - Establishment: scheme for the recognition of qualifications
 - Limited scope for host State refusal
 - 'Automatic' recognition for some professions (doctors, architects...)
- Sector-specific
 - lawyers
 - statutory auditors
 - activities involving toxic products
 - Some licences/certificates: e.g. transport

Summary - Single market vs FTA in services

FTA

- Differentiated liberalisation:
 - Open on establishment (but no direct branching in sectors like financial services)
 - More limited for cross-border provision of services and movement of staff (only temporary)
 - Based on existing levels of openness
- Sectoral exclusions to market access; reservations; exceptions
- No harmonisation of regulation on service sectors; horizontal & sectoral disciplines and principles
- General framework for recognition of professional qualifications

Single Market

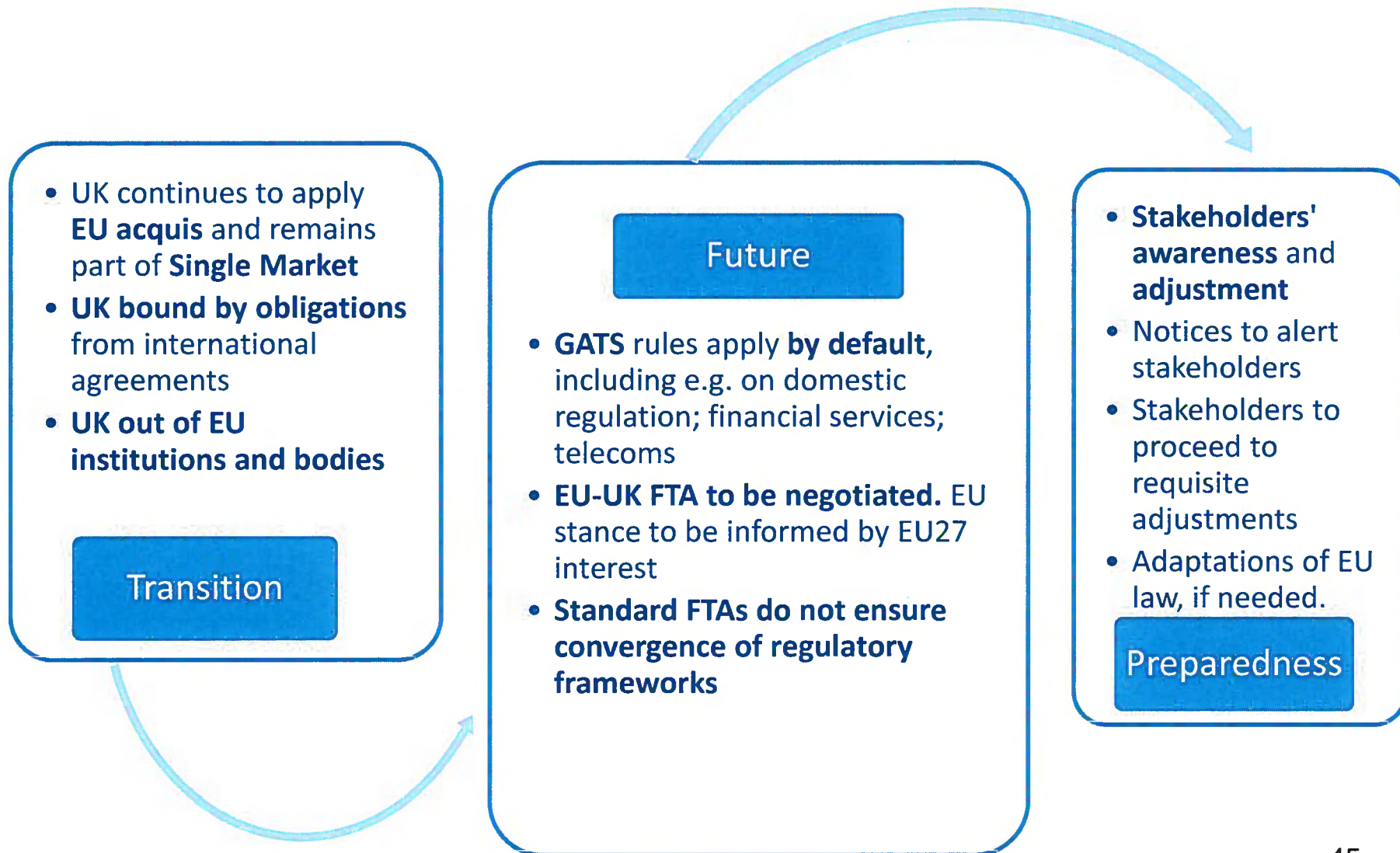
- Fundamental freedoms → dismantling national barriers
 - Services
 - Establishment
 - Capital
 - Persons
- Sectoral liberalisation
 - Services Directive
 - Sector-specific legislation (harmonising conditions for the provision of services)
 - Country-of-origin approach/mutual recognition
- Substantive rules on recognition of professional qualifications

Preparedness

Preparedness for **orderly handling** of end of UK's EU membership, e.g.:

- Raise public/stakeholders' **awareness** of need to anticipate and **adjust** (e.g.: notices);
- Consider **possible adaptations to EU law**, if needed: e.g. references to UK or UK-related matters in legislation.
- **Sector-specific preparatory action, e.g.:**
 - ✓ **Transport:** published notices on road transport, air transport and maritime transport (seafarers);
 - ✓ **Professional services:** published notice on intellectual property (recalling that the right to represent clients before the EU Intellectual Property Office is for EEA lawyers only);
 - ✓ *Financial services [cf. specific presentation]*
 - ✓ *Telecoms and digital services [cf. specific presentation]*
 - ✓ Other notices? – on a "need to" basis.

Summary



Internal preparatory discussions on
framework for future relationship

Financial Services

AD HOC WORKING PARTY ON ARTICLE 50 (*Seminar mode*)
30/01/2018

Agenda

- 1. EU financial services framework***
- 2. Consequences of Brexit***
- 3. Transition***
- 4. Future relationship***
- 5. Preparedness***

EU financial services framework

Regulatory objective: Creation of a Single market in financial services

- Key importance of ensuring financial stability, investor protection, market integrity and the level playing field

Therefore: **a highly regulated and strictly supervised sector**

- **Passporting rights** – free provision of services throughout the EU
- **EU Single rulebook:** >40 Directives and Regulations, plus implementing rules (delegated/implementing acts)
- **European Supervisory Authorities** ("ESAs"), with central powers and responsibilities
- **Banking Union:** Single Supervisory Mechanism (SSM) and Single Resolution Board (SRB) in the Euro area

Consequences of Brexit

- UK no longer bound by acquis on financial services.
- **EU law-based rights, obligations and benefits cease, for instance:**
 - ❖ Loss of passporting rights and right to freely provide services across the EU under home country control;
 - ❖ UK will be treated as a third country
 - ❖ End of participation in European Supervisory Authorities
- Very limited fall-back under GATS and FTAs

Transition (1)

IF Transition Agreement with the UK reached

(EUCO guidelines 15/12/2017 and negotiation directives)

UK applies **all acquis and keeps participating in the Single Market** for a limited period:

UK-authorised entities keep their passporting rights (and EU entities' passport remains valid in the UK)

UK assimilated to a Member State for the application of EU legislation (e.g. on prudential requirements)

Level-playing field secured (e.g. for state-aid control)

Transition (2)

- Assimilation of the UK to a Member State, *but need to specify precise perimeter:*
 - **UK no longer part of the EU institutions and bodies**
 - UK could attend meetings of ESAs only **exceptionally and on a case-by-case basis** - Example: individual acts addressed to UK under Articles 9, 17, 18 and 19 of the ESAs Regulations

External effects of UK becoming a third country:

- Existing EU equivalence decisions regarding third countries will continue to apply in the relation between the UK and these third countries

Future relationship (1)

- **FTA**
 - Horizontal provisions + Financial services chapter (as per earlier agreements e.g. CETA)
 - Very limited market access for cross-border service provision, plus wide prudential carve-out
- **Regulatory cooperation**
 - Sometimes inside FTA (CETA), sometimes outside (US)
 - EU keeps full regulatory autonomy, like for international standards (G20, Financial Stability Board, Basel Committee etc.)
- **Equivalence**
 - Available only in those cases foreseen in EU legislation (not all sectors)

Future relationship (2) - equivalence

- **Nature of the decisions:**

- Unilateral and discretionary EU decisions
- Based on a **proportionate and case-by-case assessment** of the risks of the third country regulatory and supervisory system, in particular financial stability, market integrity, investor protection and level playing field in the EU
- Monitoring and enforcement required

- **Legal effect of decisions:**

- In some cases equivalence may give the **right to provide services** in the EU (e.g. for investment services, clearing of derivatives, alternative investment fund managers, credit rating agencies)
- Most imply **other regulatory/compliance reliefs** e.g. for international exposures in banking and insurance

Preparedness action by industry

- **Main responsibility to adapt lies with market participants**
- **Contingency plans**, in some cases required by supervisors
- **Relocation process**: authorisation for new legal entities ("subsidiary"), extension of existing establishments, adjustment of booking models (for banks and insurers), transformation of EU branches into "third country branches"
- ***Main cliff-edge risks....and their mitigation***
 - Clearing: impact on access to UK CCPs
 - Trading: impact on access to UK trading venues
 - Existing contracts

Preparedness: Raising public awareness

2017

- Brexit Opinions of ESAs; SSM and SRB outlining supervisory expectations:
 - No "empty shells" authorised in the EU27
 - No business models based on regulatory arbitrage
 - Transfer of contracts in insurance (EIOPA)

**Feb.
2018**

- Commission's notices on the consequences attached to UK withdrawal: asset management, banking, investment services, credit rating agencies, derivatives, insurance, audit

2018

- As appropriate additional steps by ESAs/SSM - opinions/guidance/warnings to financial institutions, consumers/investors, clients and counterparties

Preparedness: Adaptations of EU law

- **EMIR Step 2**
 - Enhanced supervision of systemic third country CCPs
 - Possible relocation requirement of most systemic third country CCPs
- **ESA Review**
 - Stronger ESAs including in relation to third countries (i.e. conclusion of administrative arrangements)
 - Enhanced coordination role on authorisation/outourcing
 - Monitoring/enforcing equivalence decisions
- **Investment Firm Review**
 - Targeted enhancements to third country regime
- **Banking Regulation (CRD IV/BRRD)**
 - Intermediate parent undertaking (facilitate resolvability and supervision of large third country banks)

Conclusions

- EU financial services market is very integrated, and sector highly regulated and strictly supervised
- In view of the regulatory and prudential dimensions clear limits what can be achieved in FTAs; EU has its equivalence framework that provides the necessary tools
- Financial institutions have to prepare and adapt to the consequences of Brexit; some EU legislation, e.g. EMIR Step 2, has to be adapted and EU supervisors can prepare.

Internal preparatory discussions on
framework for future relationship

**Telecoms, digital and
audiovisual services**

(hereafter 'digital' services)

AD HOC WORKING PARTY ON ARTICLE 50 *(Seminar mode)*

30/01/2018

Key parameters informing discussion

The UK becomes a third country

- **EU 27 guiding principles:**

- Autonomy of the Union and its legal order (incl. CJEU role)
- Integrity of the Single Market
- No "cherry picking"
- Level playing field
- Consistent approach towards third country partners

- **UK red lines:**

- Regulatory autonomy
- End of CJEU jurisdiction
- End of freedom of movement of people

- ☞ **The UK is leaving the Digital Single Market**

- ☞ **EU-UK relationship to (possibly) be based on:**

- Free trade agreement
- International legal framework (fall-back)

Widely liberalised 'digital services' Single Market

- Mutual recognition : '**Country-of-origin**' principle
 - Audiovisual, e-commerce, identification & trust services;
 - [but not telecoms].
- 'Negative integration':
 - **Prohibition of authorisation schemes** [e-commerce];
 - **Prohibition of individual licences for telecoms services** (only notification, "*general authorisation*").
- 'Positive integration': **Minimum set of common rules**:
 - Foundation of country-of-origin regimes (e.g. audiovisual services: fight against hate speech, protection of minors);
 - Basis for **aligned, pro-competitive operating conditions** in telecoms markets (e.g. regulated access to inputs; access to customers; end-user protection; universal service obligations to accompany liberalisation).

Consequences of becoming a third country in digital services (1/4)

- **UK no longer part of liberalised 'digital services' Market**
- **No institutional role** for UK authorities:
 - **End of UK participation in EU agencies and regulators.**
- **EU law-based rights & benefits to UK and EU providers and citizens cease in the UK/EU cross-border context:**
 - **Providers: end of country-of-origin principle (e-commerce etc.):**
 - UK providers no longer automatically comply with EU rules;
 - EU providers no longer benefit from this principle in the UK;
 - **Providers: end of other EU law-based benefits:**

Liability exemptions, procedural safeguards in spectrum assignments, pan-EU broadcasting & content portability rules (including clearing of copyright), caps on voice call termination rates and wholesale roaming rates;
 - **Citizens:**

End of "roam like at home", "shop like a local", portability of online content subscriptions while travelling.
- **"Host State rule" principle:**
 - **EU rules will apply to UK providers**
 - **UK rules will apply to EU providers (but UK approach unknown);**

Consequences of becoming a third country in digital services (2/4)

Limited fall-back (international legal framework).

Digital services in general:

No specific GATS provisions – general GATS disciplines apply, as for other services:

- Market access (no new quantitative limitations)
- National treatment (relative to own like services & suppliers)
- Most-favoured-nation (MFN) treatment

Audiovisual:

Excluded from the EU's commitments in its GATS schedule

Some COO-type benefits under **European Convention on Trans-frontier Television (ECTT)**:

- Traditional broadcasting only (not online video-on-demand)
- Limited enforcement mechanisms; 7 MS have not ratified.

Consequences of becoming a third country in digital services (3/4)

Telecommunications:

General GATS disciplines apply, plus GATS Telecoms Annex and 1996 reference paper:

Some very basic regulatory provisions -



- Obligation to interconnect for major suppliers
- Transparency on essential facilities
- Transparent authorisation regime
- Procedural rules for allocation of scarce resources
- Regulator independent from sector
- Access to telecoms services by providers of other services

Consequences of becoming a third country in digital services (4/4)

Additional consequences and risks:

- **Uncertainty around net neutrality in the UK** (key protection for online content and service providers, esp. smaller ones);
- **Possible technical divergences EU/UK on 5G policy** (e.g. spectrum release);
- Strategic use of **State aid and public procurement rules** to favour domestic industry in the UK;

UK withdrawal implications for the digital services markets

Phases/scenarios	Aspects to consider
TRANSITION	 <u>Issues:</u>
FUTURE	<ul style="list-style-type: none">• Market Access• Regulatory matters• Level playing field• Enforcement & Supervision
PREPAREDNESS For the UK becoming a third country including in a no deal scenario	 <u>Areas:</u> <ul style="list-style-type: none">• E-commerce & online services• Audiovisual and copyright• Telecoms• Identification & trust services

Transition (1/2)

If TRANSITION AGREEMENT WITH UK reached
(EUCO guidelines 15/12/2017 and negotiation Directives)

UK applies **all acquis and keeps participating in the (Digital) Single Market** for a limited period

 **Status quo** would be maintained, e.g.:

- Country-of-origin principle
- Harmonized standards on market access, end-user rights, security etc.
- Level playing field secured
- Supervision at EU level

Transition (2/2)

- **Assimilation of UK to EU Member State but need to specify precise perimeter:**
 - **UK no longer part** of the EU institutions, agencies and bodies;
 - UK invitation to EU expert groups and agency/bodies meetings **only exceptionally on a case-by-case** basis.
- **External effects** of UK becoming a third country:
 - UK remains bound by the obligations stemming from EU agreements (including GATS);
 - UK should no longer participate in bodies set up by those agreements.

Options for the future

✗ Digital Single Market

- EU Acquis
 - E-commerce & online services
 - Audiovisual & copyright
 - Telecoms
 - Identification & Trust services
- Enforcement/CJEU
- Competition acquis
- State Aid acquis



✓ External relations

- **Free Trade Agreement**
 - Digital trade
 - Telecommunications
 - Other?
- **International legal framework fall-back**
 - **GATS Telecoms Annex and 1996 Reference Paper**
 - **ECTT (European Convention on Transfrontier Television)**

Future relationship (1/4)

FTA – market access & regulation

- **Market access:**

- **GATS + FTA commitments: rather open EU and UK markets** for mode 1 (cross-border supply) and mode 3 (establishment) **in digital services.**
Notable exception : audiovisual

- **Regulatory pillar:**

- **FTAs have chapters on regulatory issues in respect of digital trade & telecoms services,** but limited scope :
 - only contain a basic set of rules providing for minimum protection;
 - their level of detail and harmonisation effect are well below that of the Single Market rules;
- **Host State rules apply in each market** (no country-of-origin rule).
- **In practice: EU openness to establishment & EU pro-competitive market entry rules / favourable eCommerce rules make access to EU market much easier than FTA rules alone would allow for.**
- **Main added value of FTAs regulatory pillar:** imposes broad objectives to discipline Parties, provides certainty to operators/Parties (e.g. could partially **address uncertainty about future UK approach**).

Future relationship (2/4)

FTA – Digital Trade regulatory issues

FTA most common rules:

- No customs duties on electronic transmissions
- **E-Commerce:**
 - No prior authorisation principle; validity of conclusion of contracts by electronic mean; rules on unsolicited commercial electronic messages (spam);
 - **no liability of on-line intermediaries** (mere conduit, hosting, caching) - either general or intellectual property rights-related;
- **Electronic identification and electronic trust services:** basic rule confirming the validity of electronic services as evidence in legal proceedings;
- (sometimes) limited standards on **online consumer trust**.

No FTA rules to date on:

- **protecting open internet (net neutrality)** – important for all online service providers.

Transfer of personal data to the UK: EU legal framework provides for rules facilitating the transfer of personal data, in particular "adequacy decisions" (unilateral decision of the EU regarding the equivalence of safeguards in the UK).

Future relationship (3/4)

FTA - Telecoms Services regulatory issues

FTAs provide for **common standards beyond the minimum principles of GATS** (Annex on Telecoms and Reference Paper): e.g. on

- Basic regulatory principles: e.g. regulatory authority, simple authorisation procedure to provide services, access and use of public (basic) telecoms services, access to domestic dispute resolution mechanisms.
- Major suppliers: access to essential facilities and major suppliers networks, competitive safeguards.
- Market issues: universal service; allocation of scarce resources (e.g. spectrum); number portability; confidentiality of telecoms information and prevention of foreign shareholding limitations.

FTA rules

- **are much less detailed/harmonised and enforceable than the EU rules** (e.g. supervisory powers, competition rules, end-users rights, etc);
- **may be limited to basic telecoms services only**: cf. EU/Korea (but in CETA, also value-added services)
- **depend on market access commitments** (e.g. in CETA, Canada maintains restrictions)

Future relationship (4/4)

FTA – issues traditionally not covered

Audiovisual:

- **Existing FTAs: exclusion from liberalisation commitments.**
- Some limited benefits accrue in audiovisual, outside the usual FTA framework, under **European Convention on Trans-frontier Television** (ECTT):

(= International law fall-back, above)

- In all other respects, broadcasting / related content licensing from UK would normally lose access to EU market (& vice versa).

Roaming, content portability, shop like a local, termination:

- Specific EU regimes highly relevant to the price of cross-border activities of individual end-users – e.g. mobile roaming, content portability (e.g. temporary lifting of geoblocking), shop like a local – are typically excluded from FTAs.
- FTA provisions on call interconnection/termination usually do not go beyond GATS.

Preparedness

Preparedness for **orderly handling** of end of UK's EU membership, e.g.:

- Raise public/stakeholders' **awareness** of need to anticipate and **adjust** (e.g.: notices)
 - *Need for notices on digital services?*
- Possible adaptations to EU **law**, if needed

Summary

