A Briefing Note on the Withdrawal Agreement and the future EU-UK relationship(s) and its implication for medical professional qualifications and access to information exchange on professional misconduct of qualified medical professionals under the IMI

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Note. This analysis must not be treated as formal legal advice, not least because its authors are not insured to give such advice. Anyone seeking such advice should consult a solicitor.

Summary

The British Medical Association is the trade union and professional association for doctors throughout the UK. The BMA champions and supports doctors throughout their professional lives. It also engages with governments in the UK on matters pertaining to its members. These include professional qualifications and training. Brexit will change the legal landscape for medical professional qualifications in the UK.

The future relationship(s) between the European Union (EU) and the United Kingdom (UK) will have to be embodied in some kind of legal form(s). This briefing paper focuses on possible legal forms for post-transition cooperation in mutual recognition of professional qualifications, and the sharing of data on professional misconduct, in the context of health professionals.

After the end of the transition period established in the Withdrawal Agreement, the level of cooperation, data sharing and mutual recognition *will fall short* of the present relationship. The latter is part of the deepest type of legal integration of different systems/economies that falls short of a federal state, that is, membership of the European Union. Cooperation in mutual recognition of medical qualifications and data sharing on professional misconduct will be *conditioned by the broader EU/UK (trade) relationship(s)* within which it sits. In general, from the point of view of the EU (and possibly the UK too), these aspects of cooperation are a part of trade relations, *not a severable part of the economy/society*.

Post-Brexit, the UK is formally a 'third country', like any other non-EU Member State. There is no formal EU legal category of 'ex Member State'. The EU's power or *competence* to enter into agreements with 'third countries' must be understood as an important legal *constraint* on what is politically possible for the EU-UK future relationship(s). But EU competence must also be understood as *dynamic*.

Scope for cooperation between entities in the EU Member States and those in a third country which regulate medical professionals is restricted by broader EU competences, *as interpreted by the EU's Court of Justice (CJEU)*. Specific and bespoke agreements for some small elements of cooperation between the EU's Member States and UK would be legally possible

without an EU-UK trade agreement being in place. But for anything less piecemeal, more ambitious, nearer to the current position of UK membership of the EU, a relatively deep underpinning free trade agreement FTA will be necessary.

Some specific features of the EU's approach to regulation of health professionals which are important in the context of post-transition EU-UK relations include the following.

In the absence of a trade or other agreement, individual EU Member States may recognise UK qualifications, either unilaterally or in bilateral agreements with the UK. If the EU agrees a trade agreement that includes mutual recognition of qualifications, this will 'occupy the field' and Member States will no longer be competent to take unilateral action. If modelled on the EU's trade agreements with Canada or Singapore, the EU-UK trade agreement may make provision for a process leading to further specific mutual recognition agreements (MRAs) between the EU and the UK for particular professions.

The UK may of course lawfully unilaterally recognise the professional qualifications gained in one or more EU Member State(s).

The Withdrawal Agreement provides for data flow from the EU to the UK until the end of transition, and the Political Declaration states that the European Commission will take steps to take an 'adequacy decision' to allow data flow from the EU to the UK thereafter. The UK has already adopted legislation to permit data flow from the UK to the EU post-Brexit.

To the best of our knowledge, EU law does not at present grant full or partial access to the alert mechanisms for any entities in any non-EEA third country. The IMI Regulation permits the EU to agree access, but only where certain conditions – including the application of EU law in the relevant third country – are met. Unless agreed otherwise, the UK will therefore lose access to that system on 30 September 2021.

In short, the choice for the UK – in this policy area as in others – is between depth of integration and corresponding loss of regulatory control, or the regaining of regulatory control accompanied by a loss of access to the EU market. This trade-off is the critical question which successive UK governments have failed to settle. If shared standards and deep collaboration are the preferred outcomes, the UK must look to models such as the EEA Agreement for inspiration in its negotiations with the EU. The Johnson Political Declaration and recent government speeches suggest a less deep relationship, although the language from the UK government is sufficiently flexible to leave matters relatively open.

1. Introduction and context

The EU-27 and UK reached an Agreement on the Withdrawal of the United Kingdom from the EU.[1] The Agreement entered into effect on 31 January 2020, following the enactment of the requisite implementation legislation (known as the 'Withdrawal Agreement Bill') by the UK Parliament. The UK left the EU on 31 January 2020. A 'transitional period', during which time EU law will continue to apply in most respects as it currently does in the UK, will end on 31 December 2020, unless the EU and EU agree by 1 July 2020 to extend this period. The December 2019 Johnson government's manifesto stated that no such extension would be sought.

During the transition period, the intention is that the EU and UK will agree their future (trade) relationship(s). In general, it takes significantly longer than 11 months to negotiate such an international agreement. This raises the possibility that the EU and UK's trade relationship will be WTO terms only, on 1 January 2021. Neither the EU nor the UK government seek such terms for their future relationship. Rather, the (Johnson-renegotiated) Political Declaration on the future EU-UK relationship suggests an 'ambitious, broad, deep and flexible partnership'. The Political Declaration is neither legally binding nor precisely written enough to determine much about what the future EU-UK relationship will look like. Neither are recent statements from the Johnson government.[2] There is scope within these statements for a range of models. The question, then, is what each side in the negotiation will seek. The EU has been clear about its 'red lines': for instance, access to the EU market is contingent on regulatory alignment. Commentators have pointed out that Johnson's government has yet to speak with such clarity. In a choice between a 'bare bones' FTA, and a 'softer' Brexit involving a relationship closer to the status quo, all is still open.[3]

In this briefing paper, we address the following questions:

1. How to get as close as possible to the status quo in relation to the mutual recognition of professional qualifications.
2. How to get as close as possible to the status quo in relation to the alert mechanism on professional misconduct.

We first outline briefly the status quo, and the position under the Withdrawal Agreement until the end of transition. Then we turn to the legal constraints on the EU in its negotiation and agreeing of trade relationships, and to the possible models for a post-transition EU-UK trade relationship. We consider in detail their implications for mutual recognition of qualifications, drawing on existing examples. Finally, we consider the post-transition position on data sharing on professional misconduct, elaborating the GDPR rules, and the provisions in the IMI Regulation concerning access of 'third countries' to that information exchange mechanism.

[1] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community, C 66 I/01 OJEU (2019).

[2] See, eg, Johnson Greenwich speech 3 February 2020 https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020.

[3] See A Menon, 'What will Boris Johnson's majority mean for Brexit?' The Guardian 13 December 2019. https://www.theguardian.com/commentisfree/2019/dec/13/boris-johnson-brexit-leave-eu?CMP=Share_iOSApp_Other

1.1 Status quo for mutual recognition of qualifications

The EU's Directive 2005/36/EC on the mutual recognition of professional qualifications[4] makes it possible for a professional to exercise her rights to work,[5] become established[6] or provide services[7] in another Member State and conduct professional activity on the same terms as nationals (or non-nationals with host Member State qualifications). The Directive does this by providing for the recognition of home Member State qualifications in a host Member State. Put simply, the Directive supports the exercise of free movement rights.[8] Its detailed rules are enforceable by individuals in national courts, and supported by administrative and institutional structures of cooperation between relevant administrative authorities and professional bodies. This means that the practical realities for migrant professionals within the EU make accessing a market in another Member State significantly easier than elsewhere.

The Directive provides for a general system that applies to professions not covered by specific provisions elsewhere in the Directive. So, for instance, lawyers trained in a system that differs from that of the host Member State must either sit an aptitude test or complete an adaptation period in order for their qualifications to be recognised in another Member State.

The competent authority in each Member State must allow access to and pursuit of a profession under the same conditions as apply to nationals, as long as the applicant holds a training qualification from another Member State which shows that she has a level of training at least equivalent to the level immediately prior to that required of home nationals. Alternatively, if access to the profession is not subject to rules on professional qualification in an applicant's home state, but is regulated in the host state, then the applicant must demonstrate two years full time professional experience over the proceeding 10 years.[9]

[4] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.

[5] Articles 45 – 48 TFEU, interpreted in: Case 139/85 *RH Kempf v Staatssecretaris van Justitie* [1986] ECR 1741; Case 379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967; Case C-415/93 *Union royale belge des sociétés de football association ASBL and Others v Jean-Marc Bosman* [1995] ECR I-4921; Case 176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basketball ASBL* [2000] ECR I-2681.

[6] Articles 49 – 55 TFEU, interpreted in: Case C-340/89 *Irene Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357; Case C-55/94, *Reinhard Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; Case C-238/98, *Hugo Fernando Hocsman v Ministre de l'Emploi et de la Solidarité* [2000] ECR I-6623.

[7] Articles 56-62 TFEU, interpreted in: Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221.

[8] Also recognised in the institution of EU citizenship – see: Articles 18 and 20-21 TFEU, interpreted in: *Case C-413/99 Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-456/02 *Trojani v CPAS* [2004] ECR-7573; Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925; Case C-135/08 *Rottmann v Freistadt Bayern* [2010] ECR I-1449; Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375. EU citizenship is fleshed out further in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 229/35.

[9] Member States may require applicants to meet supplementary requirements before recognising their qualifications, for example, where their existing training was a year shorter than is required in the host state or was substantially different from that required by the host state. The supplementary requirements could include an aptitude test or a period of training/adaptation of up to three years.

The general system is based on the principle of mutual recognition.[10] Professional qualifications obtained from one Member State should in principle be recognised in others, subject to the application of measures that compensate for substantial differences in the levels of training between the home Member Stare and the host Member State.[11] These 'compensation measures' must be applied proportionately, and may not be used to impose unreasonable burdens on migrant professionals.

The general system, and its qualified mutual recognition model, do not, however, apply to doctors. Instead, doctors are subject to an even more favourable unqualified system of mutual recognition.[12] Under this system each Member State is required to *automatically* recognise training certificates relating to doctors (and several other professions[13]). This approach to mutual recognition operates in conjunction with partial harmonisation as regards training requirements. These essentially pertain to minimum standards relating to training conditions and duration of studies. The Directive also includes a list of the formal qualifications that conform to it.[14] Doctors (or indeed other holders) of these qualifications are free to practise their profession throughout the EU.

The exercise of rights to free movement by doctors means that the competent authorities relating to the profession, and indeed others, may need to exchange information. For instance, in respect of doctors there may be a need to ensure those who are 'struck off' and can no longer practise in one Member State can be tracked in other Member States. In this example Member State competent authorities are able to maintain the professional standards of the profession and the safety of their patients. The Internal Market Information (IMI) system fulfils this function by enabling such information to be exchanged between Member State competent authorities. Since significant elements of professional qualifications for doctors are subject to partial harmonisation, the information exchanged effectively relates to licensing, including suspensions and withdrawals of licences, and professional misconduct.

This is a particularly deep approach and is virtually unique among Mutual Recognition Agreements (MRAs) for professional qualifications worldwide. The nearest equivalent may be the Trans-Tasman Mutual Recognition Arrangement between New Zealand and Australia (TTMRA) which is a bilateral MRA providing for automatic recognition for all qualifications except those of medical doctors.[15]

[10] Derived from case law – see: Case C-340/89 *Vlassopoulou* above.
[11] For the meaning of 'regulated profession' to which the general system applies, see: Case C-313/01, *Christine Morgenbesser v Consiglio dell' Ordine degli avvocati di Genova* [2003] ECR I-13467. The examination of equivalence must be carried out in light of the academic and professional training and experience as a whole before requiring a candidate to take an aptitude test – see: Case C-345/08, *Krzystof Peśla* [2009] ECR I-11049.
[12] Chapter III, Directive 2005/36/EC. Chapter II provides for automatic recognition of qualifications attested by professional experience in certain industrial, craft and commercial activities.
[13] Including nurses responsible for general care.
[14] Annex V, Directive 2005/36/EC.
[15] See https://unctad.org/meetings/en/Presentation/tncd2019-05-03_Qalo.pdf.

1.2 Status quo for the Internal Market Information System, encompassing the alert mechanism

The alert mechanism is covered by Article 56a of Directive 2005/36/EC[16] and by the IMI Regulation 1024/2012.[17] The IMI Regulation is based on Article 114 TFEU, which is the EU's internal market competence. Internal market is an area of 'shared' competence, between the EU and its Member States.[18] The purpose of the IMI system is to improve the functioning of the internal market.[19]

In the short term, the Withdrawal Agreement provides for a transitional period, during which EU law applies in the UK, even though the UK has left the EU.[20] During this time, the UK is able to access the IMI system as before. The transitional period is due to end on 31 December 2020.[21] In general, at the end of transition, the UK will cease to have access to any EU network, information system or database.[22] But by derogation, the Withdrawal Agreement, Article 29 explicitly provides that the UK will continue to be able to access the IMI system for 9 months after the end of transition. So the key date for IMI access to be negotiated, or at least for access to the alert system part of the IMI, is 30 September 2021.

2. Post-transition EU-UK (trade) relationship

There is an important correlation between what level of cooperation and integration a third country has with the EU *in general* and what level of cooperation and integration can be achieved between professional bodies that regulate qualifications in that third country with their EU counterparts. Hence we consider the possibilities for a general post-transition UK-EU relationship before exploring the options available for mutual recognition of qualifications agreements.

2.1 EU-third country relationships: legal limitations

In order to consider the legal limitations on EU-UK relationships post-transition, we first provide some basic definitions of the two key participants under consideration: the European Union and the UK as a 'third country'.

The EU is not a state. The EU is a legally created entity comprising 27 Member States, by the agreement of the governments of those Member States. This agreement (now embodied in the Treaty on European Union (TEU) and Treaty on the Functioning of the EU (TFEU), and all the law that flows from those international instruments) informs the EU's objectives of economic and political union. But the TEU and TFEU, as interpreted by the CJEU, also comprise the legal bases by which the EU's powers and competence are constrained. These legal texts are

16 See above n 3.
17 Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (the IMI Regulation) OJ L 316 14.11.2012, p. 1.
18 Article 4 TFEU.
19 IMI Regulation, recital 4.
20 Withdrawal Agreement, Articles 126 and 127.
21 Withdrawal Agreement, Article 126. Unless the EU and UK agree, before 1 July 2020, through the Withdrawal Agreement's Joint Committee, to extend this period, see Article 132.
22 Withdrawal Agreement, Article 8.

crucial to determining the EU's competence to enter into agreements with what are known as 'third countries'.

The TEU and TFEU envisage two types of country: EU Member States and 'third countries'. The only commonality between all third countries is that they are not Member States of the EU and therefore they cannot enjoy the same cooperation with and participation within the EU as the Member States. Other than being an EU Member State, it is in principle not legally possible to go beyond third country cooperation, for instance, as the May government suggested, as a 'former EU Member State'. Even the closest cooperation, for instance, within the EEA, or association agreements with countries seeking to join the EU, is still, legally speaking, 'third country cooperation' from the point of view of the EU. But there is significant variation in the types and levels of cooperation between the EU and different 'third countries' or groups of third countries. The US, Switzerland, and the EEA, for example, all fall on different points of the spectrum of cooperation and participation.

Legal limits to the EU's competence are outlined in the TEU and TFEU. They are of two broad types:

- Substantive limits to the contents of what the EU may lawfully agree with third countries;
- Procedural limits to how those agreements must be negotiated, ratified and enter into force.

Mutual recognition of qualifications falls within the broad parameters of the EU's external trade policy – the various bases on which the EU agrees to trade with the rest of the world. The EU's competence in external trade policy determines:

- To what extent the EU may lawfully negotiate trade agreements with third countries;
- To what extent the EU may do this without the involvement of its Member States (known as 'exclusive competence')? (*procedural* points);
- What legal limits there are on the *contents* of trade agreements that the EU negotiates (a point of *substance*).

The TFEU's aim is 'the progressive abolition of restrictions on international trade'. The EU aims to be 'a strong and united player on the international scene, rather than a more or less effective coordination platform'[23] for its Member States.

Under the Common Commercial Policy (CCP), Article 207 TFEU sets out the scope of trade to include goods, services, commercial aspects of intellectual property, and foreign direct investment.[24]

Procedurally, Article 3 TFEU confirmed these as the exclusive competence of the EU. Where a FTA includes areas outside of these (such as non-direct investment or investor-state dispute

[23] https://epin.org/wp-content/uploads/2019/02/EPIN_wp43-Erlbacher-External-Competences.pdf.
[24] See, eg, Steve Peers (2016) The EU's future trade policy starts to take shape: the Opinion on the EU/Singapore FTA. https://eulawanalysis.blogspot.com/2016/12/the-eus-future-trade-policy-starts-to.html. Last accessed 11 August 2019.

settlement (ISDS)), the EU may not conclude the agreement alone, but the Member States also have to agree it (known as a 'mixed agreement').[25]

As trade in services is an exclusive EU external competence, it would seem that mutual recognition of qualifications falls within that category. However, freedom of establishment and movement of human beings are areas of shared EU-Member State (MS) competence. Hence, the likelihood that an EU-UK FTA may have to be a mixed agreement should be borne in mind, given that a broader FTA between the EU and the UK is likely to encompass areas beyond those of exclusive EU competence. Put differently, in this case an EU-UK FTA would have to be agreed by the EU and its MSs, on the one side, and the UK, on the other.

However, even if it is within the EU's remit to negotiate and conclude an agreement independently, this does not guarantee that its content adheres to the limitations on EU competence set out in the TEU and TFEU. *Substantively*, the EU may not, for instance, agree FTAs that are incompatible with the Treaties, including fundamental rights. FTAs, for instance, must respect the autonomy of the EU and its legal order. However, it is permissible for the EU to agree to establishing a new institution to interpret and apply provisions of a FTA, as is the case in the EU-Canada FTA (CETA).[26]

Furthermore, *substantively* the EU may not agree other types of cooperation agreements that undermine the EU's CCP. If an agreement to cooperate in science and technology, for instance, grants access to the EU's market in products or services, then it is a FTA in the terms of EU law, and EU law on FTA competences applies.

To summarise:

- An EU-UK FTA could lawfully encompass cooperation in the form of mutual recognition of qualifications
- Those aspects of such a FTA would be within the EU's shared competence
- And the FTA as a whole would have to be considered to determine whether *procedurally* each EU Member State would, in effect, have a veto
- *Substantively*, an EU-UK FTA must respect the Treaties, including, for instance, fundamental rights, and the autonomy of the EU legal order
- An EU-UK FTA could not lawfully give the UK identical access to the EU market as an EU Member State
- An EU-UK FTA could lawfully extend EU standards to the UK
- An EU-UK FTA could lawfully include an institution for dispute settlement.

Note, however, that all of the above rules have been fleshed out by decisions of the CJEU, as well as changing over time as the EU's foundational treaties (the TFEU and TEU) changes. Neither the procedural nor the substantive aspects of EU competence are static. Rather, they should be understood as *dynamic*. The legal constraints on the EU's competence are important: nothing is 'simply a political decision' because of the nature of the EU. But the way those legal constraints are interpreted changes over time, and in response to non-legal (political) situations.

[25] Note that, for political reasons, the EU sometimes negotiates agreements as 'mixed agreements' even where legally this would not be required.
[26] Opinion 1/17 ('CETA'), EU:C:2019:341.

2.2 EU-third country relationships: possible models

The EU has trade agreements with over 70 countries.[27] There is evidently a range of options along the spectrum of integration and cooperation within the broad umbrella terms of 'third country relationship', and 'FTA'. An EU-UK FTA could in principle occupy any point on that spectrum.

For those seeking a deeply cooperative relationship, however, the FTA on the European Economic Area (EEA) offers a particularly useful case study. Outside of EU Membership, the EEA European Free Trade Association (EFTA) States (Iceland, Liechtenstein and Norway) have the closest cooperative relationship with the EU, and full access to its internal market.

The Agreement on the European Economic Area has been in force since 1 January 1994. It creates a single market encompassing the EU, and three EFTA States, Iceland, Liechtenstein and Norway. The fourth EFTA State, Switzerland, is not party to the EEA, but instead has a series of complex bilateral agreements with the EU. The Agreement on the EEA gives all entities within that single market equal rights to access the market and imposes equal obligations on them. EU legislation on free movement of products, services, persons and capital applies throughout the EEA single market, including in Iceland, Liechtenstein and Norway. The Agreement covers EU cooperation with those states in related areas, which include mutual recognition of qualifications.

The Agreement represents a compromise: Iceland, Liechtenstein and Norway agree to apply EU legislation which they do not participate in creating, and to contribute towards the EU's budget, in exchange for access to the EU's market. Unlike for EU Member States, in Iceland and Norway,[28] measures of EU law have to be implemented domestically: they do not automatically become part of the 'law of the land' (as is the case with the EU doctrine of direct applicability). Moreover, the doctrine of 'primacy' of law (where a piece of national law that is inconsistent with applicable EU law must be 'disapplied' by national courts[29]) does not apply under the EEA. Nor are domestic courts obliged to refer questions of EEA law to the EFTA Court, and if they do ask for an Advisory Opinion from that Court, the Advisory Opinion is not formally binding on domestic courts.[30]

Compliance by the EU Member States with this agreement is secured by the European Commission and CJEU. Compliance by Iceland, Liechtenstein and Norway is secured by the EFTA Surveillance Authority and the EFTA Court. This 'two pillar' or 'twin track' institutional architecture, and especially the independent EFTA Court compensates those countries' restriction of sovereignty.[31] But the EFTA Court is formally obliged to interpret EEA provisions in conformity with rulings of the CJEU before the EEA, and to take account

[27] See Full Fact, 'Who trades with the EU on WTO terms?' https://fullfact.org/europe/who-trades-eu-under-wto-rules/. Accessed 4 January 2020. See further, European Commission (2019) A balanced and progressive trade policy to harness globalisation. https://ec.europa.eu/info/priorities/stronger-europe-world/balanced-and-progressive-trade-policy-harness-globalisation_en. Accessed 4 January 2020.

[28] Liechtenstein is different because its constitution means that international legal obligations are automatically part of its domestic law (it has a 'monist' legal system). That is not the case in UK constitutional law (which maintains a distinction between domestic and international law – it has a dualist' legal system).

[29] See *Factortame Ltd v Secretary of State for Transport* [1991] 1 AC 603.

[30] In practice, the threat of proceedings before the EFTA Surveillance Authority means that domestic courts would usually follow the EFTA Court's Advisory Opinions. See further C Franklin, ed, *The Effectiveness and Application of EU and EEA Law in National Courts* (Intersentia 2018).

[31] See further C Baudenbacher, ed, *The Handbook of EEA Law* (Springer 2016).

of its rulings thereafter.[32] And domestic courts in Iceland and Norway interpret domestic law consistently with EEA law not because of EEA law obligations, but because they are obliged to do so in domestic law.[33]

At the time the Agreement on the EEA was concluded, it was unprecedented.

Until the EU entered into the EEA, it was not clear that the EU had the competence to do so. This competence was tested before the CJEU, which held that the originally-proposed EEA was, in part, beyond the EU's competence.[34] In particular, the EU had no substantive competence to agree to the originally proposed EEA Court. The EEA Agreement was renegotiated, and the CJEU found that the new arrangements (including an EFTA Court) were within the EU's competence.[35]

As well as offering a model of an existing agreement, which could provide a blueprint for the 'deep and special relationship' the UK seeks with the EU, the EEA also illustrates that events in the non-legal (political) realm *can* forge new paths for the law to follow – as opposed to the law *entirely* constraining the politics.

3. Post-transition mutual recognition of qualifications

3.1 Third country qualifications in Directive 2005/36/EC

In principle, Directive 2005/36/EC leaves intact the competence of each EU Member State to recognise qualifications from 'third countries'.[36] However, the Directive obliges Member States of the EU to recognise 'third country' qualifications under the following limited circumstances. Recognition of a qualification is not, of course, the same as an entitlement to move to or reside in an EU Member State, those being matters of immigration law, within national competence.[37]

Where a Member State is considering evidence of formal qualifications, a formal qualification issued by a third country must be regarded as evidence of a formal qualification if the holder

[32] Article 6 EEA which obliges the EFTA Court to interpret EEA provisions consistently with the relevant CJEU case law *prior* to signature of the EEA (2 May 1992). Article 3 (2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice requires the EFTA Court to 'take due account' of the principles of EU Law laid down in rulings of the CJEU after that date. In practice, the EFTA Court consistently follows the CJEU's approach, even in post-1992 CJEU rulings. See C Franklin, ed, *The Effectiveness and Application of EU and EEA Law in National Courts* (Intersentia 2018), p8-10.

[33] See C Franklin, ed, *The Effectiveness and Application of EU and EEA Law in National Courts* (Intersentia 2018), p16-18; 322-332; 392-408.

[34] Opinion 1/91 ECLI:EU:C:1991:490.

[35] Opinion 1/92 ECLI:EU:C:1992:189. See Barbara Brandtner, 'The Drama of the EEA: comments on Opinions 1/91 and 1/92' (1992) 3 *European Journal of International Law* 300-328 http://www.ejil.org/pdfs/3/2/2042.pdf.

[36] Recital 10: "This Directive does not create an obstacle to the possibility of Member States recognising, in accordance with their rules, the professional qualifications acquired outside the territory of the European Union by third country nationals. All recognition should respect in any case minimum training conditions for certain professions."

[37] Subject to the obligations on Member States under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16, 23.1.2004, p. 44–53, which obliges Member States to grant long-term residence to third country nationals who have been lawfully resident in their territory for five years or more.

of that qualification has three years' professional experience in that profession on the territory of the Member State which recognised that qualification under Article 2 (2) of the Directive.[38] So, even if nothing else is agreed, a holder of a UK qualification, post-Brexit and post-transition, will be able to have that qualification recognised in an EU Member State if she has been operating as a professional for at least three years in another Member State which recognised that profession (presumably, although Directive 2005/35/EC does not specify this, including recognition of that profession under the duties applicable at the relevant time to that Member State in EU law).

Furthermore, a Member State seeking to apply 'compensation measures' to a professional seeking to provide services in that Member State must give proportionate recognition to professional experience in a 'third country'.[39] Professional experience in the UK must therefore be duly recognised, as experience in any other 'third country', under the terms of the Directive: but only in terms of when a Member State is seeking to apply 'compensation measures'.

3.2 Examples of Mutual Recognition of Qualifications in the EU's existing trade relationships with third countries.

The EU's latest free trade agreements include those with Canada,[40] which entered into force provisionally on 21 September 2017, and with Singapore,[41] which entered into force on 21 November 2019. These are known as 'third generation' 'deep and comprehensive free trade agreements', as they represent the most ambitious type of trade agreements to which the EU is a party, setting aside the EEA which is significantly more ambitious than these.

These kinds of agreement seem to be the type of EU-UK agreement signalled by Johnson's Political Declaration. But they still fall far short of the trade agreement between the EU Member States; and of that between the EU and Norway, Iceland and Liechtenstein in the EEA. This is the case in many respects, including the way that they cover mutual recognition of qualifications.

- **The EU-Canada trade relationship**

Chapter 9 of CETA covers services. The EU and Canada ('the Parties') have agreed to allow access to each other's services markets, for instance by removing measures that restrict the number of service suppliers, monopolies, or economic means tests.[42] Chapter 10 covers temporary stay for persons providing services, including professionals. These provisions leave intact the rules on professional qualifications that apply in Canada and the EU. Technical standards, licensing requirements and professional qualifications rules continue to apply as before. This approach is far from the mutual recognition of qualifications rules that apply within the EU and EEA (see section 1.1 above).

[38] Directive 2005/36/EC, Article 3 (3).
[39] Directive 2005/36/EC, Article 14 (5).
[40] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14.1.2017, p. 23–1079 and see https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.
[41] Free trade Agreement between the European Union and the Republic of Singapore OJ L 294, 14.11.2019, p. 3–755 and see https://data.consilium.europa.eu/doc/document/ST-7972-2018-REV-1/en/pdf,
[42] CETA Article 9.6.

Licensing and qualifications requirements and procedures that affect cross-border supply of services, pursuit of economic activity through establishment in the territory of the other Party, supply of a service through the presence of a natural person of the other Party on the territory of a Party[43] must be clear, transparent, objective, established in advance and publicly accessible.[44]

But these obligations in CETA are not enforceable by private individuals.[45] They are thus far from the position in EU law (and during the transition period under the Withdrawal Agreement) where the mutual recognition of qualifications rules are 'directly effective' and domestic courts in the UK and the Member States of the EU must enforce them, potentially referring to the CJEU in order to do so.

Chapter 11 of CETA sets up a *process*, whereby qualifications in Canada would be recognised in the EU and vice versa. Each of the Parties to CETA is obliged to encourage its relevant regulatory authorities to develop joint recommendations on proposed Mutual Recognition Agreements (MRAs) to the Joint Committee on Mutual Recognition of Professional Qualifications, which is set up under Article 26.2.1(b) CETA.[46] The joint recommendation must assess the potential value of an MRA, on the basis of criteria such as 'the existing level of market openness, industry needs, and business opportunities'. It must also 'provide an assessment as to the compatibility of the licensing or qualification regimes of the Parties, and the intended approach for the negotiation of an MRA'.[47]

As far as we have been able to ascertain, only one meeting of the Joint Committee on Mutual Recognition of Professional Qualifications has taken place so far, on 16 April 2019.[48] That meeting considered documents for an MRA on architects' qualifications.

● The EU-Singapore trade relationship

The EU and Singapore have agreed to provide preferential market access to each other's service providers in certain sectors. The FTA includes access for EU providers to access markets in Singapore for medical and dental services (though apparently not the other way around).[49] The EU and Singapore (the 'Parties') have agreed to remove some restrictions that would impede companies from providing services in each other's markets. These include removing restrictions on the number of services suppliers, the specific type of legal entity permitted, and foreign shareholding or equity limits. But technical standards, licensing requirements and professional qualifications rules continue to apply as before.

Chapter 8 of the EU-Singapore FTA covers services, establishment and electronic commerce. On mutual recognition of qualifications, Article 8.16 provides for a *process* by which mutual recognition may be achieved. It obliges the Parties to encourage relevant professional bodies to develop a detailed joint recommendation on mutual recognition, taking into account evidence on the economic benefits of such benefits, and the extent of regulatory compatibility

[43] CETA, Article 12.2.
[44] CETA Article 12.3.2.
[45] CETA Article 30.
[46] As per Article 11.3.1 CETA.
[47] Article 11.3.2 CETA.
[48] https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157559.pdf.
[49] see https://www.mti.gov.sg/-/media/MTI/Microsites/EUSFTA/SG-EU-Trade-and-Investment-7.pdf.

between the two professional qualifications systems. This joint recommendation is to be put to the FTA's Committee on Trade in Services, Investment and Government Procurement, one of several 'Specialised Committees' established under the FTA's Article 16.2. If the Specialised Committee consider that the joint recommendation is consistent with the FTA, the Parties are obliged to negotiate a Mutual Recognition Agreement, through their competent authorities.

In the meantime, each Party is obliged, under Articles 8.17 and 13.4, to provide one or more 'Enquiry and Contact Points', to provide information to entrepreneurs and service suppliers seeking to access services markets in the other Party.

> 'Article 8.17 (3). Each Party shall establish or maintain appropriate mechanisms for responding to enquiries from any interested person of the other Party regarding any measures of general application which are proposed or in force, and their application. Enquiries may be addressed through the contact points established under paragraph 1 or any other mechanism, as appropriate.'

Licensing and qualification requirements and procedures must be clear, objective, transparent, pre-established, and accessible.[50]

But no provisions of the EU-Singapore FTA are directly effective,[51] so none of these obligations can be enforced by individual health professionals or any other service providers, or professional associations acting on their behalf.

● EU/Canada and EU/Singapore model: implications for MRAs

The process, or 'roadmap', approach to MRAs, taken in the CETA and EU-Singapore trade agreements, is also found in examples of MRAs not involving the EU, but involving its Member States individually. For instance, the France-Québec Accord, establishes a common framework and procedure for the conclusion of occupation-specific MRAs. The accord means that regulatory bodies in each profession are given a framework within which to negotiate the specific eligibility requirements for recognition. More than 70 MRAs have been signed since the accord's entry into force in 2009.[52] The existence of the France-Québec Accord suggests that competence to enter into MRAs is not an exclusive EU competence, but is shared with the Member States.

Some bilateral MRAs exist between some Canadian provinces and some EU Member States.[53] It is not clear whether any of these cover health professionals. But what is important is that, like the France-Québec Accord, this shows that competence to negotiate MRAs rests with EU Member States, as well as at the EU level.

It follows that MRAs would therefore need to be 'mixed' agreements, negotiated by the EU and its Member States, in accordance with their constitutional requirements. This, as noted above, adds significantly to the complexity of the negotiation, and the time it takes.

50 EU/Singapore FTA, Article 8.19.
51 EU/Singapore FTA, Article 16.16.
52 https://unctad.org/meetings/en/Presentation/tncd2019-05-03_Qalo.pdf.
53 http://www.mondaq.com/x/846046/international+trade+investment/CETA+and+Mutual+Recognition+Agreements, re accountants.

- **The EEA**

By contrast, the EEA approach to mutual recognition of qualifications is entirely different. The relevant EU law, including Directive 2005/36/EC, essentially applies in EEA states in more or less the same way as it does in the EU.

- **Specific and bespoke agreements**

Examples of narrow Mutual Recognition Agreements limited to specific occupations and sectors exist. These include, for instance,[54]

- the Mutual Recognition Arrangement on Architecture between the United States and Canada, which is a bilateral MRA providing automatic recognition for licensed architects in good standing and with permanent residence or citizenship in the United States or Canada;
- the Washington Accord on Engineering, which is a plurilateral MRA among engineering professional bodies from 15 economies in various regions of the world: Australia; Canada; Taipei, China; Hong Kong, China; Ireland; Japan; the Republic of Korea; Malaysia, New Zealand; Singapore; South Africa; Turkey; the United Kingdom; and the United States, in which signatories accept one another's engineering programs as fulfilling educational requirements for practicing as an engineer; and
- the Caribbean Community (CARICOM) Skills Certificate Scheme, which is a regional MRA offering partial recognition within the Caribbean Community (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago) limited to occupations with university degrees and those in the arts, sports, and media sectors.

Whether the EU, or its individual Member States, would be competent to enter into such agreements depends on the interpretation of EU competence in the field of mutual recognition of qualifications, as outlined above.

4. Post-transition data sharing on professional misconduct: access to the alert mechanism

Post-transition, data sharing on professional conduct will be dependent on at least two key concerns: post-transition data protection law in the EU and UK; and whether the EU could lawfully grant access to the alert mechanism to a 'third country'.

4.1 GDPR / data protection law

[54] https://unctad.org/meetings/en/Presentation/tncd2019-05-03_Qalo.pdf.

In practice, the alert mechanism involves sharing of personal data from the UK to the EU and from the EU to the UK. At present, that data sharing is consistent with EU (and hence UK) rules on data protection rights, under the General Data Protection Regulation (GDPR).[55]

The Withdrawal Agreement secures legal continuity for data sharing until the end of transition (currently 31 December 2020).[56] Under the Withdrawal Agreement, the EU is obliged to continue to treat data obtained from the UK before the end of transition the same as data obtained from an EU Member State, or rather, not to treat it differently 'on the sole ground of the UK having withdrawn from the Union'.[57]

After that date, if any data is to flow from the EU to the UK, the EU will have to recognise the UK's regulatory environment as 'adequate', and vice versa. Data sharing without such an adequacy decision (or alternative basis for information flow) would breach the GDPR, as a provision of EU law (applicable in the EU-27) and 'retained EU law' (applicable in the UK). In EU law, adequacy decisions are formal acts, taken by the Commission, assisted by a committee and according to a specified procedure,[58] lasting for a period of up to 4 years, at which point they are reviewed.[59]

Data flow from the UK to the EU. The EU Exit Regulations[60] add new sections 17A and 17B, and 74A to the Data Protection Act 2018. These give the Secretary of State power to adopt adequacy decisions by regulations, and oblige the Secretary of State to keep such decisions under periodic review. An adequacy decision may be taken in respect of a third country (which in this context, contrary to its meaning in EU and international law, means a country outside of the UK[61]); a territory or one or more sectors within a third country; an international organisation (such as the EU); or a description of such a country, territory, sector or organisation. Transfer of personal data from the UK to such a country, territory, sector or organisation would not be lawful in the absence of an adequacy decision, or other basis for lawful transfer, such as 'standard data protection clauses', or 'special circumstances'.

When assessing the adequacy of protection in a third state or international organisation, the Secretary of State must take into account a list of factors outlined in new section 74A of the Data Protection Act. These are for things like whether the state or entity (the EU in this case) receiving data from the UK respects human rights, has a robust data protection environment, and adequate dispute-resolution mechanisms in the event of a breach. The Secretary of State must monitor developments in such third countries, sectors etc, and amend or revoke adequacy decisions accordingly, having given the country etc the opportunity to remedy any lack of protection. In addition, each adequacy decision must be reviewed at least once every 4 years.[62]

The UK government's guidance explains that the UK 'will transitionally recognise all EEA countries (including EU Member States) and Gibraltar as 'adequate' to allow data flows from

55 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ 2016 L 119/1.
56 WA, Article 126.
57 WA, Article 73.
58 GDPR, Article 93 (2), Regulation (EU) No 182/2011, Article 5.
59 GDPR, Article 45 (3).
60 The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations SI No 419 28 February 2019.
61 New provision in Article 4 GDPR, after para 26.
62 Data Protection Act 2018, new Sections 17B and 74B.

the UK to Europe to continue,' and 'preserve the effect of existing EU adequacy decisions', including the EU-US Privacy Shield, on a transitional basis.[63] The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) (No. 2), Regulations 2019, schedule 2, article 102, inserting a new Schedule 21 into the UK GDPR provides that all EEA states (which of course include all EU Member States), Gibraltar, EU and EEA institutions, and all the third countries, territories, sectors or international organisations which the EU recognises with adequacy clauses (Switzerland, Canada, Argentina, Guernsey, Isle of Man, Jersey, Faroe Isles, Andorra, Israel, Uruguay, New Zealand, and the USA) are regarded as countries etc which the UK recognises as having an adequate level of protection for personal data transferred from the UK into that country.

Data flow from the UK to the EU would thus be lawful within the alert mechanism, were the UK to secure access to it after the end of transition (currently 30 December 2020).

Data flow from the EU to the UK. Obviously the UK's EU Exit Regulations can make no provision for the transfer of personal data into the UK from another country.

Transfer of personal data from EU Member States into the UK post-Brexit remains subject to EU law; the UK's unilateral adequacy decision is irrelevant to data flowing from the EU to the UK. In the absence of any other provision being in place (or other basis for lawful data sharing), for data being shared from the EU to the UK, post-transition the UK will be treated as a 'third country' in the terms of the GDPR. This will mean that transfer of data to the UK will in principle be unlawful, unless there is a lawful basis for that transfer as provided for under the GDPR. At present, there is no agreement on how the EU and UK are to treat each other's assessments of adequacy. For these purposes, it would be beneficial to reach an agreement that would allow for mutual recognition of adequacy.

It is not yet clear what the EU's legal position will be on data transfer into the UK from the EU following transition. However, the revised Political Declaration, paragraph 9, indicates an intention that the EU will commence proceedings towards an 'adequacy decision' 'as soon as possible after the United Kingdom's withdrawal, endeavouring to adopt a decision by the end of 2020, if the appropriate conditions are met'.

In terms of whether the 'appropriate conditions are met', the UK will become a 'third country', but its law, up until the end of transition, has been (at least presumptively) compliant with EU data protection law. Indeed, under the EU (Withdrawal) Act 2018, the GDPR will become 'retained EU law', a part of the law of the UK. It would seem that an adequacy decision is highly likely to be taken, and probably before the end of transition. However, it does depend on whether the UK makes changes to its domestic data protection law under the EU (Withdrawal) Act 2018, or otherwise, post-Brexit. Too much regulatory non-alignment runs the risk of not being regarded as having 'adequate' data protection laws by the EU.

These questions engage the continued application in the UK of both the GDPR's requirements and those of the EU Charter of Fundamental Rights, Articles 7 (privacy); 8 (data protection) and 47 (right to an effective judicial remedy).

[63] Department for Digital, Culture, Media & Sport (updated 11 April 2019) Amendments to UK data protection law in the event the UK leaves the EU without a deal. (UK Government, Guidance Note) https://www.gov.uk/government/publications/data-protection-law-eu-exit/amendments-to-uk-data-protection-law-in-the-event-the-uk-leaves-the-eu-without-a-deal-on-29-march-2019 Last accessed 18 June 2019.

Here the UK's amendments to the GDPR, as 'retained EU law', through the relevant EU Exit Regulations are important. Will the UK arrangements for remedies and enforcement suffice to secure adequate protection from the point of view of the EU? Bear in mind, first, that the EU Exit Regulations remove all obligations on the UK, or entities within the UK, to cooperate within the structures of the EU, or to exchange information on data protection with the European Commission, including in matters of enforcement. Further, and perhaps more seriously, the EU Exit Regulations,[64] the amended Data Protection Act,[65] and the European Union (Withdrawal) Act,[66] all seek to prevent future developments of EU law that arise through interpretations of the CJEU becoming applicable in the UK. Where data protection cases are decided by the CJEU after transition, any principles of EU law deriving from those decisions would not necessarily be applied in the UK, and data subjects in the UK would not necessarily be able to rely on those principles in seeking to remedy any breaches of their data protection rights. Into the future, therefore, there is a risk that the UK may not be found 'adequate' as a place for the EU to send data. It is a question of the extent of the regulatory alignment between the UK and the EU's data protection regime.

4.2 The legality of 'third country' access to the alert mechanism

The Professional Qualifications Directive 2005/36/EC requires recognition of qualifications under certain circumstances. However, Member States remain free to determine the disciplinary rules applicable to health professionals practising within their territory. Medical professional discipline is not harmonised at EU level. It is a national competence.[67]

Article 56(2) of the Professional Qualifications Directive provides:

> '[t]he competent authorities of the host and home Member State shall exchange information regarding disciplinary action or criminal sanctions taken or any other serious, specific circumstances which are likely to have consequences for the pursuit of activities under this Directive ...'.

Information exchange required under the Directive must be compliant with EU data protection law. The obligations to exchange data on disciplinary actions of health (and other) professionals are further specified in Directive 2013/55/EU, which amends Directive 2005/36/EC, and in Commission implementing Regulation 2015/983/EU. A new Article 56a of Directive 2005/36/EC obliges Member States to use an alert mechanism to

> 'inform the competent authorities of all other Member States about a professional whose pursuit on the territory of that Member State of the following professional activities in their entirety or parts thereof has been restricted or prohibited, even temporarily, by national authorities or courts'.

The mechanism for information exchange is the Internal Market Information ('IMI') system. The IMI system, running since 2008, is a general multilingual online tool through which national public authorities of the Member States exchange information about the functioning of the internal market, particularly to improve professional mobility. The alert mechanism began in January 2016. By 2018, over 4000 alerts had been sent concerning disciplinary

64 Regulation 5 (3).
65 DPA, section 205.
66 EU (Withdrawal) Act 2018, section 4.
67 Article 168(7) TFEU.

sanctions taken against doctors, just over 30% of all alerts sent.[68] The UK was one of the most frequent users of the system, responsible for over two-thirds of all alerts sent (covering all professions, not just doctors). At the time of the Commission's 2018 report, some ten Member States had yet to send any alerts through the system, and in March 2019, the European Commission announced compliance proceedings against some 16 Member States for failure to comply with the alert mechanism obligations.[69] The proportion of UK alerts may reflect the significant numbers of medical professionals from other EU Member States working in the UK: it is in the UK's interests to have a robust alert mechanism, hence the UK's cooperation with it. As recipient of alerts, it may be in the EU's interests to continue cooperation with the UK too.

At present, so far as we have been able to discern, access to the IMI is available only to national competent authorities in EU Member States, and EEA States.[70] Switzerland is not part of IMI. Nor is any other non-EEA 'third country'.

The IMI Regulation, Article 5, envisages three types of 'IMI actors' within the system: (i) the European Commission; (ii) 'IMI coordinators' (the UK's Department for Business Innovation and Skills; Ireland's Department of Education and Science Block); and (iii) 'competent authorities' which have regulatory responsibilities in each Member State. IMI coordinators are responsible for registering competent authorities in the IMI system, on request. At the level of human being, 'IMI user' means a natural person working under the authority of an IMI actor and registered in IMI on behalf of that IMI actor. The whole tenor of the IMI Regulation is on the assumption that it is used *within* the EU, not by actors outside of the EU. Article 9 (1) of the Regulation provides 'only IMI users shall have access to IMI'.

However, we should consider three possible legal routes for the UK to access the IMI's alert mechanism post-transition: 'external actors' (Article 12); future expansion of IMI (recital 11); and access for 'third countries' (Article 23). Of these, only Article 23 is a viable legal route, for the following reasons.

First, the Regulation envisages that 'external actors' (who are not IMI users) will be able to access the IMI. Article 5(i) of the IMI Regulation defines such 'external actors' as:

> 'natural or legal persons other than IMI users that may interact with IMI only through separate technical means and in accordance with a specific pre-defined workflow provided for that purpose'.

But Article 12 of the IMI Regulation explicitly states that the 'separate technical means' to facilitate external actors to 'interact with IMI' 'shall be separate from IMI and shall not enable external actors to access IMI'. The relevant 'external actors' at present are those who seek a 'European Professional Card' (a system currently available only to general care nurses, physiotherapists, pharmacists, real estate agents and mountain guides), which simplifies the procedure for recognition of qualifications, and which uses the IMI to do so. So 'external actors' may 'interact with' the IMI, but they may not access the information held within it. So this will not provide a legal route for post-transition UK access to the alert mechanism.

[68] European Commission, 'Assessment of stakeholders' experience with the European Professional Card and the Alert Mechanism procedures' SWD(2018) 90 final

[69] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1479.

[70] https://ec.europa.eu/internal_market/imi-net/contact/index_en.htm.

Second, the IMI Regulation explicitly envisages the future expansion of the system to 'new areas',[71] and requires ordinary EU legislation to do so. But 'new areas' in this context means areas of the internal market's administration, not geographical areas outside the internal market. So this will not provide a legal route for post-transition UK access to the alert mechanism.

Third, Article 23 of the IMI Regulation provides that the IMI may be used to exchange data between 'IMI actors within the Union and their counterparts in a third country'. This is the case *only* where the following cumulative conditions are satisfied:

(a) the information is processed pursuant to a provision of a Union act listed in the Annex and an equivalent provision in the law of the third country;
(b) the information is exchanged or made available in accordance with an international agreement providing for:
    (i) the application of a provision of a Union act listed in the Annex by the third country
    (ii) the use of IMI; and
    (iii) the principles and modalities of that exchange; and
(c) The third country in question ensures adequate protection of personal data in accordance with Article 24 (2) of Directive 95/46/EC [now the GDPR], including adequate safeguards that the data processed in IMI shall only be used for the purpose for which they were originally exchanged, and the Commission has adopted an [adequacy decision].

The word 'and' at the end of (b) (iii) indicates that these conditions must all be met.

As noted above, the condition in (c) will be met by the proposed adequacy decision that the EU has indicated it will take during the transition period (before the end of December 2020).

Relevant Acts listed in the Annex include provisions of Directive 2005/36; the 'Services Directive' 2006/123/EC; and Directives 96/71/EC and 2014/67/EU on the posting of workers. The condition in (a) would be met by these provisions becoming part of 'retained EU law' in the UK, hence an 'equivalent provision in the law of the third country', under the EU (Withdrawal) Act 2018, provided that they were not amended to deal with 'deficiencies' under the executive powers given in that Act.

The condition in (b) could be met by an agreement between the EU and the UK, provided that agreement includes that the UK applies a relevant provision of a Union act listed in the Annex. If the UK were prepared to apply relevant provisions of EU law, this condition in the IMI Regulation would be met. Additionally, the EU-UK agreement would have to provide for use of IMI and the specific principles and modalities of that exchange.

All of those provisions *could* be included in an EU-UK trade agreement, provided that (a) there were sufficient time to negotiate the detail; and (b) the UK were prepared to agree to the application of EU law in the UK. Neither of these seem likely under a Johnson government, given that Johnson has stated that he will not seek a further extension of transition; and that the Political Declaration indicates that Johnson is not prepared to negotiate an agreement which involves loss of 'control' by the UK of the laws that apply therein. However, it may be that the

[71] recital 11.

'application of the provision of the Union act listed in the Annex' can be interpreted purposively, as application of a piece of 'retained EU law', rather than literally the application of Union law per se. This would *potentially* allow the UK under a Johnson government to agree with the EU in a way that is consistent with the EU's obligations under Article 23 of the IMI Regulation.

5. Conclusion

In general, it is difficult for countries to achieve harmonization of training standards, and thus to recognise each other's qualifications. It is even more difficult to maintain such harmonization. Where there are successful examples in ordinary international trade law, these took decades and deep investments of expertise into detailed negotiations to achieve. Ongoing resources are needed to maintain alignment and continued recognition. There are examples of defiance of a MRA by licensing and registration authorities.[72] All of this is what makes the EU's legal arrangements on mutual recognition of qualifications so impressive: the EU has found a way to deploy appropriate resources, secure compliance, and to continue to do so within structures that are politically acceptable to all its Member States.

Apart from its relationship with EEA states, the available models for EU-UK future relationships provide examples for an approach that would involve the negotiation of a 'mixed agreement' if mutual recognition of qualifications were to be included as part of the trade agreement. These models provide for a 'process' or 'road map' approach to the mutual recognition of qualifications. Over time, they allow for recognition to be achieved at the level of administrative authorities. However, the approach does not allow for enforcement of individual legal entitlements to have one's professional qualifications recognised, as is the case with EU law.

At present, the UK is aligned with the EU in terms of the relevant regulatory standards. In theory, this means that the 'process' approach could be completed immediately (or very quickly). This is (or at least has been) the position of the UK government. From the point of view of the EU, however, regulatory alignment is only one part of the picture: the deep form of integration within which mutual recognition of qualifications is situated in EU law includes the administrative structures, such as the IMI, as well as the 'direct effect' (legal enforceability) of EU law.

In terms of access to the IMI, the UK has already and EU is likely to take unilateral 'adequacy decisions' to allow data sharing between them in both directions. Access to the IMI would be legally achievable within an EU-UK trade agreement. As EU law currently stands, it could be achieved only if the UK is prepared to apply Directive 2005/36 within the UK or if the EU is prepared to recognise its application as 'retained EU law' as compliant with the IMI Regulation, Article 23. Such recognition is likely only if there is no, or very little, regulatory drift not only from the Directive as it stands at the end of transition, but also from the Directive as it is amended into the future, and interpreted by the CJEU. This type of alignment does not sit well with the UK government's promise of 'taking back regulatory control', so may not be achievable.

[72] See https://unctad.org/meetings/en/Presentation/tncd2019-05-03_Qalo.pdf.