EUA European University Association

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Comprehensive Economic and Trade Agreement with Canada
CETA: How far has it come and where is it headed?

This **briefing note** is a follow-up to two previous EUA updates on:

1. *EU Trade Agreements and the Recognition of Professional Qualifications*[1] (June 2016);
2. the *EU's Comprehensive Economic and Trade Agreement (CETA) with Canada*, with particular reference to trade in higher education services[2] (March 2017).

It has a **triple focus on**:

1. the "provisional application" of the CETA;
2. progress on Mutual Recognition Agreements (in relation to professional qualifications);
3. the implications of the probable Brexit.

EUA opposes the inclusion of higher education in trade deals

In 2015, the EUA Board declared that "higher education benefits individuals, society and the world at large in ways that are not easily quantifiable. It is a public responsibility to which all citizens have right of access and not a commodity to be transacted by commercial interests on a for-profit basis. It should not be subject to international trade regimes."[3]

Note that this briefing note does not cover research. Readers interested in joint EU-Canada research activities should visit the archived ERA-Can website.

1. Provisional application of the CETA

1.1 Provisional application means, in effect, partial implementation. The CETA came into partial effect on 21 September 2017, somewhat later than had been envisaged, due to disagreement over cheese quotas.

1 http://www.eua.be/policy-representation/higher-education-policies/recognition-of-professional-qualifications
2 http://www.eua.be/Libraries/higher-education/eua-update-special-on-ceta.pdf?sfvrsn=0
3 http://www.eua.be/Libraries/publication/EUA_Statement_TTIP.pdf?sfvrsn=2

1.2 Earlier, heated debate had focused on the issue of whether the CETA had to be ratified, on the European side, by the EU institutions only (Council and Parliament) or also by national and devolved parliaments. The Walloon parliament (in francophone Belgium) took a strong stand. It argued that while the EU has exclusive legal competence in trade policy, the CETA covers sectors in which legal competence is shared with member states or in which the EU has only supplementary competence. One obvious example of the latter category is higher education.[4]

1.3 The question therefore arose of whether the CETA is a "mixed" agreement and whether, by extension, only those elements that are unambiguously within EU competence could be applied at the outset. If so, the remainder would come into effect only once the 30+ national and sub-national parliaments had given their approval.

1.4 This issue had already arisen in connection with the EU-Singapore Free Trade Agreement (EUSFTA). The Court of Justice ruled in May 2017[5] that EUSFTA was indeed "mixed" and this ruling was duly imported into the CETA. Council Decision 2017/38[6] subsequently listed the provisions that could not be immediately implemented. They concern foreign indirect investment, investment dispute mechanisms and administrative proceedings at the member state level. Although to date over one quarter of member states,[7] together with Canada, have ratified the CETA, the bulk of the ratification process has still to be completed - over a period of time that is impossible to compute.

1.5 The debate of how to manage investor-state dispute settlement (ISDS) – whether and how corporates can sue countries for compensation in the event of legislation that curtails their market access – bedevilled the EU-US negotiations (TTIP). It has not gone away. In another recent ruling,[8] the Court decided that intra-EU dispute settlement agreements between member states were illegal, thus raising the question of whether such agreements concluded with third countries might also be illegal. Belgium has requested, and awaits, clarification.

2. Trade in higher education services and mutual recognition agreements

2.1 Despite the fact that the EU can supplement the legal competence enjoyed by member states in the field of education, by organising and funding the ERASMUS+ programme for example, Council Decision 2017/38 chose not to regard this as an impediment to the provisional application of the CETA. Trade in higher education services can therefore go ahead in the CETA as intended. Canadian commercial providers interested in procurement opportunities will have to decide whether to run the risk of disputes which have no clear route to settlement. They should also note the existence of other constraints. The EU has reserved "the right to adopt or maintain any measure with regard to the supply of all educational services which receive public funding or state support in any form, and are therefore not considered to be privately funded."[9] The definition of "public" is – as always – uncertain, which allows it to be interpreted

4 Article 6 of the Treaty on the Functioning of the European Union
5 http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=882092
6 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017D0038&from=EN
7 Croatia, Czech Republic, Denmark, Estonia, Latvia, Malta, Portugal, with ratification by Lithuania and Spain imminent
8 C 284/16 http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TXT&ancre
9 CETA, Consolidated Text, p.1305, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

differently by member states, in line with their various legal frameworks and policy positions. Individual member states have taken reservations that limit the extent to which Canadian business concerns can access their higher education systems. These are detailed in EUA's March 2017 update.

2.2 In the field of international student recruitment, Canada is keen to take advantage of the difficulties experienced by its major anglophone competitors, notably the perceived rise of xenophobia in the US as well as in the UK, where the cost factor also plays against the local providers. The Canadian Trade Commission (CTC) has produced country profiles, accessible only by accredited Canadian business concerns.[10] The focus of the profiles is on importing students, rather than on the export of higher education services. On one official CTC website, higher education does not figure on Canada's list of key sectors for outward foreign investment.[11]

2.3 On another website, however, Canada has also indicated, on an EU member-state-by-member-state basis, the sectors that present the greatest opportunity to Canadian businesses.[12] The target countries for education services are four of the EU's most liberal in trade terms: Croatia, Latvia, Spain and the UK. Only Spain sets limits on the incursion of third country providers, requiring foreign privately-funded universities to seek prior parliamentary approval and to satisfy an economic needs test. Precisely what undertakings the Canadians would wish to engage in remains to be seen; whether in secondary, adult or higher education, their website offers no clues.

Mutual Recognition Agreements (MRAs)

2.4 Chapter 11 of the CETA opens the way for professional bodies in each party to reach agreement on the mutual recognition of professional qualifications. Such recognition gives would-be mobile professionals the possibility of accessing the other party's labour market. The same facility exists in theory in the North American Free Trade Agreement (NAFTA), which the Trump administration has recently forced into renegotiation. In practice, professional mobility in NAFTA has been low. Canada's experience of MRAs derives instead from the *Québec-France Agreement on the Mutual Recognition of Professional Qualifications*[13] of 2008, which by March 2017 covered 27 professions.

10 http://tradecommissioner.gc.ca/market-reports-etudes-de-marches/education.aspx?lang=eng
11 http://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/key_sectors-secteurs_cles.aspx?lang=eng
12 http://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng
13 http://www.mrif.gouv.qc.ca/en/ententes-et-engagements/ententes-internationales/reconnaissance-qualifications/entente-en-details

2.5 The CETA stipulates that once EU and Canadian professional bodies reach agreement in principle, they must refer their proposal to the MRA Committee (Article 11.5), from which it processes to the overarching CETA Joint Committee. It can come into effect if it is consistent with each party's relevant legislation, as well as with Article VII of the General Agreement on Trade in Services (GATS). Neither the Canadian federal authorities nor the European Commission have the power to compel professional bodies to collaborate. This is because the relevant professional and regulatory bodies are those of the twelve provinces and territories in Canada and, post-Brexit, with 27 member states (some with devolved regions) in the EU. The UK Law Society reports the existence of "anecdotal evidence which suggests the Canadian authorities wish to prioritise discussions over the inter-provincial mobility of professionals through an international dialogue between Canada and the EU."[14] It does not clarify the implications of this.

2.6 The road to an MRA is more navigable on the EU side, because the principles and mechanisms of the recognition of professional qualifications are enshrined in Directive 2005/36/EC,[15] which covers all member states. It is crucial to remember, however, that recognition does not automatically confer the right to practise. Recognition is managed at the EU level, but licence to practise is a member state prerogative.

2.7 On the Canadian side, there is no coast-to-coast recognition regime, only the limited New West Partnership Trade Agreement (NWPTA), which came into effect in 2010, bringing Alberta, British Columbia and Saskatchewan into a single framework. A CETA MRA is evidently more challenging than one agreed between Quebec and France. Informed commentators feel that MRAs are one of the most problematic aspects of the CETA.[15] What is clear is that the CETA allows both the EU and Canada to think in terms of labour market planning at a macro level, rather than at the level of the individual practitioner. After all, Canadian professionals have long been able to practise across the EU, once they have completed three years of activity in the member state that first recognised their qualification.[17]

14 See http://www.lawsociety.org.uk/news/stories/blind-spot-how-ceta-overlooks-legal-services/

15 Directive 2005/36/EC on the Recognition of Professional Qualifications, consolidated in 2014, http://eur-lex.europa.eu/legal-content/LVN/TXT/?uri=celex:02005L0036-20140117

16 Natalie Brender, 'Across the sea with CETA: what new labour mobility might mean for Canadian business', the Conference Board of Canada, July 2014 http://www.conferenceboard.ca/e-library/abstract.aspx?did=6344&AspxAutoDetectCookieSupport=1 and Patrick Leblond, 'Making the most of CETA: a complete and effective implementation is the key to realising the Agreement's full potential', Centre for International Governance Innovation, 2016 https://www.cigionline.org/publications/making-most-ceta-complete-and-effective-Art implementation-key-realizing-agreements-full-0

17 Article 3.3 of Directive 2005/36/EC

MRA: Architects are the front-runners

2.8 Despite the many obstacles, the architects are reportedly very near to signing an MRA. The Architects' Council of Europe (ACE) and the Canadian Architectural Licensing Authority (CALA) hope to seal a deal before the summer. It will build on a 2005 cooperation agreement between ACE and the Committee of Canadian Architectural Councils (CCAC) and the Royal Architectural Institute of Canada (RAIC). ACE is also in discussion with the Korean Institute of Registered Architects (KIRA) and hopes to update an earlier MRA signed with the *Federacion de Colegios de Arquitectos de la Republica Mexicana* (FCARM).[18] It is keen to gain market access for architectural services on as wide a basis as possible and "has developed a generic, WTO-compliant template"[19] applicable to all free trade agreements (FTAs) that the EU might sign in the future.

2.9 Annex 11(a) of the CETA proposes a recognition procedure that depends on the identification of "substantial differences" between the training programme completed in country A and the requirements of country B. This principle is enshrined the EU Directive's General System, as well as in the Lisbon Recognition Convention, which all EU member states except Greece have signed and ratified and which Canada too has signed. ACE, however, proposes to by-pass the procedure:

> Recognising the futility of engaging in a forensic examination of academic and practical training outcomes – given that architectural education is not globally harmonised - ACE proposes that differences be accepted at face value, and that a compensatory mechanism be developed – expressed in terms of a post-license/recognition period of professional practice experience (e.g. 5 years) so that the principal beneficiaries of MRAs may be considered as broadly experienced before seeking registration in the Country of Destination.[20]

This approach appears to be legitimate, because the guidelines set out in Annex 11(a) are non-binding. It will nevertheless have to be accepted by both parties, as well as by the CETA committees. Whether it will prove acceptable to the European Commission, in its capacity of guardian of the internal market, remains to be seen. The short-cutting of established recognition procedures appears a dubious proposition. The situation is complicated by the fact that, even though architecture is a sectoral profession blessed with automatic recognition by the Directive, it is anomalous in the sense that compliance is not obligatory. Only those training programmes notified to the Commission are eligible for automatic recognition; graduates of non-notified programmes are, technically if not always in reality, excluded from cross-border professional mobility within the EU. On the EU side, therefore, the training landscape is much less uniform than it appears.

19 See the 2016 ACE policy position statement on 'Support for the Negotiation of Binding MRAs', accessible via https://www.ace-cae.eu/4/?L=0

20 'Support for the Negotiation of Binding MRAs', op.cit

MRA: Engineers

2.10 Under the auspices of the European Network for Accreditation of Engineering Education (ENAEE), a 13-country accord[21] was signed in November 2014 guaranteeing the mutual recognition of engineering qualifications (Bachelor and Master) carrying the EUR-ACE (EUR*opean* AC*credited* E*ngineer*) label. The countries involved were Finland, France, Germany, Ireland, Italy, Poland, Portugal, Romania, Russia, Spain, Switzerland, Turkey and the UK. Any engineering accreditation agency joining ENAEE in the future is obliged to sign up to the accord.

2.11 Of the original thirteen, Ireland, Russia, Turkey and the UK are also signatories to the Washington Accord of 1989, which assures a mutual recognition regime between 19 countries, including Canada. Individual EU member states also have bilateral agreements,[22] notably the Québec-France MRA which dates back to 2008.

2.12 This patchwork of agreements should constitute a good platform for an EU-Canada MRA. To date, Engineers Canada has negotiated only five bilateral agreements (Australia, France, Hong Kong, Ireland and Texas). Its website nevertheless welcomes the opportunity afforded by the CETA.[23] To date, however, there has been no reciprocal approach from the EU side.

CTF: engineers, hospital pharmacists and specialist nurses

2.13 The Common Training Framework (CTF) facility enshrined in the EU Directive offers an alternative way of approaching an MRA. Under the CTF arrangement (Article 49a), one third of member states may agree on a common training programme, in regulated professions to which the procedures of automatic recognition do not apply.[24] Engineering is one such discipline. A CTF approved by a delegated act of the European Commission would be a sound platform on which to base a proposal for an MRA with Canada. The Commission is currently considering whether the EUR-ACE Standards and Guidelines[25] might be taken as the basis of a CTF.

2.14 The CTF in hospital pharmacy is in an advanced state of preparation. Readers are referred to the very detailed information posted on the website of the European Association of Hospital Pharmacists (EAHP).[26]

2.15 Specialist nurses, too, are actively contemplating a CTF under the auspices of the European Specialist Nurses Organisations (ESN).[27] Like engineers and hospital pharmacists, but unlike general care nurses, they do not fall within the automatic recognition regime set out in Directive 2005/36/EC.

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21 http://www.enaee.eu/accredited-engineering-courses-html/eur-ace-accord/

22 See, for example, the Portuguese agreements listed at http://www.ordemengenheiros.pt/pt/a-ordem/area-internacional/protocolos-internacionais/

23 https://engineerscanada.ca/accreditation/equivalency-for-programs-outside-of-canada

24 That is to say, regulated professions other than the seven 'sectoral' professions: medical doctor, dentist, general care nurse, midwife, veterinary surgeon, pharmacist and architect

25 http://www.enaee.eu/accredited-engineering-courses-html/accredited-engineering-degree-programmes/

26 http://www.hospitalpharmacy.eu/general-information

27 See the 'common plinth of competences', which can be downloaded from http://www.esno.org/harmonisation-of-training.html

2.16 The CTF option raises the question of whether its facilitation of intra-EU professional mobility will raise or depress the prospects of mobility within the framework of the CETA. If EU professionals find it easier to cross borders within the EU, will they be less attracted by opportunities in Canada? Or will they become more open to the prospect of mobility in principle? No general answer is possible, given the number of variables in the patterns of supply and demand. Only time will tell.

3. The CETA and the implications of Brexit

3.1 In the event of Brexit, the EU and the UK anticipate signing a trade agreement, as distinct from the Withdrawal Agreement. It is not clear when such an agreement might be negotiated, signed, ratified and implemented. Both sides assume that Brexit will occur on 29 March 2019, to be followed by a transitional period lasting until the end of 2020. The transitional period requires the UK to continue to participate fully in the Customs Union and the Single Market, but excludes it from all the policy- and decision-making processes of the EU, except in exceptional circumstances.

3.2 The negotiations on the Withdrawal Agreement have hitherto been marked by their asymmetry. While the EU negotiator Michel Barnier has a detailed, evolving and published mandate from the European Council, his UK counterpart David Davis is mandated only in the broadest of terms by the UK government, which itself is mandated effectively by the one-word answer – "leave" – given in response to the simple binary question posed in the 2016 referendum. The future trade agreement is similarly bizarre, in the sense that it will be the first FTA to erect, rather than remove, trade barriers.

3.3 The CETA has loomed large in the discussions. Barnier's position is clear: given his mandate and the red lines announced periodically by the British Prime Minister, the only possible outcome of an EU-UK trade negotiation is an agreement very similar to the CETA.[28] Davis, on the other hand, has spoken of a CETA+++. By this, he means essentially the inclusion of financial services. However, if this were interpreted as partial participation in the Single Market, it would be ruled out by the EU on the grounds of "cherry-picking".

3.4 The UK is keen to get trade negotiations up and running as soon as possible, both to minimise uncertainty and to clarify its scope for FTAs with other third countries. The current EU position is embodied in the recently published *Guidelines on the Framework for the future EU-UK relationship*.[29] These will be revisited at the European Council meeting in June. As they stand, they envisage a trade agreement incorporating, *inter alia*:

28 See his PowerPoint slide downloadable from https://ec.europa.eu/commission/publications/slide-presented-michel-barnier-european-commission-chief-negotiator-heads-state-and-government-european-council-article-50-15-december-2017_en

29 http://www.consilium.europa.eu/en/press/press-releases/2018/03/23/european-council-art-50-guidelines-on-the-framework-for-the-future-eu-uk-relationship-23-march-2018/

8.v) trade in services, with the aim of allowing market access to provide services under host state rules, including as regards right of establishment for providers, to an extent consistent with the fact that the UK will become a third country and the Union and the UK will no longer share a common regulatory, supervisory, enforcement and judiciary framework;

8.vi) access to public procurement markets, investments and protection of intellectual property rights, including geographical indications, and other areas of interest to the Union. [...]

10. The future partnership should include ambitious provisions on movement of natural persons, based on full reciprocity and non-discrimination among member states, and related areas such as coordination of social security and recognition of professional qualifications. [...]

11.ii) regarding certain Union programmes, e.g. in the fields of research and innovation and of education and culture, any participation of the UK should be subject to the relevant conditions for the participation of third countries to be established in the corresponding programmes.

Trade in higher education services

3.5 If indeed, an eventual EU-UK FTA mimics the CETA in structure and content, it will confer on UK educational businesses, including higher education institutions, in-principle access to the higher education markets of EU27. However, the reservations taken by many EU member states[30] in the CETA would apply. Moreover, the cloud of ambiguity surrounding the public/private distinction would inevitably thicken, since the legal status of UK higher education institutions, currently irrelevant in the framework of EU membership, would come into question. All this being so, it would appear extremely unwise for UK higher education institutions to contemplate long-term investment in EU member states by establishing a commercial presence in line with GATS mode 3. Such is the degree of political and legal uncertainty, that due diligence is unachievable in the current circumstances.

30 Set out in EUA's March 2017 update, http://www.eua.be/Libraries/higher-education/eua-update-special-on-ceta.pdf?sfvrsn=0

Recognition of professional qualifications

3.6 In March, the Commission published a version of the draft Withdrawal Agreement[31] in which a number of Articles were highlighted in green. This signified agreement reached between the negotiators, with due allowance for technical legal revisions. Articles 25-27 of Title II, Chapter 3, state that recognition of professional qualifications gained before the end of the transition period will enjoy continuing effect. Any application for recognition received during the transition period will be duly considered. For a further nine months, i.e. until September 2021, the UK will continue to have access to the internal market information system (IMI) which manages issues of recognition online. This measure of agreement, of benefit to both sides, must still be regarded as insecure, since – as the EU regularly asserts – "nothing is agreed until everything is agreed."

3.7 As for qualifications obtained and recognition sought after the end of the transition period, this is a matter for an eventual EU-UK trade agreement. The timeframe of the FTA is, of course, unknown, and there could be a huge gap between December 2020 and its eventual implementation. There could also be failure to seal a Withdrawal Agreement, in which case the UK would find itself at the cliff-edge of a no-deal. The *Financial Times* reports that the EU is contemplating emergency powers to address the no-deal situation; it quotes an unnamed diplomat saying that these powers "could also give a grace period for lawyers or professionals based in Europe who rely on UK qualifications."[32]

3.8 Failing agreement with the EU, the UK will lose the opportunity to participate formally in the CTFs enshrined in Directive 2005/36/EC. Having been prominent in the development of competence-based curricula in many of the major regulated professions, its higher education institutions and professional bodies should have little difficulty in mirroring CTF developments if they so choose.

3.9 The UK will also, of necessity, fall out of the CETA at the end of the transition period. (The UK government signed the CETA in 2016, by-passing normal parliamentary procedure.)[33] Talk of "rolling-over" all of the EU FTAs to which the UK is currently party, effectively replicating them as UK/xx bilateral deals, seems unduly optimistic. Certainly, this cannot be guaranteed by the Withdrawal Agreement. Moreover, there is a high probability that third countries, having agreed deals with a very large market with powerful muscle (the EU), will seize the chance to press for better deals with a smaller and less muscular market (the UK). This is particularly true in agriculture, where the business of disaggregating the UK from tariff rate quotas will prove problematic.

3.10 In the case of higher education services, there is perhaps greater scope for Canada-UK trade. As indicated earlier, the UK is one of Canada's four target countries in the current EU28 and is also wide open to inward foreign investment. Whether such trade would be balanced will depend on the market openness of the Canadian provinces and territories.

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31 https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en

32 *Financial Times*, April 18 2018

33 See the very useful summary published by Patients4NHS at http://www.patients4nhs.org.uk/the-eu-ftas/

3.11 MRAs are just as theoretically viable in an eventual Canada-UK framework as in the CETA. A suite of MRAs will serve the UK particularly well, if it can give graduates of disciplines in the regulated professions some measure of compensation for the international mobility opportunities that they will lose once the UK-located training programmes have exited the EU.

3.12 The UK has been by far the dominant exporter of architectural services in the EU and it is not surprising that British architects have put MRAs high on their agenda. The UK Competent Authority, the Architects Registration Board (ARB), has kept abreast of the ACE-CALA negotiations and has fully supported them. It has also embarked on discussions with the National Council of Architectural Registration Boards (NCARB) in the USA and with the Architects Accreditation Council of Australia (AACA) and the New Zealand Registered Architects Board (NZRAB).[34]

3.13 The Royal Institute of British Architects (RIBA) is pressing the case for MRAs more aggressively. Its view is that while its delivery of architectural services to EU27 will be damaged by Brexit, the cost can be rapidly outweighed by greater access to the markets of large third countries, assuming (quite unrealistically) that there will be no gap between the end of the transition period and the implementation of UK FTAs with third country partners. RIBA points out that currently the UK has no recognition agreements outside the EU and that the ARB engages in no unilateral recognition of qualifications from any third country. Accordingly, it recommends that "registration bodies in the UK should move towards allowing professionals trained and registered in non-EU countries to work in the UK where the quality of training and professional practice in their country is recognised as broadly equivalent to the UK by the UK regulator."[35]

3.14 At the level of the UK government, there is likely to be a strong desire for MRAs to figure in whatever FTAs can be secured. By virtue of Brexit, the UK will have significantly reduced its importation of high-skilled labour from the EU. It will need to compensate for this in circumstances that are already dramatic, notably in the healthcare professions. Between 2016 and 2017 the number of EEA nurses and midwives leaving the UK Competent Authority's register rose by 67%.[36] Between 2012 and 2016 the number of EEA medical doctors with licence to practise in the UK was particularly unstable:[37] the number leaving the register rose by 75%; the number joining the register fell by one third.

3.15 And, of course, all future developments in professional mobility will have to be accommodated within a politically acceptable UK immigration policy, an issue on which this briefing note cannot usefully speculate…

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34 www.arb.org.uk/wp-content/uploads/2016/09/Approved-Open-Minutes-24-November-2016-Approved-by-the-Board-on-16-February-2017.pdf

35 RIBA Policy Note January 2017, 'Mutual Recognition of Professional Qualifications', and *Global Talent, Global Reach*, RIBA, December 2017 https://www.architecture.com/knowledge-and-resources/resources-landing-page/global-talent-global-reach

36 See *The NMC Register*, Nursing and Midwifery Council, September 2017, accessible via https://www.nmc.org.uk/news/news-and-updates/increasing-number-nurses-midwives-leaving-profession-major-challenges/

37 General Medical Council, 'Our data about doctors with a European primary medical qualification in 2017', Working Paper 3, November 2017, https://www.gmc-uk.org/about/what-we-do-and-why/data-and-research/research-and-insight-archive/our-data-about-doctors-with-a-european-primary-medical-qualification---part-two

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Please feel free to comment on and to forward this briefing note to other interested parties.

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