



## **Issues of Legal Uncertainty Arising in the Context of the U.K.’s Withdrawal from the E.U.—the Application and Impact of World Trade Organization Rules on Financial Services**

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Robert van Geffen	Association for Financial Markets in Europe
Martin Thomas	Altima Partners
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<sup>1</sup> Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.

<sup>2</sup> The FMLC is also grateful to Lorand Bartels, Special Counsel at Linklaters LLP and Reader in International Trade Law at the University of Cambridge, to whom any errors in this paper should not be attributed.

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## 1. INTRODUCTION

- 1.1. The role of the Financial Markets Law Committee (the “**FMLC**” or the “**Committee**”) is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.
- 1.2. On 23 June 2016, the U.K. voted by way of an in/out referendum to withdraw from the European Union (“**Brexit**”). In the aftermath of the referendum, and in the absence of any official roadmap for the upcoming separation, discussion about the U.K.’s future relationship with the E.U. has followed two main strands. In the first, the U.K.’s withdrawal from the E.U. would be complemented by the successful negotiation of a new U.K.-E.U. relationship—for example, in the form of a new trade agreement. The second option, dubbed in the media the “cliff-edge”, would entail the U.K. leaving the E.U. without signing a new agreement, as a result of which the conduct of business across borders would be governed by World Trade Organization (“**WTO**”) rules.
- 1.3. On 17 January 2017, U.K. Prime Minister, Theresa May, offered a first outline for the upcoming negotiations with the E.U.<sup>3</sup> The Prime Minister stated at that time that it was her intention to seek a customs agreement with the E.U. that would leave the U.K. free to establish its own individual tariff schedules at the WTO, “meaning we can conclude new trade agreements, not just with the European Union but with old friends and new allies from outside Europe too”.<sup>4</sup> She observed that the U.K. cannot remain within the European single market. This latter thought was reiterated in Mrs May’s speech in Florence in September 2017, and this time accompanied by a proposal for a transitional deal of “around two years” based on “the existing structure of E.U. rules and regulations”, leading eventually to a “new, deep and special partnership” partnership with the E.U.<sup>5</sup>
- 1.4. On the domestic front, preparations for withdrawal have continued. On 29 March, HM Government officially served notice of the U.K.’s withdrawal to the E.U. under Article 50 of the Treaty on European Union (“**TEU**”). On the following day, the U.K.

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<sup>3</sup> Theresa May’s Speech: *The government’s negotiating objectives for exiting the E.U.*, (17 January 2017), the full text of which is available here: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

<sup>4</sup> See point 9: “New trade agreements with other countries”, in PM Theresa May’s Speech (*supra*, n. 2).

<sup>5</sup> See, *PM’s Florence speech: a new era of cooperation and partnership between the U.K. and the E.U.*, (22 September 2017), available at: <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

Department for Exiting the European Union published a White Paper introducing HM Government’s proposals to repeal the European Communities Act 1972 and incorporate E.U. law into U.K. law by way of a “Great Repeal Bill”.<sup>6</sup> The Bill, officially titled the European Union (Withdrawal) Bill (the “**Withdrawal Bill**”), was introduced into the House of Commons on 13 July. It completed its Committee Stage there, having been amended, on 20 December 2017.

1.5. At the end of the two-year Article 50 notice period—i.e., on the day which is defined in the Withdrawal Bill as “**Exit Day**”—the U.K. will cease to be an E.U. Member State unless there is unanimous approval from other E.U. Member States to extend this period. Given the absence of an official position on the future relationship between the U.K. and the E.U. and the protracted nature of the Article 50 negotiations, it was equally plausible at the outset of this project that the relationship between the U.K. and E.U. might either be governed, as described in paragraph 1.2, by a treaty agreement or by the WTO rules. The basis for the U.K.’s trade with the E.U. could take the form of: (1) U.K. membership of the European Economic Area (“**E.E.A.**”), subject to the European Economic Area Agreement (the “**E.E.A. Agreement**”);<sup>7</sup> (2) a transitional arrangement; (3) a new bespoke treaty; or (4) E.U. commitments to the WTO with the U.K. qualifying as both a WTO Member and a “Third Country”<sup>8</sup> under existing E.U. access provisions (this fourth option is referred to in this paper as the “**fallback scenario**”). Each of these options is impacted by the WTO’s principles which have influenced and shaped international trade since 1947.

1.6. On 7 December 2017, the U.K. and E.U. concluded negotiations on the first part of the Article 50 negotiations, with the U.K. agreeing to pay a financial settlement and to protect the rights of E.U. citizens resident in the U.K.<sup>9</sup> As the negotiations move on to

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<sup>6</sup> HM Government, *Legislating for the U.K.’s Withdrawal from the European Union*, (30 March 2017), available at: <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper>.

<sup>7</sup> The E.E.A. Agreement governs relations between the E.U. and the three states of the European Free Trade Association (“EFTA”)—Iceland, Liechtenstein and Norway—which make up the European Economic Area (“E.E.A.”). In *Yalland and others v Secretary of State for Exiting the E.U.* [2017] EWHC 630, the Applicants sought a declaration that it would be unlawful for the Prime Minister to take the U.K. out of the E.E.A. by serving a withdrawal notice under Article 127 of the Agreement on the European Economic Area (the “E.E.A. Agreement”) and that, absent such notice, the U.K. remains bound as a Contracting Party to the E.E.A. Agreement. One limb of the Appellants’ argument rested on the contention that an action under a Treaty to which EFTA states were not party, i.e. under Article 50 of the Treaty of the European Union, could not unilaterally affect the rights of those states vis-à-vis the U.K. under the E.E.A. Agreement. The High Court refused to hear the case in February 2017 on the grounds that the application was premature. Since then HM Government has submitted an Article 50 withdrawal letter which makes no mention of the need to give notice under Article 127 of the E.E.A. Agreement.

<sup>8</sup> See definition in paragraph 1.7.

<sup>9</sup> Barker, A. and Brunsden, J., “Brexit divorce deal: the essentials”, *Financial Times*, (8 December 2017), available at: <https://www.ft.com/content/21c5d076-dbee-11e7-a039-c64b1c09b482>.

focus on the trade deal, the FMLC acknowledges that the possibility of the occurrence of the fallback scenario might have reduced. The possibility is, however, given due consideration in this paper so as to provide a comprehensive picture of the legal complexities.

- 1.7. In this paper, the FMLC examines the future of the U.K.'s cross-border trade with the E.U. and the potential impact of the WTO's rules. Section 2 contains an overview of the WTO agreements relevant to financial services while section 3 delves more deeply into the application of these rules including the operation of the prudential carve-out and the ways in which they support the negotiation of a Free Trade Agreement ("FTA"). Section 4 offers an analysis of the impact of the WTO's principles on each of the options outlined in the preceding paragraph and section 5 considers briefly the U.K.'s future arrangements with non-E.U. countries (or "**Third Countries**").<sup>10</sup> In section 6, the FMLC suggests ways by which HM Government might ensure greater legal certainty in the financial markets.
- 1.8. It is not for the FMLC to comment on matters of policy or the form that future regulatory approaches, if any, should take and this paper should not be understood to constitute comments thereon.

## **2. THE WTO RULES APPLICABLE TO THE FINANCIAL SERVICES**

- 2.1. The WTO provides a common framework for trade in goods and services, as well as the protection of intellectual property rights. The Marrakesh Agreement establishing the World Trade Organization ("**WTO Agreement**") provides the basic rules on membership, structure and decision-making and is applicable to 164 Members worldwide.<sup>11</sup> The E.U. currently represents itself and the E.U. Member States, including the U.K., in the WTO.<sup>12</sup> The U.K. is, however, also independently a WTO

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<sup>10</sup> The United Kingdom may be able to inherit existing E.U. preferential FTAs with certain Third Countries but this will require the agreement of the Third Country in question, and possibly also the assistance of the E.U. This is elaborated upon in the European Council Draft Guidelines XT 21001/17 of 31 March 2017, which state that the United Kingdom "will no longer be covered" by E.U. agreements with Third Countries. However, it goes on to say that the European Council "expects" the U.K. to honour its share of commitments and indicates that there needs to be a "constructive dialogue" to achieve this. See European Union, Press Release: "European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU", (29 April 2017), available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/#>.

<sup>11</sup> Unlike the E.U. rules and the single market directives, individual financial institutions cannot invoke the WTO rules in order to gain market access. However, governments can and do act as proxies for their companies in the WTO.

<sup>12</sup> For the sake of internal consistency, Member nations of the E.U. will be referred to throughout this paper as "E.U. Member States" or as "Member States". Signatories to the WTO Agreement are referred to as "WTO Member(s)".

Member and a party to the WTO multilateral agreements, including the General Agreement on Tariffs and Trade 1994 (“**GATT**”) and the General Agreement on Trade in Services (“**GATS**”).

- 2.2. The WTO rules and disciplines applicable to trade in financial services are contained in three legal instruments: the GATS, the Annex to the GATS on Financial Services (the "**Annex**") and the Understanding on Commitments in Financial Services (the "**Understanding**").

**GATS: objectives, coverage and disciplines**

- 2.3. The GATS was the first multilateral trade agreement to be signed which concerned services. It applies in principle to all service sectors, with two exceptions:

- i. GATS Article I:3 excludes “services supplied in the exercise of governmental authority”. These are services that are supplied neither on a commercial basis nor in competition with other suppliers. Cases in point are social security schemes and other public services provided at non-market conditions.<sup>13</sup>
- ii. The Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights.

- 2.4. Article I of the GATS distinguishes between four modes of supplying services:

- i. **Mode 1 Cross-border supply**, which covers services from the territory of one WTO Member into the territory of another WTO Member (e.g. banking or architectural services transmitted via telecommunications or mail);
- ii. **Mode 2 Consumption abroad** refers to situations in which a service is supplied in the territory of one WTO Member to the service consumer of another WTO Member (e.g. tourist or patient);
- iii. **Mode 3 Commercial presence** refers to the supply of a service by a service supplier of one WTO Member through commercial presence in the territory of another WTO Member, such as through ownership or lease of premises (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and

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<sup>13</sup> See I(b) of the Annex on Financial Services.

iv. **Mode 4 Presence of natural persons** is the supply of a service by a service supplier of one WTO Member through the presence of natural persons in the territory of another WTO Member (e.g. accountants, doctors or teachers and provision of “fly in, fly out” services, whether employed or self-employed).<sup>14</sup>

2.5. The GATS imposes upon all WTO Members two broad categories of obligations: (i) general obligations, which apply to all WTO Members trading in services; and (ii) commitments concerning market access and national treatment in specifically designated sectors. Of the general commitments, perhaps the best known is the Most Favoured Nation (“MFN”) treatment. Article II:1 of the GATS provides:

With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

The MFN obligation applies to any measure that affects trade in services in any sector within the scope of GATS, whether or not specific commitments have been made.

2.6. Derogations from the MFN treatment are possible in the form of the so-called Article II exemptions.<sup>15</sup> WTO Members were allowed to seek such exemptions for existing measures before the WTO Agreement entered into force. New exemptions can only be granted to new Members at the time of accession or, in the case of current Members, in exceptional circumstances, by way of a waiver under Article IX:3 of the WTO Agreement. For those WTO Members which negotiated MFN exemptions, these are specified in their MFN exemption lists, specifying the measures for which the derogations were obtained. These exemptions are subject to review and should not—in principle—have lasted longer than 10 years, although many are expressed to last indefinitely.

2.7. FTAs are another form of derogation from the MFN obligation, permitted by Article V of GATS under certain conditions. One requirement of such an agreement is that it “has substantial sectoral coverage”, which the GATS further states should be understood

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<sup>14</sup> The Annex to the GATS on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

<sup>15</sup> These exemptions are provided in the Annex to the GATS on Article II Exemptions.

in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.<sup>16</sup>

2.8. Reinforcing this, one WTO Panel has observed that

the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements. However, in our view, it is not within the object and purpose of Article V to provide legal coverage for the extension of more favourable treatment only to a few service suppliers of parties to an economic integration agreement on a selective basis, even in situations where the maintenance of such measures may explicitly be provided for in the agreement itself.<sup>17</sup>

2.9. With reference to the specific commitments, each WTO Member maintains a schedule which provides a record of its individual commitments of market access and national treatment with respect to the four modes of service supply. Although these are the schedules of individual Members, they are negotiated texts and by virtue of Article XX:3 of GATS are an integral part of GATS with the same treaty status. In sectors where market-access commitments have been undertaken, Article XVI of GATS provides that certain “quantitative restrictions” cannot be imposed by a WTO member on services, unless these are specified in its schedule. These quantitative restrictions include maximum limitations on the number of service suppliers; the total value of service transactions; the total number of service operations or employees in the sector; the legal form of the service supplier; or the participation of foreign capital. For the sectors included in its schedule, Article XVII of GATS requires each WTO Member to provide national treatment, i.e., to accord to services and service suppliers of any other WTO Member treatment no less favourable than that it accords to its own like (similar) services and service suppliers, subject to any limitations in its schedule. Article VI of GATS requires that for scheduled services new domestic regulations must be no more trade restrictive than necessary to ensure the quality of the service.

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<sup>16</sup> GATS Article V and footnote 1.

<sup>17</sup> Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, [WT/DS139/R](#), [WT/DS142/R](#), adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043, paragraph 10.271.

### The Annex on Financial Services

- 2.10. The Annex provides a detailed definition of the financial services covered. The Annex includes a so-called “prudential carve-out”, which provides in part that

Notwithstanding any other provisions of the [GATS], a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.<sup>18</sup>

The Annex does not provide any definition or indicative list of prudential measures that would be covered by this provision. While governments have considerable discretion in introducing prudential measures, the GATS provides that the prudential exception “shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement”.<sup>19</sup>

- 2.11. The Annex also provides the legal basis for WTO Members to enter into mutual recognition agreements (“MRAs”) under which they may recognise each other’s prudential and certification measures (as to more on the practical use of both of these measures, see paragraphs 3.12 to 3.14 below).

### The Understanding on Commitments in Financial Services

- 2.12. The Understanding was agreed at the same time as the GATS.<sup>20</sup> It has no legal effect *per se*, but has effect insofar as its terms are incorporated in individual WTO Members’ schedules. Several WTO Members which have accepted it, including the E.U. (and thus, the U.K.), the U.S. and other OECD countries.

- 2.13. The Understanding builds on the GATS, first by imposing a standstill obligation under which parties undertake not to introduce more restrictive measures in respect of trade in financial services. In addition, the Understanding creates obligations which build on the basic GATS obligations of market access and national treatment. The obligations on market access are further broken down into the following categories: monopoly

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<sup>18</sup> GATS Annex on Financial Services, paragraph 2(a). The other general exceptions provided for in GATS Article XIV apply to all services sectors and measures.

<sup>19</sup> *Ibid.*

<sup>20</sup> The text of the Understanding on Commitments in Financial Services is available here: [https://www.wto.org/english/docs\\_e/legal\\_e/54-ufins\\_e.htm](https://www.wto.org/english/docs_e/legal_e/54-ufins_e.htm).

rights; financial services purchased by public entities; cross-border trade; commercial presence; new financial services; transfers of information and processing of information; temporary entry of personnel; and non-discriminatory measures. The national treatment provision imposes upon WTO Members that have accepted the Understanding the obligation to grant financial service suppliers of any other WTO Member established in their territories access to payment and clearing systems operated by public entities and to official funding and refinancing facilities.

### 3. APPLICATION OF THE WTO RULES TO FINANCIAL SERVICES

#### Certification of schedules of Commitments at the WTO

- 3.1. In accordance with the requirement in the GATS and the WTO Agreement, each WTO member has annexed a schedule of commitments setting out its market access and national treatment commitments. WTO Members can amend their own schedules in case of changing circumstances, provided that WTO rules are followed. This section sets out the process for registering a GATS schedule with the WTO with reference to the procedures for the rectification or modification of schedules set out in the GATS and two related decisions of the WTO Council for Trade in Services (the “**GATS Council**”).
- 3.2. The overarching authority to modify services commitments is set out in GATS Article XXI. GATS Article XXI provides in part that a WTO Member (referred to in this context as the “**modifying Member**”) may “modify or withdraw any commitment in its schedule” by notifying its intent to the GATS Council.<sup>21</sup>
- 3.3. Other WTO Members which consider their benefits have been affected by the modifying Member’s proposed modification have the right to object and to seek “compensatory adjustment” in the form of additional market access in other sectors in the modifying Member’s services schedule. If no agreement is reached on the compensatory adjustment, the matter can referred to arbitration.<sup>22</sup> In case of arbitration, were the modifying Member to implement changes to its schedule without

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<sup>21</sup> GATS Article XXI:1(a) and (b).

<sup>22</sup> GATS Article XXI:3(a). Moreover, the “modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration”. GATS Article XXI:4(a).

complying with the arbitral findings, affected WTO Members would have retaliation rights.<sup>23</sup>

3.4. In 1999, the GATS Council adopted procedures to implement the GATS provision on modifying services schedules. They provide in part that other WTO Members must submit any objections within 45 days of the notification of the proposed modification or withdrawal.<sup>24</sup> If no claims are made during that period, then “the modifying Member shall be free to implement the proposed modification or withdrawal” and it shall be deemed certified.<sup>25</sup>

3.5. In 2000, the GATS Council adopted additional procedures related to the “rectification” of a WTO Member’s GATS schedule.<sup>26</sup> These procedures state in part that

new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments, shall take effect by means of certification.<sup>27</sup>

The proposed changes will enter into force 45 days from the date of circulation “provided no objection has been raised by any other Member”.<sup>28</sup> If any objection has been made and not withdrawn, the 2000 Procedures cease to apply and the matter must be resolved under the 1999 Procedures for modifications, described above.<sup>29</sup>

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<sup>23</sup> “If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings”. GATS Article XXI:4(b).

<sup>24</sup> World Trade Organization, *Procedures For The Implementation Of Article XXI of the General Agreement On Trade In Services (GATS) (Modification Of schedules)*, adopted by the Council for Trade in Services on 19 July 1999, S/L/80, (the “**1999 Services Council Procedures**”), paragraph 3.

<sup>25</sup> 1999 Services Council Procedures, para. 3. The certification procedures provide in part that “[a]t the end of the 45-day period, if no objection has been raised, the Secretariat shall issue a communication to all Members to the effect that the Certification procedure has been concluded, indicating the date of entry into force of the modifications”. 1999 Services Council Procedures, para. 20. If Members object to the proposed certification, “the Certification will be deemed concluded upon the withdrawal of the objections by all objecting Members”.

<sup>26</sup> World Trade Organization *Procedures for the Certification of Rectification or Improvements to schedules of Specific Commitments*. Adopted by the Council for Trade in Services on 14 April 2000, S/L/84 (the “**2000 Services Council Procedures**”).

<sup>27</sup> 2000 Services Council Procedures, para. 1.

<sup>28</sup> 2000 Services Council Procedures, para. 1.

<sup>29</sup> 2000 Services Council Procedures, para. 4.

*The E.U.'s GATS schedule*

- 3.6. The E.U. has registered a schedule of commitments with the WTO on behalf of the E.U. and its Member States. The E.U.'s schedule of commitments enumerates commitments for the bloc as a whole, with derogations listed for individual Member States.
- 3.7. The GATS financial services schedule from 1999 (the “**1999 schedule**”) is the most recent certified schedule containing the commitments of the E.U. and its Member States. The 1999 schedule affirms that the E.U. and its Member States have undertaken commitments on financial services in accordance with the Understanding. It includes Member States’ limitations on market access and national treatment in relation to these commitments. In 2006, the E.U. published amended draft GATS schedules (the “**draft 2006 schedules**”) to reflect the addition of new E.U. members. These schedules, however, have not been formally certified at the WTO. The 2006 draft schedules contain the new E.U. Member States’ commitments and restate the commitments set out in the 1999 schedules for the existing E.U. Member States. The 2006 draft schedules also set out a significant number of limitations by the additional Member States. These schedules, however, have not come into force because some Member States are yet to ratify them individually.
- 3.8. E.U. Member States have provided very limited commitments reflecting those in the Understanding to allow non-resident suppliers to supply (on the basis of terms and conditions that accord national treatment) the following services:
- i. insurance of risks relating to: (i) maritime shipping, commercial aviation and space launching and freight (including satellites); and (ii) goods in international transit;
  - ii. reinsurance, retrocession and the services auxiliary to insurance such as consultancy, actuarial, risk assessment and claim settlement services;
  - iii. provision and transfer of financial information and financial data processing and related software by suppliers of other financial services; and
  - iv. advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services.

The 1999 and draft 2006 schedules also contain E.U. Member States’ limitations on market access and national treatment. While each Member State’s limitations differ, a

number of Member States have imposed restrictions on the provision of insurance and insurance-related services on a cross-border basis.<sup>30</sup>

3.9. In relation to commercial presence, some E.U. Member States offer financial service suppliers from any other WTO Member “the right to establish or expand within its territory ... a commercial presence” although Members can impose terms, conditions and procedures for authorisation of the establishment and expansion of a commercial presence. The 1999 and the draft 2006 schedules contain E.U. Member States’ limitations in relation to the commercial presence commitment.<sup>31</sup>

3.10. Finally, the E.U.’s schedule applies only

to the territories in which the Treaties establishing the European Communities are applied and under the conditions laid down in these Treaties.<sup>32</sup>

Following Brexit, as the United Kingdom will not be an E.U. Member State, the U.K. will have to establish its own GATS schedule (for more on this, see paragraphs 4.2 to 4.6.

### **Free Trade Agreements as an Exception to the MFN rule**

3.11. The MFN obligation establishes a prohibition, in principle, of preferential arrangements among groups of Members in individual sectors or of reciprocity provisions which confine access benefits to trading partners granting similar treatment. By way of exception, the WTO provides for parties to agree Preferential Trade Agreements (“PTAs”) amongst themselves on the condition that such agreements facilitate trade, increase economic integration between the relevant parties and do not raise barriers to trade with respect to Third Countries not participating in the agreement. In that sense, PTAs are a tool for trade liberalisation and are considered to be “WTO-plus” in effect,

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<sup>30</sup> For example, in Germany, “compulsory air insurance” policies can only be underwritten by a subsidiary established in the E.U. or by a branch established in Germany. Furthermore, if a foreign insurance company has established a branch in Germany, it may only conclude insurance contracts in Germany relating to international transport through the branch established in Germany. In France, only insurance firms established in the E.U. may carry out insurance of risks related to ground transport. (Please see Draft 2006 schedule of Commitments, p. 182.)

<sup>31</sup> For example, in Spain, before establishing a branch or agency to provide certain classes of insurance, foreign insurers must have been authorised to operate in the same classes of insurance in its country of origin for at least five years. In France, the establishment of branches in the insurance sector is subject to a special authorisation for the representative of the branch, while in Ireland, the right of establishment in the insurance sector does not cover the creation of representative offices. In relation to banking and other financial services, in Italy, for example, representative offices of foreign intermediaries cannot carry out activities aimed at providing investment services. (Please see Draft 2006 schedule of Commitments, pp. 187, 188 and 197 respectively.)

<sup>32</sup> Draft 2006 schedule of Commitments, p. 7

both with regards to the scope and depth of liberalisation. For services, such PTAs are called “economic integration” agreements. Their requirements are specified in Article V of GATS, which provides that an economic integration agreement must have “substantial sectoral coverage”, and must provide for “the absence or elimination of substantially all discrimination”, between or among the parties, in the covered sectors, subject to some specified exceptions.<sup>33</sup>

### **Mutual Recognition Agreements**

- 3.12. Article VII of GATS provides principles in relation to Mutual Recognition Agreements (“MRAs”) which state (*inter alia*):

For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country.<sup>34</sup>

One obligation imposed upon WTO Members concerning MRAs is that they must not accord recognition in a discriminatory manner between countries. In case of an existing MRA, Members to that agreement are required to provide other WTO Members adequate opportunity to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it.<sup>35</sup> The Annex provides for the possibility of WTO Members recognising the prudential measures of other countries.

### **The Prudential Carve-out**

- 3.13. The prudential carve-out was considered for the first time in WTO dispute settlement in the case of *Argentina – Financial Services*, in which Panama brought a complaint against Argentina for measures regarding its transparency and the application of tax regulations, claiming that those measures were inconsistent with the MFN, market access, national treatment and other GATS provisions. Argentina argued, among other things, that its regulations were “defensive tax measures” that were designed to protect Argentina's tax base by preventing tax evasion, tax avoidance and fraud. The WTO

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<sup>33</sup> GATS indicates, in Article V and footnote 1, that the substantial coverage refers to number of sectors, volume of trade and modes of supply and that, in order to meet that condition, the agreement should not a priori exclude any mode of supply. Along the same lines, it follows that an a priori exclusion of some sectors will not satisfy the requirements.

<sup>34</sup> Article VII:1 of GATS

<sup>35</sup> Article VII:2 and VII:3 of GATS

Appellate Body confirmed in its ruling that three requirements must be fulfilled for any measures to be justified under the prudential carve-out:

First, there is the threshold, or preliminary, question of what types of measures may potentially fall within the scope of paragraph 2(a). Second, a measure must have been taken "for prudential reasons". Finally, under the second sentence of paragraph 2(a), the measure "shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement". Only when a measure falls within the scope of paragraph 2(a) will there be a need to evaluate whether it was taken "for prudential reasons" and whether it fulfils the requirement in the second sentence of paragraph 2(a).<sup>36</sup>

3.14. Further, the Appellate Body concluded, among other things, that:

- The prudential exception covers all measures affecting the supply of financial services.
- The prudential exception covers violations of obligations under any provision of the GATS Agreement, which means that the exception "could be invoked to justify inconsistencies with all of a Member's obligations under the GATS".<sup>37</sup>

Thus, according to the only WTO Appellate Body ruling on the prudential exception, it covers all measures affecting the supply of financial services, as well as any violations of GATS obligations, provided that the Member complies with the requirements of the provision.

### **Interim Agreements**

3.15. Article XXIV of GATT allows for an "interim agreement" to be signed among parties as a precursor to an FTA in goods. With reference to services, GATS Article V permits parties to enter into "an agreement liberalizing trade in services between or among the parties to such an agreement", provided that certain conditions are met, including "substantial sectoral coverage". The agreement must provide

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<sup>36</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.246.

<sup>37</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.255.

for the absence or elimination of substantially all discrimination...either at the entry into force of that agreement or on the *basis of a reasonable time-frame...*

- 3.16. This interim arrangement could continue for some time. The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 provides, in the parallel context of FTAs on goods, that the “reasonable length of time ... should exceed 10 years only in exceptional cases.”

### **Dispute Resolution**

- 3.17. Trade disputes concerning the GATS are governed by the WTO Understanding on Rules and Procedures governing the Settlement of Disputes (the "DSU"), which was adopted as part of the package of WTO agreements in 1994 and came into force as of 1 January 1995. The Dispute Settlement Body (the "DSB") administers the rules and the procedures of the DSU. The procedures of the DSU are the only formal means to resolve disputes between WTO Members regarding a violation, or other nullification or impairment of GATS obligations. Failure to comply with the DSB recommendations and rulings within a reasonable period of time may lead to demands for compensation, failing which, the complainant may request authorisation temporarily to suspend concessions or other obligations under the relevant agreements (i.e. retaliation) until such time as the defending Member brings itself into conformity. The DSB must authorise the retaliation unless there is consensus to reject the request. If the level of retaliation is opposed, the matter will be referred to arbitration.

## **4. THE IMPACT OF THE WTO RULES ON THE FUTURE U.K.-E.U. RELATIONSHIP**

- 4.1. As set out above, the shape of the future partnership between the U.K. and the E.U. is as yet undecided. In broad terms, the future relationship could take the form of: (1) U.K. membership of the E.E.A. on a transitional or even permanent basis;<sup>38</sup> (2) a transitional agreement; (3) a bespoke FTA or (4) the U.K. trading with the E.U. on the basis of both parties' WTO scheduled commitments and the E.U.'s existing Third Country provisions. Some of these options are more straightforward than others: were the U.K. to join the E.E.A., for example, its relationship with the E.U. would be shaped by the E.E.A. Agreement, which might be considered simply a continuation of an old

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<sup>38</sup> Accession to the E.E.A. would be subject to agreement and ratification by both the E.U. 27 and by the EFTA State parties.

agreement. Somewhat more complicated is a scenario in which the U.K. and E.U. are unable to agree on any future arrangements and trade in services must continue on the basis of existing provisions for cross-border trade, such as those offered in each party's schedule of commitments and those requirements imposed by the E.U. via the Third Country regimes codified in E.U. law—the FMLC explores this briefly below. The WTO rules have greatest impact and raise most questions, however, in the event the U.K. negotiates with the E.U. a new future agreement, whether transitional or in the form of an FTA. In this section, the FMLC considers the ways in which the rules set at the WTO, explained above in sections 2 and 3, would affect or limit the U.K.-E.U. relationship. First, however, the U.K. would have to certify its schedule of commitments at the WTO.

#### **Certifying the U.K.'s GATS schedules**

- 4.2. In order to reflect its new position as an independent WTO Member, the U.K. must prepare its own schedules of MFN commitments for goods and services and seek approval for these from other WTO Members.<sup>39</sup> The U.K. Secretary of State for International Trade, Dr Liam Fox MP, has stated that the U.K. intends to prepare “draft schedules which replicate as far as possible our current obligations”.<sup>40</sup> As the E.U.'s schedule of commitments on market access and national treatment for services includes the U.K., the process of preparing a U.K. GATS schedule should not be technically difficult. Unless the U.K. decided to change any of its existing commitments, the schedule would contain the same commitments set out in the E.U. schedule, which include the limitations scheduled by the U.K. (of which there are very few).
- 4.3. If the U.K. leaves unchanged its current services commitments, it could claim that there is no change in their scope or their substance and present its new schedule in the WTO as a rectification under the 2000 procedures. If, however, another WTO Member objects that its trade interests are nonetheless affected (e.g., that the division of the E.U. into two markets will increase costs for its services exporters), or if the U.K. changes any of its commitments, the U.K. may need to use the 1999 procedures for the modification of schedules (both of these procedures are described at paragraphs 3.4-3.5 above).

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<sup>39</sup> The E.U. will also undertake a similar process to rearrange its commitments and limitations without the U.K.

<sup>40</sup> International Trade Committee, “Establishing the U.K.'s position at the WTO”, *U.K. Trade Options beyond 2019*, (7 March 2017), available here: <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmintrade/817/81705.htm>.

- 4.4. Those WTO Members which consider their market access benefits to have been affected by the U.K.'s proposed modification have the right to object and to seek "compensatory adjustment" in the form of additional market access in other sectors in the U.K.'s services schedule. As described in paragraph 3.3, in the case no agreement is reached on such a compensatory adjustment, the affected Member may refer the matter to arbitration, in which it can be joined by any other WTO Member who may be similarly affected. If the U.K. were to modify its schedule without complying with the arbitral findings, the affected Members would have retaliation rights whereby they may modify or withdraw with regards to the U.K. "substantially equivalent benefits", i.e., limited to the value of the lost trade.<sup>41</sup>
- 4.5. The jurisprudence of the WTO suggests that it may be difficult to for the U.K. to argue that its new GATS schedule is a rectification rather than a modification. The WTO Appellate Body has essentially interpreted the term "modify" to mean any substantive change. Although it was interpreting the obligations with respect to trade in goods, its ruling may well serve as a precedent for services as well:

The ordinary meaning of the term "modify" appears to include both the situation in which the scope of a concession is reduced (for example, a tariff increase) and when the scope is expanded (for example, a tariff reduction). In fact, whether the proposed modification actually constitutes a reduction or an expansion of the concession may only become clear in the course of the renegotiations and will determine whether and to what extent the modifying Member owes compensatory adjustment...<sup>42</sup>

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<sup>41</sup> GATS Article XXI:4(b).

<sup>42</sup> Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and *Corr.1 / European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and *Corr.1*, adopted 22 December 2008, DSR 2008:XVIII, p. 7165 .

- 4.6. The procedure for certifying the new U.K. services schedule would depend on whether any other WTO Member were to lodge an objection to its automatic certification and request that the U.K. enter into negotiations.<sup>43</sup>

**A. The “fallback” scenario**

- 4.7. The E.U. represents the highest level of integration available in any PTA through, amongst other measures, the establishment of a customs union and an extremely high level of regulatory convergence and mutual recognition. In services terms, the four modes of supply of services set out in paragraph 2.4 of this paper are unrestricted. The function of GATS, besides the MFN and transparency commitments, is for Members to set out the maximum commitments they will accept for granting market access in the absence of an FTA (such as that provided for in GATS Article V). The GATS does not, therefore, offer a satisfactory substitute for the passporting arrangements currently available under E.U. rules.
- 4.8. Whilst the WTO obligations of national treatment and market access have played some role in expanding the rather limited provision for financial services granted in the schedules which entered into force in 1995, this falls a long way short of the liberalisation achieved by the E.U. single market. Following Brexit and as things currently stand, the U.K. will lose access to the E.U.’s single market and indeed to the “passporting” rights written into certain E.U. legislative measures, which allow a financial service supplier authorised in an E.U. Member State to provide services in another Member State and to trade on a cross-border basis within the single market without the need for a second authorisation. Without “passporting” rights, WTO Members have very limited access to the E.U. market under GATS. The U.K. will subsequently have the right to trade in services with the E.U. under the conditions or limitations specified by it in its specific schedules of commitments and its rules for Third Country access. The FMLC published a paper in July 2017 considering the partial and uncertain nature of Third Country regimes and highlighting complexities relating to: their scope; the specificity of conditions which must be met in order to gain access; and

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<sup>43</sup> On 26 September 2017, the U.K. Ambassador to the WTO in Geneva received a letter from seven WTO Members—the United States, Canada, New Zealand, Brazil, Argentina, Thailand and Uruguay—objecting to a proposal for the E.U. and the U.K. to split Tariff Rate Quotas (TRQs) based on historical averages. This issue relates to trade in goods rather than services, but it helps to illustrate how quickly other WTO Members will assert their rights. The letter began by stating that the seven signatories “support the United Kingdom’s interest in establishing its own WTO schedules so as to provide a seamless transition upon its exit from the European Union”. Having said that, it referred to the TRQ proposal, objecting that “such an outcome would not be consistent with the principle of leaving other World Trade Organization Members no worse off, nor fully honour the existing TRQ commitments. Thus, we cannot accept such an agreement”. They added that “[t]he modification of these TRQ access arrangements cannot credibly be achieved through a technical rectification. None of these arrangements should be modified without our agreement”. <http://im.ft-static.com/content/images/cc0a64b2-a95f-11e7-ab55-27219df83c97.pdf>

the uncertainty in the timing of any assessment carried out by E.U. regulators or representative bodies.<sup>44</sup>

- 4.9. Even where national rules allow the cross-border provision of services this will not be as seamless as the provision of services across the single market. Market participants may be subject to restrictions and duplicative rules. Although recorded on a single schedule of commitments, as each E.U. Member State's commitments and limitations can differ, a financial service supplier wishing to operate in more than one E.U. Member State might need to satisfy multiple requirements or sustain more than one business model.
- 4.10. Importantly, WTO Members are only bound by their scheduled commitments, even though autonomous trade liberalisation has progressed in reality, and thus countries can revert to operating on the basis of their schedules at any time. A 2012 World Bank report observed that, since the binding commitments made under the GATS during the Uruguay Round are on average 2.3 times more restrictive than currently prevalent trade policies, countries could more than double their trade barriers without violating their commitments.<sup>45</sup>
- 4.11. Finally, trade disputes between the E.U. and the U.K. will have to be resolved under the WTO dispute settlement system, which is time-consuming and may result in the imposition of retaliatory measures failing compliance with the dispute settlement ruling and recommendation or an agreement on compensation.

## **B. Transitional Arrangements**

- 4.12. A key concern among financial markets participants relating to the Brexit process has been the prospect of a “cliff-edge” whereby, should the U.K. exit the E.U. without successfully negotiating a future trade agreement, financial service suppliers will lose their “passports” to the single market and may be unable to service existing (legacy) business or initiate new business in the E.U. unless and until access is acquired on some other basis. The question of legacy business alone would potentially give rise to considerable market disruption—in addition to the market dislocation experienced in regard to new and future business—and litigation risk, since contracts do not always make clear or provide for the allocation of risks associated with regulatory displacement

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<sup>44</sup> FMLC, *Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.—the Provision and Application of Third Country Regimes in E.U. Legislation*, (13 July 2017), available at: <http://www.fmlc.org/fmlc-paper-on-brexit-and-third-country-regimes.html>.

<sup>45</sup> Hoekman, B and Matoo, A. “Liberalising Trade in Services: Lessons from Regional and WTO Negotiations”, *World Bank. Regulatory Cooperation for Services Trade Liberalisation and Policy Reform* (2012), p. 6.

when it arises from an Act of State and the interplay of geopolitical forces. The extent to which the impact of this economic disruption can be smoothed for the benefit of both the E.U. and the U.K. depends on the ability of all parties to agree to transitional arrangements.

- 4.13. The FMLC has previously expressed support for the desirability of transitional plans, first in a letter to the U.K. Treasury Select Committee, in which it encouraged a staged approach to negotiating and developing such provisions.<sup>46</sup> In August 2017, some Members of Parliament, too, expressed support for a transitional deal between the U.K. and the E.U. which would last until 2022.<sup>47</sup>
- 4.14. Nonetheless, the negotiation of transitional arrangements represents a unique set of circumstances. The logic of Article V of GATS, which provides Preferential Trade Agreements as an exception to the MFN rule, covered in paragraph 3.16, is to foster an *increase* in economic integration between two or more WTO Members. By contrast, the parties to any agreement post-Brexit will start from a very high degree of integration and liberalisation. The U.K.'s current membership of the E.U. already satisfies the requirements of Article V because it provides for substantial sectoral coverage (paragraph 1(a) of Article V) and it eliminates and prohibits discriminatory measures between the U.K. and the other Member States of the E.U. (paragraph (1)(b) of Article V). Unless the U.K. were to continue to participate fully in the single market, which has been ruled out by HM Government, the terms of any future PTA between the E.U. and U.K. on services, including a transitional agreement, might be expected to increase discriminatory measures between the U.K. and E.U. *vis-à-vis* the *status quo ante*, while its effect *vis-à-vis* a (hypothetical) baseline of trading under MFN rules remains unclear.<sup>48</sup>

### **C. Bespoke treaty**

- 4.15. Whilst FTAs can be useful instruments to deepen liberalisation for financial services and enhance regulatory reform, they do not provide the same degree of market access or level of integration as the E.U. framework and do not replicate the effects of passporting rights or regulatory conformity. Given that the European Council guidelines for the U.K.'s withdrawal explicitly indicate that a non-E.U.-member cannot have similar

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<sup>46</sup> The FMLC's letter to the Treasury Select Committee is available at: <http://www.fmlc.org/letter-to-treasury-select-committee-on-transitional-arrangements.html>.

<sup>47</sup> George Parker, "Conservatives come together to sell a Brexit transition", *Financial Times*, (29 August 2017), available at: <https://www.ft.com/content/315ecb00-8bd0-11e7-a352-e46f43c5825d>.

<sup>48</sup> It should be noted that it is the latter which is the test to be applied under Article V.

rights as those of E.U. Member States,<sup>49</sup> it is likely to be challenging to agree a U.K.-E.U. FTA to replicate the market access rights currently enjoyed by the U.K. through membership of the single market.

- 4.16. The E.U. has historically included, within its FTAs, regulatory frameworks which address trade barriers and promote trade liberalisation. There are two main options for ensuring trade liberalisation through an FTA: (i) the parties choose to list all those subsectors in which they are committing to trade liberalisation (the “positive list approach”);<sup>50</sup> or (ii) the parties only list those sectors or subsectors that are excluded from trade liberalisation (the “negative list approach”).<sup>51</sup> Whilst it is generally agreed that the latter provides a broader scope of liberalisation, the degree of liberalisation achieved in the past has depended less on the adopted approach than on the impact of the notified restrictions and the supply modes of services affected by those restrictions. In either case, some of the E.U.’s FTAs have included an MFN clause requiring concessions granted to the services and service suppliers of a third party to be extended to the preferential partner.<sup>52</sup> This clause could restrict the E.U.’s ability to provide U.K.-based services and service suppliers more access than that accorded to preferential partners, like Korea or Canada.
- 4.17. Of particular importance to financial services is the caveat that GATS forbids an FTA which only covers financial services. Arguably, this has, in any event, already been excluded by the European Council’s Guidelines for Brexit negotiations.<sup>53</sup>

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<sup>49</sup> See Core Principle (1) at Council of the European Union, Press Release: “European Council (Art. 50) guidelines following the United Kingdom’s notification under Article 50 TEU”, (29 April 2017), available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/#>.

<sup>50</sup> The E.U.’s FTA with Korea follows a “positive approach” and includes rules for Mutual Recognition Agreements, transparency and the treatment of confidential information, domestic regulation and governance. The specific regulatory framework for financial services includes provisions on self-regulatory organisations, payment and clearing systems, new financial services, data processing, prudential carve-out, specific exceptions and dispute settlement.

<sup>51</sup> In the E.U.-Canada Comprehensive Economic and Trade Agreement (“CETA”), the E.U. adopted a “negative approach”. Whilst CETA prevents parties from introducing similar limitations to market access as those permitted by GATS Article XVI, parties are allowed the freedom to impose conditions. While CETA’s commitments on market access for cross border financial services have been criticised as only reflecting current levels of liberalisation, CETA Article 13.7.6 arguably eliminates licensing or commercial presence requirements, and parties are able to permit a person located in its territory, and a national wherever they are located, to purchase a financial service from a cross-border financial supplier located in the territory of the other party.

<sup>52</sup> See for example, E.U./Korea Article 7.8(1) and E.U./Canada Article 9.5(1). The FMLC notes, however, that these clauses are subject to certain carve-outs which have not been examined in this paper.

<sup>53</sup> See Core Principle (2) in European Council (Art. 50) guidelines, *supra* n. 45.

## 5. THE IMPACT OF THE WTO RULES ON THE U.K.'S TRADE AGREEMENTS WITH NON-E.U. COUNTRIES

- 5.1. The E.U. is currently party to FTAs which cover financial services liberalisation with South Korea and with developing countries such as Colombia, Peru and the CARIFORUM (Dominican Republic and the Caribbean countries). The E.U. has concluded FTA negotiations with Singapore and Canada but those agreements are not yet in force although they are provisionally applied. Negotiations for an FTA with Japan are ongoing while talks have just been launched for a bilateral trade agreement with China.
- 5.2. Upon Brexit, these FTAs will no longer apply to the U.K. In order to trade with any of the countries listed above on a preferential basis, the U.K. will have to negotiate new trade agreements or transitionally adopt the existing FTAs with all parties' agreement. Until Exit Day, the U.K., as an E.U. Member State, is bound by the E.U.'s Common Commercial Policy and arguably cannot become party to independent FTAs with Third Countries. During a trip to Japan in August 2017, U.K. Prime Minister Theresa May said that the U.K. will seek first to replicate the E.U.'s trade deals with Third Countries and then recast new agreements.<sup>54</sup>
- 5.3. While the E.U.'s FTAs with Third Countries are not as comprehensive as the E.U. single market, they do allow E.U. financial service suppliers significant market access abroad. For instance, the E.U.-South Korea FTA enables the removal of limitations on market access and national treatment concerning access, establishment and operation of E.U. suppliers and investors in the South Korean market in a way that goes beyond the requirements of the Understanding. Another important improvement, in contrast with the GATS, is that the FTA includes liberalisation commitments that will apply to new financial services once they appear, hence safeguarding the application of the bilateral commitments to the evolution of financial services and related products. This commitment has also been replicated in the E.U. FTAs with Colombia/Peru, CARIFORUM, Singapore and Canada. The E.U.-Korea FTA also includes rules to address regulatory barriers that can be quite damaging for financial services. These rules refer to transparency in financial regulation and its application to foreign suppliers, implementation of international standards and the recognition of professional

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<sup>54</sup> Wright, R., "Theresa May looks to reassure Shinzo Abe over Brexit", *Financial Times*, (31 August 2017), available at: <https://www.ft.com/content/558ef0e8-8e16-11e7-a352-e46f43c5825d>.

qualifications and prudential measures. Furthermore, regulatory obligations in FTAs also cover investment protections and government procurement provisions.

- 5.4. Upon Brexit, and in the absence of a new FTA, the U.K. will trade with South Korea on the same basis as any other WTO Member, on the basis on South Korea's schedule of commitments.

## 6. SOLUTIONS AND MITIGANTS

- 6.1. Previous sections of this paper have examined in detail the principles set by the WTO to promote trade growth and progressive liberalisation, especially in relation to financial services. These rules, as highlighted in section 4 above, generate two sets of uncertainties. In the event the U.K. were to withdraw from the E.U. without successfully negotiating a post-Brexit deal, transitional or otherwise, the WTO only requires the E.U. to grant to the U.K. MFN treatment, leading to a scenario in which U.K.-based financial service suppliers will have considerably less access to the E.U. market than is currently available. Second, were the U.K. and the E.U. to agree upon a future trade deal, transitional or otherwise, which provides a significant reduction in market access and/or a corresponding increase in conditions applied to enable such access, this will present a dissonance with the WTO's aims of encouraging economic integration. In this section, the FMLC offers suggestions by which these uncertainties might be mitigated, first specifically with regard to transitional and free trade agreements, and then in the form of a different U.K.-E.U. relationship. The FMLC does not express a view on the political merits and demerits of the various alternatives explored in this section.

### Transitional Arrangements

- 6.2. Many commentators have argued that transitional arrangements between the U.K. and E.U. which apply from the end of the Article 50 notice period (March 2019) and through the period of negotiation of a future relationship are essential to prevent the market disruption likely to be caused by a *hiatus* in the provision of financial services across borders.<sup>55</sup>

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<sup>55</sup> As noted above, the WTO envisages transitional agreements—or “interim” agreements—as a stage during which parties boost economic integration with the aim of signing an FTA within a “reasonable” period of time in which such integration is enhanced and confirmed.

6.3. One way by which the U.K. and E.U. could continue to interact during the transition period is by agreeing to a “standstill” transition whereby current market access arrangements would be extended for a fixed period of time.<sup>56</sup> This would entail extending the U.K.’s membership of the E.U. up to the point at which the new FTA would become applicable. Such an agreement might be considered simply a continuation of the old agreement rather than the creation of a new transitional agreement, which would greatly increase certainty amongst market participants. Such an extension would also reduce the burden on market participants and regulators who, in the case of an interim and subsequent bespoke agreement, would have to engage twice in the onerous and costly processes of adapting to new market access permissions and requirements.

#### **A comprehensive trade agreement**

6.4. The FMLC considers the negotiation of a bespoke treaty essential to legal and operational certainty. In order to avoid legal risks as far as possible, the U.K. and E.U. would have to work toward a wide-ranging deal, with substantial sectoral coverage in relation to the volume of trade, sectors and modes of supply, within which U.K. and E.U. financial service suppliers might be offered the ability to engage in cross-border trade that is as close to status quo as possible.

6.5. A key element of any FTA would be the development of regulatory mechanisms that facilitate trade in financial services, perhaps based upon the common features of the regulatory regime which will prevail until the U.K. withdraws from the E.U. One of the, if not *the*, most important of those regulatory mechanisms would be mutual recognition provisions. Those measures might focus on additional specific agreements and regulatory convergence or acceptance of a lead regulator as the basis for the parties to grant mutual access rights for financial services to operate without the need for specific authorisations from the regulators in both the U.K. and the pertinent E.U. Member State and avoid the need for multiple authorisations. It would be equally important for those additional measures or arrangements to avoid the need for financial service suppliers to establish subsidiaries or branches to supply financial services in the single market. The FMLC recommends that such measures also advance provisions dealing with recognition and international standards which have been written into current FTAs.

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<sup>56</sup> HM Government has previously indicated preference for this option. Gordon, S. and Parker G, “Philip Hammond seeks ‘off-the-shelf’ Brexit transition”, *Financial Times* (27 July 2017), available at: <https://www.ft.com/content/cc1dbf04-71fc-11e7-aca6-c6bd07df1a3c>.

6.6. Moreover, Article 13.7.6 of the E.U.-Canada Comprehensive Economic and Trade Agreement (“CETA”) eliminates licensing or commercial presence requirements, requiring the E.U. and Canada to permit the purchase of a financial service from a cross-border financial service supplier of the other party.<sup>57</sup> As the agreement is not yet in force, there are different interpretations as to the scope of this provision, which makes it difficult to ascertain how close CETA will be in reality to a passporting system for cross-border financial services. In any event, given the existing level of integration and regulatory convergence between the U.K. and E.U., it is recommended that this U.K.-E.U. FTA not build upon CETA, as has been suggested in a number of quarters, but negotiate from the current conditions of market access and make decisions about which sectors, services and/or activities might be excluded or restricted.<sup>58</sup>

### **Membership of the E.E.A.**

- 6.7. The U.K. is currently party to the E.E.A. Agreement as an E.U. Member State. The U.K. could become a member of the E.E.A. by rejoining the existing FTA between EFTA and the E.U. To do so, the U.K. would need to rejoin EFTA.<sup>59</sup>
- 6.8. As an E.E.A. state, the U.K. would benefit from an FTA with the E.U. in the form of the E.E.A. Agreement, a reasonably straightforward option under WTO law because it implies the U.K.’s participation in an FTA which has been already notified to the WTO

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<sup>57</sup> Article 13.7.6 of CETA provides

Each Party shall permit a person located in its territory, and a national wherever they are

located, to purchase a financial service from a cross-border financial service supplier of the other Party located in the territory of that other Party. This obligation does not require a Party to permit such suppliers to do business or solicit in its territory.

<sup>58</sup> The FMLC observes that it is standard practice for governments to consult industry experts to benefit from their technical knowledge during the negotiation processes of FTAs. While it is not for the FMLC to advise HM Government on such policy matters, the FMLC acknowledges that such an approach would ensure transparency and, consequently, legal certainty.

<sup>59</sup> See Article 128 of the E.E.A. Agreement which provides that: “Any European State becoming a Member of the Community shall, and the Swiss Confederation or any European State becoming a Member of EFTA may, apply to become a party to this Agreement.”

and ensures certainty for market participants.<sup>60</sup> This option is said to be politically unattractive, not least because it involves the U.K. being in essence a rule-taker.

### **Grandfather FTAs between the U.K. and Third Countries**

- 6.9. The U.K.'s Department of International Trade (“DIT”) has announced as a priority the grandfathering of current FTAs with Third Countries to which the U.K. is a party *qua* membership of the E.U.<sup>61</sup> The DIT hopes that the U.K. will inherit the levels of market access it currently has in these Third Countries. The confirmation of multiple FTAs, however, is likely to require time and human resources. As the U.K. is unable to become party to independent FTAs with Third Countries while it remains an E.U. Member State and bound by the Common Commercial Policy, the FMLC urges HM Government to prioritise the agreement with the E.U. of a mechanism whereby it might be permitted formally to discuss and provisionally to agree future FTAs with Third Countries during the Article 50 negotiations.<sup>62</sup> These successor FTAs would then have to be signed as of Exit Day.
- 6.10. The FMLC also considers the reestablishment of other framework arrangements, which may not be embedded in FTAs, to be of utmost importance. Such provisions include the frameworks for cooperation and mutual recognition between financial markets regulators between the E.U. and the U.S. HM Government will have to provide a recognition mechanism to those Third Country firms which have availed of the Third Country provisions in E.U. law to attain the right to operate in the U.K.

## **7. CONCLUSION**

- 7.1. Following the end of the two-year Article 50 notice period, the future relationship between the U.K. and the E.U.—whether in the form of an FTA or not—will be shaped by the non-preferential international trading rules of the WTO. In this paper, the

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<sup>60</sup> The EEA Agreement (to which the U.K., all other E.U. Member States and the three E.E.A. countries are party) is already notified to the WTO under Article V of GATS (see: <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=114&lang=1&redirect=1>) while the original Treaty of Rome is separately notified to the WTO under both Article XXIV of GATT and Article V of GATS as a customs union and economic integration agreement covering both goods and services (see: <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=120&lang=1&redirect=1>).

<sup>61</sup> U.K. Parliament, “U.K. Free Trade Agreements with non-E.U. Countries”, in *U.K. Trade Options beyond 2019*, (6 March 2017), available at: [https://publications.parliament.uk/pa/cm201617/cmselect/cminttrade/817/81708.htm#\\_idTextAnchor072](https://publications.parliament.uk/pa/cm201617/cmselect/cminttrade/817/81708.htm#_idTextAnchor072).

<sup>62</sup> The E.U. has previously recognised the necessity for such dialogue. See paragraph 13 of the European Council (Art. 50) guidelines, *supra* n. 45.

FMLC has first examined the rules and obligations created by the WTO in relation to financial services, and reviewed their application in specific contexts. In section 4, the FMLC analysed the impact of these rules on the following options for a future U.K.-E.U. deal: (1) the fallback scenario; (2) a short-term transitional arrangement; and (3) a bespoke new treaty. Section 5 considered briefly the U.K.'s arrangements with Third Countries. In section 6, the FMLC suggested mitigants by which HM Government could ensure great legal certainty in the financial markets.

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<sup>63</sup> Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.