

The background of the cover features a faded, high-angle photograph of a modern building with a complex glass and steel facade. The building's structure is composed of numerous rectangular panels and beams, creating a grid-like pattern. The overall color palette is muted, with greys and whites, which makes the green text stand out.

Upgrading Trade and Services in EU and International Economic Law

Radboud
Economic Law
Series

Simon Tans &
Marc Veenbrink (eds)

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RADBOUD ECONOMIC LAW SERIES

VOLUME 3

**Upgrading Trade and Services in EU
and International Economic Law**

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About This Series

Radboud Economic Law Series

The aim of this series is to disseminate ideas and research presented at the Radboud Economic Law international conferences, which are organised annually by the staff of the International and European Law Department of Radboud University Nijmegen, the Netherlands. The conference and the published contributions focus on economic law. This legal field is dynamic and broad. Its complexity stems from the multitude of sub-domains embedded in it, as well as from the interplay between them. Economic law entails constantly developing policies and frameworks, multi-layered regulatory and law enforcement regimes, and actors active at various (domestic and transnational) jurisdictional levels. This series attempts to unravel some of the complexities which occur in the interplay between various international, EU, and domestic legal aspects pertaining to the economic law realm. Each conference, and consequently each resulting edited volume, discusses a specific economic law development from academic and practical perspectives. Therefore, the interdisciplinary nature of this series makes it attractive for academics and practitioners with an interest in (international, EU, and domestic) economic law.

TITLES IN THIS SERIES

- Boosting the Enforcement of EU Competition Law at the Domestic Level (Cambridge Scholars Publishing, 2017)
- Digital Markets in the EU (2018)
- Upgrading Trade and Services in EU and International Economic Law (2019)
- New Directions in Competition Law Enforcement (forthcoming, 2020)

Acknowledgments

The present volume is based on the contributions presented at the 3rd Radboud Economic Law Conference, held at Radboud University Nijmegen, the Netherlands, on 15 June 2018. The focus of this year's conference was on 'Upgrading Trade and Services in EU and International Economic Law'. From an EU perspective, presentations were held on the way to ensure that the free movement of service provisions are future-proof, how to deal with environmental law and the division of competences between the EU and its Member States when implementing liberalization as adopted in FTAs. The latter topic thus provides an introduction to the international topics dealt with in the second part of the book. That part mainly focuses on service trade liberalization as provided in FTAs. All chapters use CETA as the example to discuss respectively regulatory approximation, recognition of professional qualifications and lastly, the difficulties of enforcing trade commitments relating to mobility rights of service providers. The conference, and this contribution, therefore touch upon multiple aspects relating to the freedom to provide services.

The editors of this volume would like to express their gratitude to a number of persons without whose help both the conference and this volume would not have been possible. Firstly, we would like to thank the Faculty of Law of the Radboud University for giving us the opportunity to host this conference in the Grotius Building. We would also like to thank all speakers who presented their research findings at this conference and to those who also contributed to this volume. A special word of thanks goes to professor Johan van de Gronden and Professor Elspeth Guild, who have found the time in their busy schedules to chair the discussion sessions in a stimulating and thought-provoking manner.

Gratitude should be extended to Mrs Charley Berndsen from the Law Faculty for ensuring, once again, that the conference ran smoothly from an organisational perspective. Last, but not least, we would like to thank Ms Meryem Sayin, student assistant at the Department of International and European Law, for her valuable help in editing this volume.

Simon Tans and Marc Veenbrink

Nijmegen, January 2019

List of Abbreviations

AG	Advocate General
BIT	Bilateral Investment Treaty
BV	Business Visitors
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CSS	Contractual Service Suppliers
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
ENP	European Neighbourhood Policy
EQF	European Qualification Framework
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GT	Graduate Trainees
HSE	Health Service Executive
ICS	Investment Court System
ICT	Intra-Company Transfers
IP	Independent Professionals
M&A	Mergers & Acquisitions
MA	Market Access

MRA	Mutual Recognition Agreement
MS	Member State
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PTA	Preferential Trade Agreement
QTL	Qualification Requirements, Technical Standards and Licensing Requirements
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade & Investment Partnership
WTO	World Trade Organization

Foreword

Services currently dominate economic activity in most countries around the world irrespective of their level of development. Services are a growth engine, not only in terms of economic growth but also social growth. While financial, telecommunications or transport services come to mind, other services such as health or education can also be key inputs and determinants of the stock and growth of human capital. New technological means 'democratize' the supply of services globally, opening new pathways for interaction and empowerment. The new collaborative consumption opportunities that are given through the internet expand the pool of potential service suppliers and are capable of ensuring a more equal distribution of trade gains.

In 2017, global trade recorded its highest growth rate since 2011. However, recovery of the global economy is not robust: softening industrial activity, partly driven by higher trade policy uncertainty, leads to a slowing down of global trade, which appears to be more rapid than anticipated. The trade war between the US and China and tariff hikes implemented by other major economies has affected about 2.5% of global trade in goods. This uncertainty affects the willingness of companies to invest and export, or engage in international value chains, which may be beneficial at first blush but create undesirable dependencies in times of uncertainty.

Global trade in services has grown in the last 20 years in a steadier manner than merchandise trade. On average, trade in services has increased by eight percent annually in the last two decades and services exports more than doubled between 2007 and 2017, amidst the Great Recession. Reaching their peak in recent times, world services exports grew by 8% in 2017, accounting for over US\$5 trillion. Importantly, services have been more resilient than goods to the macroeconomic upheaval of recent times. Services are crisis-proof and are surprisingly immune to short-term negative shocks when compared to goods exports. They continued to be consumed despite the negative economic situation. Such resilience is particularly apparent in business services. Only transport services saw a decline similar to goods exports, but this is an inevitable consequence of the collapse of such exports.

The EU and the US are the leading traders of services globally. Nonetheless, the growth of the services industries in the developing world is also quite important. Exports of developing economies in services trade grew by 8 percent in 2017, amounting to about one third of global trade in services. Again, the distribution of the gains from trade in services is not balanced, as China, India and Singapore account for a disproportionately high share of trade in services. Tourism and travel but also transport and business process outsourcing (BPO) constitute areas whereby low-income economies have a comparative advantage and currently lead the services revolution in the developing world. Furthermore, trade *among* developing countries has increased from 8 to 13 percent between 2000 and 2012.

However, the previously identified mismatch between the importance of services for the global economy and the attention that services draw from the regulatory authorities largely remains. To be sure, four decades ago, the public perception would be aligned to consider services as non-tradable. Work at the OECD, mainly led by the US, only gradually lead to an increased acknowledgement for international rules to regulate services trade. Within the EU, services would be regarded as an ancillary freedom for several decades, whereas the EU single market for services remains one of the most important desiderata of EU integration if we are to tap into the EU's full economic potential. The EU Services Directive has already addressed various important bottleneck barriers within the legal orders of EU member States and will continue to do so as it is implemented.

Having said this, the increased servicification of the global economy and the pace of technological advances regarding services delivery will continue raising new questions with regard to regulatory approaches at the domestic, supranational and international level; the optimal level of inducing labour mobility; or the most efficient way to protect fundamental rights, just to name a few. Such questions are not tackled in a vacuum; on the contrary, the EU and its trading partners try to address these through a combination of strategic considerations, *Realpolitik*-type of action in the European neighbourhood, and ever-increasing, upstream regulatory cooperation with other advanced economies. However, the need (or not) for coherence in dealing with trade in services will remain an important, recurring theme in the near future.

Against this backdrop, this volume, masterfully edited by Simon Tans and Marc Veenbrink touches upon some of the most timely questions regarding the fate of trade in services at the EU and international level. Within the volume, which constitutes the result of a conference organized by the University of Nijmegen

in June 2018, the EU and its role in a 'world of services' occupies the biggest part of the volume; and rightly so: not only does the EU constitute one of the most important geographical areas whereby regulatory approaches and the limits of the quest for coherence in regulating services supply will be tested but is also one of the biggest proponents for intensifying efforts at the global level with a view to addressing remaining regulatory barriers to trade in services. Recent activities such as the EU leadership on the adoption of domestic regulation disciplines under the GATS Article VI:4 mandate until the next WTO Ministerial conference in Astana in June 2020 or the open-minded approach in negotiations for regulatory cooperation in its preferential trade agreements (PTAs) like CETA are quite telling.

The volume covers important and timely legal questions relating to the scope of the Services Directive; the impact of services regulation and liberalization on fundamental rights and non-economic values such as the protection of the environment or labor rights; the room and prospects for regulatory cooperation and liberalization 'from above' in services; the repercussions of Brexit for service supply; or the role that the controversial Mode 4 plays in shaping national immigration laws. In doing so, all chapters touch upon the specificities of the EU legal order as a complex legal construct with a sophisticated system of competences attribution and the interaction with the domestic legal orders of the EU member States. Thus, pertinent constitutional questions are equally dealt with in this volume. Overall, this book is a welcome addition in deciphering further trade in services and understanding better any normative claims that are made about the future directions regarding the regulation of services.

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Upgrading Trade and Services in EU and International Economic Law

Simon Tans & Marc Veenbrink (eds)

International trade currently receives significant attention: the Brexit, trade wars and the implications of Free Trade Agreements on national policies, these issues consistently surface in the news and political discourse. Services liberalization has consequences for a broad range of policy areas, ranging from public utility services to the environment and immigration. The challenge is to balance the right to regulate such policy areas with the need to remove barriers to trade in services to open services markets to international trade. From the perspective of states, service trade liberalization is often both something to pursue and something to be wary of.

This book contains various chapters dealing with the question how to upgrade trade in services. At the multilateral level, fundamental differences, inter alia in relation to the intrusiveness of liberalization on regulatory autonomy, have led to a stalemate. Yet, liberalization of services trade does move forward, as numerous free trade agreements have entered into force while others are being negotiated. This raises various new issues, as the precise impact of FTA obligations on national legislation is far from clear. Conversely, in EU law liberalization of trade is much further developed revealing new problems, for example relating to the digital economy and new case law of the Court of Justice on the Services Directive. The contributions in this book extensively discuss some of the issues which arise under international law and EU law in light of the liberalization of services markets.

This volume in the Radboud Economic Law series is based on the contributions presented at the third Radboud Economic Law Conference, held at Radboud University Nijmegen, the Netherlands, on 15 June 2018.

