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EU-Korea: the Free Trade Agreement and the Framework Agreement

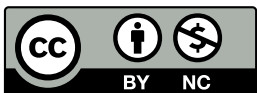
What do they mean for higher education?

By Howard Davies

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European University Association asbl

Avenue de l'Yser 24

1040 Brussels, Belgium

+32 (0) 2 230 55 44

Rue du Rhône 114

Case postale 3174

1211 Geneva 3, Switzerland

+41 22 552 02 96

www.eua.eu · info@eua.eu

EU-Korea: the Free Trade Agreement and the Framework Agreement - what do they mean for higher education?

The “Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part”¹ came into force – provisionally – on 1 July 2011 and was finally ratified in December 2015.

It was the first of a new generation of free trade agreements. It sealed the EU’s relationship with a strategic partner in a deep and comprehensive trade deal, going much further than a set of agreed tariffs on trade in goods.

Higher education featured in the chapter on trade in services, prefiguring the subsequent agreements with Canada and Japan, which EUA has summarised in earlier briefings.²

The free trade agreement provided for the mutual recognition of professional qualifications.

It was accompanied by a Framework Agreement, which opened up possibilities of greater cooperation between higher education institutions.

In the EU pipeline are agreements with, among others, Australia, Chile, India, Indonesia, the Mercosur, Mexico, Morocco, New Zealand, Tunisia and Vietnam.

EUA will provide briefings on these in due course, as appropriate.

EUA OPPOSES THE INCLUSION OF HIGHER EDUCATION IN TRADE DEALS

In 2015, the EUA Board and Council resolved 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

1. The EU-Korea Free Trade Agreement

Provisional and partial application

1.1 In the first instance the application of the free trade agreement was provisional, until such time as all EU member states had ratified it. The ratification process was completed in December 2015.

1.2 Implementation was also partial, because a number of issues were still to be settled, some of them falling within member state competence. One of these concerned the full application of a Protocol on Cultural Cooperation. Here, the difficulty partly lay in defining, on a permanent basis, what cultural activities might be feasible, given the exclusion (at the insistence of France) of the audio-visual service sector.

1.3 The EU was concerned that Korea had not ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions; nor had it revised its Copyright Act accordingly. These issues remain unresolved.

¹ *Official Journal* L-127, 14 May 2011. All subsequent references to the *Official Journal (OJ)* are relevant to this edition.

² These are posted at <https://eua.eu/component/tags/tag/40-international-trade-agreements.html>

³ <https://eua.eu/resources/publications/443:eua-statement-on-ttip-and-tisa.html>

Trade in services

1.4 Chapter 7 deals with “trade in services, establishment and electronic commerce.” It is based on a negative list, i.e. all services are included unless otherwise stated. Higher education is not in the list: it is therefore included. However, coverage extends only to privately funded higher education, since the General Agreement on Trade in Services (GATS)⁴ excludes public services which are provided “in the exercise of government authority, neither on a commercial basis nor in competition with any other provider.”

1.5 EU-Korea does not elaborate on the public-private distinction. At the time of negotiation, the Directorate General for Trade of the European Commission (DG Trade) conducted its business untroubled by headline controversy. The widespread perception that trade deals threaten public services in health and education surfaced later with the negotiations on TTIP (the EU-US Transatlantic Trade and Investment Partnership), now suspended indefinitely. EU-Korea does not, therefore, display the clarity of the EU’s later agreement with Canada, in which the EU 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.”⁵

1.6 In the EU, education is a member state competence. The commitment to trade in higher education services can thus be limited by competent authorities at national and regional levels, even though the legal competence for trade agreements resides at EU level. National reservations are made, or “taken”, and logged in the text of the free trade agreement. In EU-Korea, they are set out in its Annex 7 as follows:

- EU and Member State reservations on cross-border supply (GATS Mode 1) and consumption (Mode 2) of higher education (HE) and adult education (AE) services
- EU and Member State reservations on the establishment of HE service providers (Mode 3)
- EU and Member State reservations on the mobility of incoming Korean personnel (Mode 4)
- Korean reservations on HE and AE service sectors and establishment (all modes)

1.6.1 In the box below, which displays the EU reservations on cross-border supply and consumption of higher education and adult education services, “no reservation taken” means that the member state places no restriction on the trade in privately-funded higher education and adult education services. “Unbound” means that the member state retains the right to introduce measures that might run counter to the principles of market access and equal treatment that are enshrined in the free trade agreement and are therefore legally binding. Moreover, underpinning the content of Chapter 7 is the stated right of each party “to regulate and to introduce new regulations to meet legitimate policy objectives.”⁶

⁴ General Agreement on Trade in Services, Article 1.3 (b and c)

⁵ CETA, Consolidated Text, p.1305, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

⁶ Article 71.4

EU member state	Reservations to the commitment to trade in higher education services in GATS Mode 1 (cross-border supply of services) and Mode 2 (cross-border consumption of services)
AT	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167) HE modes 1 and 2: unbound AE mode 1: unbound for adult education services by means of radio or television broadcasting
BE	HE and AE: no reservation taken
BG	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167) HE modes 1 and 2: unbound
CY	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167) HE modes 1 and 2: unbound AE modes 1 and 2: unbound
CZ	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167)
DE	HE and AE: no reservation taken
DK	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167)
EE	HE and AE: no reservation taken
EL	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167)
ES	HE and AE: no reservation taken
FI	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167) HE modes 1 and 2: unbound AE modes 1 and 2: unbound
FR	Nationality condition. However, Korean nationals can have authorisation from competent authorities to establish and direct an education institution, and to teach.
HR ⁷	HE and AE: no reservation taken
HU	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167)
IE	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167)
IT	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167) Nationality condition for service providers to be authorised to issue State recognised diplomas.
LT	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167)
LU	HE and AE: no reservation taken
LV	HE and AE: no reservation taken
MT	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1167) HE modes 1 and 2: unbound AE modes 1 and 2: unbound

⁷ The entries concerning Croatia are taken from the Additional Protocol signed in 2014 and brought into effect in 2016. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0514%2801%29>

NL	HE and AE: no reservation taken
PL	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1200) Reservation on establishment in all service sectors (see OJ text, p.1202) HE and AE: no reservation taken
PT	HE and AE: no reservation taken
RO	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1200) Reservation on establishment in all service sectors (see OJ text, p.1202) HE: unbound AE: no reservation taken
SE	Reservation on establishment in all service sectors (see OJ text, p.1202) HE: unbound AE: no reservation taken
SI	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1200) Reservation on establishment in all service sectors (see OJ text, p.1202) HE and AE: no reservation taken
SK	Reservation on the purchase of real estate in all service sectors (see OJ text, p.1200) Reservation on establishment in all service sectors (see OJ text, p.1202) HE: Nationality condition for the majority of members of the board. Unbound for the supply of higher education services except for postsecondary technical and vocational education services AE: The number of schools being established may be limited by local authorities (or in the case of high schools and other higher education institutions by central authorities) in charge of granting licences.
UK	HE and AE: no reservation taken

1.6.3 At the EU level, an umbrella provision specifies that “participation of private operators in the education network is subject to concession.”⁸ This means that public authorities may permit a private company to run and exploit a particular service, while bearing all the financial risk.⁹ Both the EU and Korea subscribe to the WTO’s Government Procurement Agreement (GPA), but in their respective schedules there is no mention of education services. The provision is therefore exceptional, in the sense that it explicitly enables government procurement in the field of education, thus compensating for the absence of the formal legitimising mechanisms enshrined in the GPA for other categories of services.

1.6.4 Mode 4 of the GATS covers the conditions set on the access of natural persons of one party to the territory of the other in the pursuit of trade. In common with other free trade agreements, EU-Korea (Chapter 7, section D) lays down the agreed arrangements for business visitors, intra-corporate transferees, managers, specialists, graduate trainees, business service sellers, contractual service suppliers and independent professionals. The reservations boxed below are supplementary to the provisions on mode 4 mobility set out in Articles 7.17-7.20.

⁸ OJ, p.1220

⁹ For the Commission’s note on concessions, see http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/concessions_en

EU member state	Reservations to the commitment to trade in higher education services in GATS Mode 4 (mobility of key personnel)
AT	All service sectors: graduate trainees ¹⁰ - training must be linked to the university degree which has been obtained. For reservations regarding managing directors and auditors, see OJ text, p.1238.
BE	None
BG	All service sectors: economic needs tests are required for graduate trainees. For reservations regarding intra-corporate transferees, see OJ text, p.1238.
CY	None
CZ	HE: nationality condition for higher education services, except for post-secondary technical and vocational education services
DE	All service sectors: graduate trainees - training must be linked to the university degree which has been obtained.
DK	HE: nationality condition for professors
EE	None
EL	None
ES	All service sectors: graduate trainees - training must be linked to the university degree which has been obtained.
FI	All service sectors: for reservations regarding managing directors and auditors, see OJ text, p.1238.
FR	All service sectors: graduate trainees - training must be linked to the university degree which has been obtained. For reservations regarding managing directors and auditors, see OJ text, p.1238. HE: Nationality condition. However, Korean nationals may obtain authorisation from the competent authorities to establish and direct an education institution and to teach.
HR	None
HU	All service sectors: graduate trainees - training must be linked to the university degree which has been obtained. Economic needs tests are required for graduate trainees. For reservations regarding intra-corporate transferees, see OJ text, p.1238.
IE	None
IT	HE: nationality condition for service providers who are authorised to issue State-recognised diplomas
LT	None
LU	None
LV	None
MT	None
NL	None
PL	None
PT	None

¹⁰ Graduate trainees are “natural persons who have been employed by a juridical person of a Party for at least one year, who possess a university degree and who are temporarily transferred to an establishment in the territory of the other Party for career development purposes or to obtain training in business techniques or methods.” (Art.7.17.2(b))

RO	All service sectors: for reservations regarding managing directors and auditors, see OJ text, p.1238.
SE	All service sectors: for reservations regarding managing directors and auditors, see OJ text, p.1238.
SI	None
SK	None
UK	None

1.6.5 Note that, as far as the movement of persons is concerned, Korea reserves the right to depart from the “most favoured nation” principle and to give more favourable treatment to persons belonging to other economic blocs to which it might belong. In the education sector, the text runs as follows:

“Korea reserves the right to adopt or maintain any measure that accords differential treatment to persons of other countries with respect to pre-primary, primary, and secondary education; health and medicine-related higher education; higher education for prospective pre-primary, primary, and secondary teachers; professional graduate education in law; distance education at all education levels (except adult education services, provided that such services do not confer academic credit, diplomas, or degrees); and other education services.”¹¹

1.6.6 Korea’s reservations are formatted in a way which includes all GATS Modes in the same tabulation:

KOREA	Commitments in service sectors and establishment
All sectors	For acquisition of land and company stock and other horizontal commitments, see OJ text, pp.1253-4 and 1299.
Education	Mode 4: unbound
HE:	Mode 1: unbound
Higher education services provided by private higher educational institutions, which have obtained recognition from the government or public accreditation bodies, for the purpose of conferring degrees	Mode 2: none Mode 3:
Excluding:	Only non-profit school juridical persons, established under the approval by the Minister of Education, Science and Technology, may establish educational institutions under the Minister’s authorisation. Intra-company Universities do not need to establish a school juridical person.
(i) health and medicine-related higher education;	Only the types of educational institutions listed in Attachment I ¹² are allowed.
(ii) higher education for prospective pre-primary, primary and secondary teachers;	In the Seoul Metropolitan Area, the new establishment, extension, or transfer of a higher education institution other than Intra-company Universities may be restricted.
(iii) professional graduate education in law; and	Local higher education institutions may jointly operate curricula only with higher education institutions established under Korean law, or with foreign higher education institutions that have obtained accreditation from foreign governments or authorised accreditation bodies.
(iv) universities via broadcasting and communications, and cyber Universities.	The Minister of Education, Science and Technology may restrict the total number of students per year in the fields of medicine, pharmacology, veterinary medicine, traditional Asian medicine, medical technicians, and higher education for pre-primary, primary, and secondary teachers, and the total number of higher education institutions located in the Seoul Metropolitan Area.

¹¹ OJ, p.1313

¹² Attachment 1 (OJ, p.1296) lists and defines junior colleges, universities, industrial universities, technical colleges and intra-company universities.

	At least 50 per cent of the members of the board of directors of a private higher education institution must be Korean nationals. If a foreign person or a foreign juridical person contributes at least 50 per cent of the basic property of a higher education institution, less than two thirds of the members of the board of directors of such an institution may be foreign nationals.
AE:	<i>Mode 1:</i> unbound for health and medicine-related adult education services
Adult Education Services ¹³ provided by private adult educational institutions	<i>Mode 2:</i> none
Excluding:	<i>Mode 3:</i>
(i) education services which recognise education qualifications, or confer, or are linked with, local or foreign credits, degrees or diplomas;	The types of adult education institutions that a foreign person may establish in Korea are limited to:
(ii) vocational training services financially supported by the government in accordance with the Employment Insurance Act, the Worker's Vocational Competency Development Act and the Seafarers Act;	(a) hag-won (private teaching institutes for adults) related to lifelong and vocational education; and
(iii) educational services via broadcasting;	(b) lifelong adult education facilities operated for purposes other than recognising educational qualifications or conferring diplomas, which are:
and	(i) annexed to workplaces, non-governmental organisations, schools and media organisations;
(iv) vocational training services provided by institutions under authority delegated by the government.	(ii) related to the development of knowledge and human resources; or
	(iii) related to on-line lifelong education facilities, all of which are established for adults.
	In the Seoul Metropolitan Area, the new establishment, extension, or transfer of adult training facilities that equal or exceed 3,000 square meters in total floor area may be restricted.
	<i>Mode 4:</i> unbound.
	A foreign national hired by hag-won (private teaching institute) for adults as a lecturer must possess at least a bachelor's degree or the equivalent, and reside in Korea.

Professional qualifications – Mutual Recognition Agreements

1.71 Article 7.21.2 specifies that “the Parties shall encourage the relevant representative professional bodies in their respective territories to jointly develop and provide recommendations on mutual recognition.” These recommendations are to be referred to the Trade Committee, which steers the free trade agreement at the commissioner/ministerial level; thereafter, if approved, they form the basis of a mutual recognition agreement (MRA).

1.72 Progress towards the MRA is to be overseen by a dedicated working group. It was anticipated at first that EU-Korea would open up opportunities for growth in “legal, accounting, engineering and architectural services.”¹⁴ A glance at DG Trade’s annual reports shows that it is architecture and engineering which have progressed – or been encouraged to progress – the furthest. The 2017 Report, however, notes that Korea raised issues regarding mutual recognition for professional services, but it does not say what these were.

1.73 As a first step, the Architects’ Council of Europe (ACE) and the Korean Institute of Registered Architects (KIRA) agreed a Memorandum of Understanding in 2016.¹⁵ It commits each body: 1. To rationalise the resources of both Organisations in pertinent activities at all levels;

¹³ Attachment II (OJ, pp.1297-8) gives more detail on Korean adult education provision.

¹⁴ “The EU-Korea Free Trade Agreement in practice”, p.16, <http://trade.ec.europa.eu/doclib/html/148303.htm>

¹⁵ The MoU can be downloaded from <https://www.ace-cae.eu/policies/a-to-z-policy-list/>

1. To rationalise the resources of both Organisations in pertinent activities at all levels;
2. To reinforce the capacity for action of the both Organisations towards third parties, exploring opportunities for joint actions;
3. To invite and encourage reciprocal representation at their respective working bodies and to share information of mutual interest;
4. To promote high quality professional standards and code of ethics;
5. To exchange information regarding architectural practice and procedures for design and construction;
6. To affirm and promote the basic principles of professionalism contained in the “Accord on Recommended International Standards of Professionalism in Architectural Practice,” adopted by the International Union of Architects (UIA);
7. To affirm and promote consistent professional qualifications criteria and national syllabus based on international standards, such as the UNESCO/UIA Charter for Architectural Education;
8. To encourage an international exchange of knowledge through publications, seminars, exhibitions, lectures and exchange programs;
9. To develop effective political action to influence opinion makers and policy builders to create better legislation and conditions for quality architecture to flourish;
10. And finally, to undertake to establish and concretely define a closer cooperation between the parties at political, technical and working levels, both organisations commit themselves to study an agreement that will facilitate their respective members to practice [sic] in Europe and South Korea. [EUA emphasis]

1.7.4 In respect of Mode 4, EU-Korea allows EU architects to enter into formal cooperation with their Korean counterparts, on the dual condition that they are duly qualified in the EU and pass a simplified examination to obtain a Korean licence.¹⁶ For Koreans incoming to the EU, the situation is complicated, as five MSs impose on architects (and on engineers) either a residency or length of practice requirement. An MRA might ease these conditions, but not necessarily so: recognition of qualifications does not imply the automatic granting of licence to practise.

1.7.5 The respective professional bodies in engineering have met, according to the 2015 Report, but no tangible outcomes are yet visible. The Korean Professional Engineer Association (KPEA) says that negotiation is under way,¹⁷ it is also working with peer bodies in Canada, India, Singapore and New Zealand and has already sealed MRAs with Australia and Texas. Clearly, there is scope for the EU to follow suit in the free trade agreements which it hopes to finalise with Australia, India, New Zealand and others.

The basis for multilateral progress exists: Engineers Ireland, Engineering Council United Kingdom and the Accreditation Board for Engineering Education of Korea (ABEEK) are signatories to the Dublin, Sydney and Washington Accords, all of which work to promote the mutual recognition of engineering qualifications.

2. The EU-Korea Framework Agreement¹⁸

2.1 On 10 May 2010 the EU and Korea signed a Framework Agreement which came into force on 1 June 2014, three years after the provisional implementation of the free trade agreement. The parties declared common cause in a broad spectrum of global issues: climate change, combatting terrorism, human rights, multilateralism, nuclear non-proliferation, sustainable development, and so on.

¹⁶ The examination covers only two of the regular test's six subjects: (i) Architectural Laws and Regulations; and (ii) Architectural Design.

¹⁷ https://www.kpea.or.kr/kpea/english/Mutual_Recognition_Agreement.html

¹⁸ http://eeas.europa.eu/korea_south/docs/framework_agreement_final_en.pdf

2.2 The Agreement anticipated that dialogue and cooperation would take place in a number of named policy areas. Article 29 on education is worth citing in its entirety, since it enables a substantial volume of EU-Korea cooperation by higher education institutions.

1. The Parties acknowledge the crucial contribution of education and training to the development of human resources capable of participating in the global knowledge-based economy; and recognise that they have a common interest in cooperation in education and training.

2. In accordance with their mutual interests and the aims of their policies on education, the Parties undertake to support jointly appropriate cooperative activities in the field of education, training and youth, with particular emphasis on higher education [EUA emphasis]. This cooperation may take the form of, in particular:

- a) support to joint cooperation projects between education and training institutions in the European Union and the Republic of Korea, with a view to promoting curriculum development, joint study programmes and student mobility;
- b) dialogue, studies, and exchange of information and know-how in the field of education policy;
- c) promotion of exchange of students, academic and administrative staff of higher education institutions, and youth workers, including through the implementation of the Erasmus Mundus programme;
- d) cooperation in education sectors of common interest.

Korea's position in relation to ERASMUS and Horizon Europe post-2020

2.3 Korea is not an Associated Country in the current Horizon 2020. As a third country it can participate in certain actions, on condition that its researchers secure matched funding from their national agencies. The participation of third countries in Horizon Europe, the future framework research programme, depends on whether they satisfy the criteria laid down in EU legislation. These criteria are not yet finalised; all that is available so far is Article 12.1(d) of the Commission's draft Regulation¹⁹ and the draft report of the European Parliament's lead committee.²⁰

2.4 In ERASMUS+, Korea is a partner country in the Asian region. The situation regarding the ERASMUS successor programme is more complicated. The Commission's draft Regulation²¹ proposes providing for two principal categories of participation. In principle, third countries would be able to come in fully if they satisfied conditions similar to those of Horizon Europe and if they also agreed to fulfil all the obligations imposed on EU member states. Failing this, Article 17 suggests that their participation would be limited. However, at the present time all this is largely hypothetical. It is too early to say precisely how third countries might be accommodated.

3. Post-scripts

3.1 Both parties to EU-Korea acknowledge that the Agreement is not perfect. Because it pre-dates the Lisbon Treaty it contains nothing on investment protection. Both sides have agreed to explore the possibility.

3.2 There is difference of opinion on whether, thus far, the free trade agreement has been successful. The Commission reported in 2015 that it had turned the EU's trade deficit with Korea into a surplus. In 2015, according to the 2017 Report, the EU enjoyed a trade surplus in services of 4.8 billion EUR. Here, too, both parties have agreed to look at the functioning of the Agreement with a view to improving its functioning and its balance.

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2018:435:FIN>

²⁰ Document PE 625.306v01-00 can be accessed via the EP search engine at www.europarl.europa.eu/committees/en/search-in-documents.html

²¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A367%3AFIN>

3.3 The failure of Korea to ratify conventions associated with cultural matters has already been mentioned. This has not been the only obstacle to progress. Environmental issues have also been a matter of concern. Moreover, since 2013, all of the Commission' annual Reports have cited Korea's reluctance to ratify and implement the conventions of the International Labour Organisation (ILO). Freedom of association, the right to collective bargaining, forced labour – the EU has attempted to apply pressure on all of these points.

3.4 The education sector is not immune. Formal complaints made to the ILO in 1992, 2007 and 2009, by international and Korean professional bodies and trade unions (including Education International – like EUA, a consultative member of the Bologna Follow-Up Group), have been “closed, with request to be informed of new developments.” This indicates “that a violation of freedom of association standards or principles was found and that the [relevant ILO] Committee has issued recommendations to the government that it expects to be implemented.”²²

3.5 Higher education institutions will be interested to follow developments – which, given the election of President Moon Jae-In (a human rights lawyer) in 2017 and the changed political climate in Korea – may prove positive.

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

Howard Davies, August 2018

howard.davies@eua.eu

²²See the commentary and the tabulation of cases presented in the *Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea: Interim Technical Report, Part 1: Synthesis Report*, prepared by Civic Consulting and the Ifo Institute for the European Commission, 2017, p.213, <http://trade.ec.europa.eu/doclib/html/155673.htm>

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