



## **Services Priorities for a Future U.S.-UK Trade Agreement**

**November 2019**

## About the Organizations

### **U.S. Chamber of Commerce**

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. Its International Affairs division includes more than 70 regional and policy experts and 25 country- and region-specific business councils and initiatives. The Chamber also works closely with 117 American Chambers of Commerce abroad.

Established in 2016, the Chamber's U.S.-UK Business Council is the premier Washington-based business organization dedicated to strengthening the commercial relationship between the U.S. and the UK.

### **The Coalition of Services Industries**

The Coalition of Services Industries (CSI) is the leading industry association devoted exclusively to promoting the international objectives of the services sectors. CSI advocates for international rules, customs processes, market access commitments and regulatory systems that ensure fair competition for all service industries. CSI works globally to eliminate barriers to market access, promote cross-border data flows, create a level playing field for U.S.-based companies competing against state-owned enterprises, enhance regulatory transparency and due process, and strengthen global value chains.

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

The United Kingdom (UK) and the United States (U.S.) enjoy one of the most robust commercial relationships in the world. The UK is one of the United States' most important services and investment markets worldwide. The United States is the UK's largest single export market. Both countries are each other's largest source of foreign direct investment.

The UK's decision to leave the EU presents challenges and opportunities for U.S. services industries. The United States and the UK have long been in accord on many trade and investment issues. Many American services suppliers chose the UK as their European headquarters in order to benefit from operating inside the EU Single Market. Losing the UK voice in EU decision-making processes and new barriers to UK-EU trade will create challenges for U.S.-based companies operating on both sides of the Channel. In terms of opportunities, the U.S. and UK will be able to develop a high-standard agreement on future trade in services, as part of a broader deal to boost trade and investment between the two countries.

This paper considers only trade in services between the United States and the UK in the context of the latter's anticipated departure from the EU and identifies priorities for any future legal arrangement governing U.S.-UK trade in services. The paper is organized as follows:

- **Part I** – Introduction and executive summary
- **Part II** – Current U.S.-UK services trade and investment flows
- **Part III** – Review of UK's impending withdrawal from the EU and implications of the future UK-EU relationship for a U.S.-UK bilateral agreement on trade in services
- **Part IV** – Key “horizontal” priorities for most suppliers across multiple services sectors
- **Part V** – Key priorities for specific services sectors
- **Part VI** – Legal framework for U.S.-UK trade in services, including authorizations to negotiate and the potential architecture that may govern trade in services

An important – if obvious – caveat: An agreement covering the terms of the future UK-EU trade relationship, the scope of the UK's World Trade Organization (WTO) obligations, and the extent of UK government's mandate to negotiate with third countries post-Brexit are presently unknown. Management of all of these factors will significantly impact the formulation and operationalization of the priorities for U.S.-UK trade in services identified in this paper.

Even if the UK were to remain in a customs union with the EU in its post-Brexit relationship, services would be a natural priority for U.S.-UK negotiations given its prominence in both economies. This is especially true, for instance, with respect to financial services, where the U.S. and UK are central players in the global financial services architecture and where there is already a considerable degree of bilateral regulatory alignment.

Negotiations between the United States and the UK may encounter some of the difficulties that arose during the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Indeed, concerns about potential impacts on Britain's National Health Service (NHS) already are being aired. It should nonetheless prove easier to overcome these challenges with the UK as an individual negotiating partner, at least in the services sector. In general terms, the UK stands at the "liberal" end of the spectrum of EU member states on trade and investment issues; its trade objective post-Brexit is "... to push for greater liberalization of global services, investment and procurement markets;"<sup>1</sup> its economy is heavily services-oriented; and its GATS commitments are more complete and its red-lines on liberalization are fewer than most EU member states.

To preserve and enhance mutually beneficial services trade between the United States and the UK, any future legal arrangement governing U.S.-UK trade in services should include provisions that ensure equitable treatment of foreign services suppliers, maximize the general openness of each services market, continue best practices, and introduce new innovative elements for the expanding digital economy.

Part IV of the paper identifies the "horizontal" priorities important to most services suppliers across multiple sectors. These include: (i) broad market access commitments for all modes of service on a negative list basis, with minimal non-conforming measures and national treatment for foreign service suppliers; (ii) liberalization of all services links in supply chains in the manufacturing and agriculture sectors; (iii) robust investment protections, including reciprocal market access and strengthened dispute settlement disciplines; (iv) free data flows and the prohibition of localization requirements; (v) digital trade provisions, including prohibitions against customs duties on digital trade, strong consumer protection provisions, and ensuring that suppliers are not restricted in their use of electronic authentication or electronic signatures; (vi) preservation of existing data protection and privacy arrangements, to provide multiple pathways to ensure commercial data continues to flow freely; (vii) risk-based cybersecurity standards, incentives and principles that minimize both security threats and any trade-distorting impacts; (viii) increased access to government procurement markets; (ix) regulatory transparency; (x) regulation of state-owned enterprises similar to other domestic and foreign enterprises; (xi) temporary entry of service suppliers; and (xii) an increase in the UK's *de minimis* level.

Part V of the paper details U.S.-UK trade priorities for key services sectors, including financial services, delivery services, electronic payment services, media and entertainment services, retail and distribution services, and telecommunications services.

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<sup>1</sup> UK Department for International Trade, *Trade White Paper: our future UK trade policy*, (October 9, 2017), <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy>.

## II. THE IMPORTANCE OF U.S.-UK SERVICES TRADE AND INVESTMENT

The scope of the U.S.-UK trade and investment relationship is vast. The UK is one of the United States' most important services and investment markets worldwide, and the United States is the UK's largest single export market.<sup>2</sup> In 2018, U.S. exports of goods and services to the UK totaled \$140.4 billion, of which \$74.1 billion were services exports.<sup>3</sup> The UK exported \$121.5 billion in goods and services to the United States, of which \$60.7 billion were services.<sup>4</sup> U.S.-UK trade accounted for 20% of total U.S.-EU trade in 2018.<sup>5</sup>

The UK is the single largest investor in the United States. In 2018, British firms' investment in the United States was valued at \$560.9 billion, accounting for approximately 13% of all inbound foreign direct investment (FDI).<sup>6</sup> The United States is also the largest investor in the UK. American firms have invested nearly \$750 billion in the British market, more than one-fifth of their total investment in Europe, and more than 12% of all U.S. FDI worldwide as of 2017.<sup>7</sup>

Affiliate sales, not trade, are the primary means by which European firms deliver goods and services to American consumers. These sales have significant employment impacts. U.S. majority-owned affiliates supported more than 1.5 million jobs in the UK, and UK majority-owned affiliates support more than 1.26 million jobs in the United States.<sup>8</sup> These numbers do not include jobs created by trade flows or indirect employment effects.

Digital trade is particularly important for both the U.S. and UK markets, with vibrant sectors in both countries and wide adoption of digitally-enabled services across all sectors and among consumers. Expanding digital trade is a core area of common interest for the two countries. One sign of the strong, reciprocal, digital trade relationship between the U.S. and UK is that both are among the most important cross-border e-commerce markets for the other, and both are world leaders in digital exports:

- In 2018, digitally-enabled services accounted for \$451.9 billion in U.S. exports – representing 55% of all U.S. services exports, and 69% of the U.S. global surplus in

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<sup>2</sup> HM Revenue & Customs Trade Statistics Unit quarterly data,

<https://www.uktradeinfo.com/Statistics/Pages/Quarterly-Tables.aspx>.

<sup>3</sup> Office of the U.S. Trade Representative: United Kingdom country page, <https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom>.

<sup>4</sup>Office of the U.S. Trade Representative: United Kingdom country page, <https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom>.

<sup>5</sup> Office of the U.S. Trade Representative: United Kingdom country page and European Union country page, <https://ustr.gov/countries-regions/europe-middle-east/europe/european-union>.

<sup>6</sup> U.S. Bureau of Economic Analysis, *Direct Investment by Country and Industry: 2018*, <https://www.bea.gov/news/2019/direct-investment-country-and-industry-2018>.

<sup>7</sup> Center for Transatlantic Relations, U.S. Chamber of Commerce, & AmCham EU, *Transatlantic Economy 2019*, <https://www.uschamber.com/report/the-transatlantic-economy-2019> (citing Bureau of Economic Analysis; U.S. Commerce Department; International Monetary Fund; Office of Trade and Economic Analysis). See also U.S. Bureau of Economic Analysis, *Direct Investment by Country and Industry: 2017*, <https://www.bea.gov/news/2018/direct-investment-country-and-industry-2017>.

<sup>8</sup> *Transatlantic Economy 2019*.

services trade. The UK is America's largest trading partner for digitally-enabled services.<sup>9</sup>

- In the UK, the digital sector is growing 32% faster than the rest of the economy and creating jobs 2.8 times faster than the rest of the economy.<sup>10 11</sup>
- The digital economy is also a key driver of exports and trade for small- and medium-sized enterprises. 92% of U.S. small businesses that export, do so by relying on digital tools, such as online payment processing tools, online productivity tools, e-commerce websites, and online marketing.<sup>12</sup>

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<sup>9</sup> U.S. Bureau of Economic Analysis; U.S. Trade in Services, by Type of Service and by Country or Affiliation, <https://apps.bea.gov/iTable/iTable.cfm?ReqID=62&step=1#reqid=62&step=6&isuri=1&6210=4&6200=359>.

<sup>10</sup> UK Parliament, Brexit: Trade in non-Financial Services, <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/135/13508.htm#footnote-212>.

<sup>11</sup> UK Department for Digital, Culture, Media, and Sport, *The Digital Sectors – Making the UK the Best Place to Start and Grow a Digital Business*, <https://www.gov.uk/government/publications/uk-digital-strategy/3-the-digital-sectors-making-the-uk-the-best-place-to-start-and-grow-a-digital-business>

<sup>12</sup> U.S. Chamber of Commerce Technology Engagement Center, *Growing Small Business Exports: How Technology Strengthens American Trade*, <https://americaninnovators.com/small-business-exports/>.

### III. WHAT THE UK'S WITHDRAWAL FROM THE EU MEANS FOR U.S.-UK SERVICES TRADE

#### A. Overview

Since the Brexit referendum in 2016, there has been significant interest on both sides of the Atlantic for some form of U.S.-UK trade agreement. Senior officials and lawmakers in London and Washington have expressed enthusiasm for negotiating a deal. While many U.S. services suppliers chose to base their European activities in the UK in order to benefit from operating inside the EU Single Market, that advantage may be reduced or end entirely upon the UK's withdrawal from the EU, or after the transition period as envisioned in the Withdrawal Agreement. However, a new UK-EU trade agreement covering services would continue to provide preferential access to the EU market for UK-based U.S. subsidiaries.

The UK began formal negotiations to leave the European Union (EU) on March 29, 2017. Since then, the UK and EU have negotiated a proposed Withdrawal Agreement that addresses UK & EU citizens' rights, the financial settlement, and measures to avoid the imposition of a hard border between Ireland and Northern Ireland. The two sides also negotiated a non-binding Political Declaration setting forth principles for a future UK-EU relationship. Former Prime Minister Theresa May failed to secure parliamentary approval of the Withdrawal Agreement. Her successor, Boris Johnson, secured certain changes to both the Withdrawal Agreement and the Political Declaration. Faced with continued opposition, Johnson opted to hold off further parliamentary scrutiny of the revised agreement and called a General Election for December 12. In the meantime, the UK requested – and the EU granted – an extension of the departure date to January 31, 2020.

Much has been written about the prospects of a “no deal” Brexit. This would be the worst case outcome for business, but indeed could arise if the UK reached the deadline for its departure without having passed the requisite legislation to give effect to the Withdrawal Agreement. If the UK were to leave without an agreement in place, it would lose preferential access to the EU Single Market and trade with the EU would revert to WTO terms. A particularly acute concern for the business community regarding any no deal scenario would be absence of any transition period between the current and future UK-EU relationship, as described below.

Once it departs the EU, the UK can begin to craft new relationships with all of its trading partners. The UK counts the United States as its top priority country for such a new agreement, and informal discussions on potential architecture and scope have been taking place under the auspices of the U.S.-UK Trade and Investment Working Group.<sup>13</sup>

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<sup>13</sup> The UK and the United States established a working group in July 2017 in order to facilitate efforts to provide “commercial continuity for UK and U.S. businesses, workers, and consumers as the UK leaves the EU,” and to explore “ways to strengthen trade and investment ties.” This working group was established by U.S. Trade Representative Robert Lighthizer and former UK Secretary of State for International Trade, Dr. Liam Fox, MP. *See Joint Release by USTR Ambassador Lighthizer and UK International Trade Secretary Dr. Liam Fox*, July 24, 2017, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/joint-release-ustr-ambassador>.



Because there is no comprehensive trade agreement between the EU and United States, WTO agreements govern U.S.-UK trade as long as the UK is a member of the EU. They will continue to do so after the UK has withdrawn from the EU unless and until a U.S.-UK trade agreement is in place.

In sum, the UK's exit from the EU has both immediate and longer term implications for both U.S. and UK service providers in terms of (1) the Withdrawal Agreement and any post-Brexit UK-EU trade agreement; (2) WTO repercussions in terms of market access for goods and services; and (3) the UK's future trade agreements with third countries.

## **B. The Transition Period**

The Withdrawal Agreement includes a transition period following the UK's exit until December 31, 2020, with a possible extension through December 2022. As noted above, a transition period would not apply in the case of a "no deal" exit. Inclusion of a meaningful transition period is essential for the business community.

During the transition period:

- UK companies and U.S.-based businesses operating in the UK would continue to have full access to the EU Customs Union and Single Market and "Union law shall be applicable to and in the United Kingdom[.]"<sup>14</sup> This covers all EU trade law, including on services, customs, regulations, trade remedies, state aid, and public procurement. New EU trade regulations and directives that enter into force during the transition period would apply to the UK, although the UK would no longer participate in their development or adoption.<sup>15</sup>
- The UK would be able to negotiate and ratify trade agreements with third countries but those agreements could not enter into force until the end of the transition period, unless authorized by the EU.<sup>16</sup>
- The UK will remain a party to existing EU FTAs during the transition period, but the UK will only benefit from those deals after the end of the transition or in a no deal scenario if the countries concerned agree to "roll over" the benefits. Some of those "continuity agreements" have already been agreed in whole or in part (e.g. a more limited agreement with Switzerland and the European Economic Area (EEA), and a deal with South Korea), but some important trading partners like Canada and Japan are withholding final agreement on the assumption that they can negotiate better deals once the UK has left the EU.

## **C. The Future UK-EU Trade Agreement**

The revised Withdrawal Agreement that Prime Minister Johnson negotiated with the EU removed the UK's commitment to remain in the EU Customs Union until a permanent solution is found to avoid a "hard border" between Northern Ireland and the Republic of Ireland. Instead, Northern

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<sup>14</sup> Article 127.1 of the Withdrawal Agreement.

<sup>15</sup> Article 128 of the Withdrawal Agreement.

<sup>16</sup> Article 129.4 of the Withdrawal Agreement.

Ireland will remain aligned with EU customs tariffs and regulations and trade between the UK mainland and Northern Ireland will be managed so as to prevent any under-cutting of those tariffs and regulations for cross-border trade on the island of Ireland.

Johnson also secured changes to the non-binding Political Declaration which sets out general principles and objectives for the future EU-UK trade relationship. The Political Declaration suggests now that the UK and the EU will aim for a looser relationship in goods trade than had been envisaged previously, with scope for variation in their most favored nation (MFN) tariffs and trade regulations. The relationship is envisaged to be “ambitious,” rather than “as close as possible.” While the objective is to secure deep regulatory and customs cooperation, there is no longer any mention of a single customs territory or a “common rulebook” where the UK aligns with EU rules in relevant areas.

These changes reflect the importance Prime Minister Johnson attaches to negotiating new trade deals with countries outside the EU and to do so with greater flexibility than if the UK were tied to the EU Single Market over the long run.

The changes do not appear to interfere with the EU’s stated expectations for its future economic partnership with the UK. Brussels seeks a “... balanced, ambitious and wide-ranging free trade agreement ...” involving *inter alia* free trade in goods (no tariffs or quantitative restrictions) but with rules of origin, customs checks and regulatory controls, and market access for trade in services based on host state rules.<sup>17</sup> The EU has cited its Comprehensive Economic and Trade Agreement with Canada (CETA) as a potential model for a future UK-EU FTA, while underlining that it hopes to go further than any of its existing agreements.

With regard to trade in services, there have been no changes to the Political Declaration. It states that trade in services and investment should be based on host state rules and respect each other’s right to regulate. Sectoral coverage should be substantial, covering all modes of supply and avoiding substantially all discrimination. Unnecessary regulatory requirements should be avoided through disciplines on domestic regulation and a framework for voluntary regulatory cooperation. Assessments to recognize regulatory equivalence will be pursued as a priority for financial services, with the aim of concluding the assessments by June 2020. There will be “transparency and appropriate consultation” on the adoption, suspension and withdrawal of equivalence decisions.

The UK has acknowledged that it will no longer enjoy current levels of access to the EU market, e.g. passporting arrangements for financial services are expected to end. However, the UK is aiming for deep commitments on market access and national treatment, minimal barriers to establishment, mutual recognition of professional qualifications and other facilitating arrangements for professional and business services, and a new economic and regulatory arrangement for financial services. Cross-border e-commerce and data flows should be facilitated and both sides should cooperate on best practices when considering how and whether to regulate new technologies.

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<sup>17</sup> European Council, (Art. 50) (23 March 2018) – Guidelines, <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>.

## D. UK Obligations in the World Trade Organization (WTO)

The UK will become an independent WTO Member as soon as it withdraws from the EU. While most of its WTO obligations will remain the same, there will be two key areas of change: its market access schedules and its government procurement obligations will have had to be clarified, and in certain respects renegotiated, before they could be finalized.<sup>18</sup> The UK will also have to implement its accession into the Government Procurement Agreement as an independent member.

### *Market Access Schedules*

Each WTO Member must have legally binding schedules of MFN commitments for access to its market, one for goods and one for services. Once the UK has withdrawn from the EU, it must have its own WTO schedules approved (“certified”) by other WTO Members. The UK Government is aiming to replicate its existing commitments in the EU schedules as far as possible.

The prospects for completing the UK’s schedules depend on the products or services at issue:

- The UK has proposed leaving its MFN tariff schedule for manufactured goods unchanged from what it is today. Some WTO Members have questioned that and suggested the concessions they gave when negotiating the Common External Tariff with the EU are excessive when valued in terms of access to the UK market alone. They have requested that the UK make additional tariff cuts before agreeing to certify its schedule. The UK has formally reserved its right under Article XXVIII:5 of the GATT 1994 to modify its goods schedule and to seek certification within three years.<sup>19</sup>
- A similar situation pertains to the UK’s schedule of specific commitments for trade in services. The UK has presented a proposal to duplicate its current EU schedule. Reactions from some WTO Members are that this is insufficient and that further concessions from the UK will be necessary to secure support for the certification of its services schedule. In particular, some U.S. companies have encouraged the United States to seek increased and better market access than currently provided under existing General Agreement on Trade in Services (GATS) commitments by the UK.
- Reaching agreement on the UK’s MFN schedule for agricultural products is more complicated. The UK cannot duplicate the EU schedule *in toto* because it includes over 100 Tariff-Rate Quotas<sup>20</sup> (TRQs) that affect imports of certain meat and dairy products, cereals, fruits and vegetables. These have been set on an EU-wide basis and have to be divided between the UK and the EU27. The UK and the EU have proposed using historical market shares to split the TRQs. That is a recognized WTO methodology,

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<sup>18</sup> The maximum level of farm subsidies that the UK can provide will also need to be agreed in the WTO.

<sup>19</sup> WTO document G/MA/357 of 20 December 2017.

<sup>20</sup> TRQs apply a low tariff to a specified volume of (“in quota”) imports and a higher tariff to imports above that threshold.

but several countries<sup>21</sup> have objected to using it in this case on the grounds that it would prevent them from shifting exports between the UK and EU27 to take account of market conditions and fill the TRQs once the UK and EU markets are separate.

Negotiations to agree on the UK's self-standing market access schedules, particularly agricultural TRQ, are likely to be drawn out and could push back the certification of the UK's schedules in the WTO for years. Experience suggests that other WTO Members will be tolerant as long as the UK engages constructively in requests to renegotiate its tariffs, TRQs and services commitments. In the meantime, the UK will trade on its proposed ("uncertified") market access schedules.<sup>22</sup>

### ***Government Procurement***

Public procurement is excluded from standard WTO rules, but 47 WTO Members, including the EU, the United States, Canada and Japan, have opened their procurement markets to each other on a preferential (non-MFN) basis through the WTO Agreement on Government Procurement (GPA). Ten other countries, including China and Russia, are negotiating their GPA accession.

The UK is a GPA Party by virtue of its membership in the EU, so it needed to negotiate its accession to the GPA in its own right, which it finalized in February 2019<sup>23</sup>. Alongside this agreement, the GPA Parties further agreed to continue to treat the UK as an EU member state for the purposes of its access commitments to its public procurement market (covered entities, listed goods and services, and threshold values for procurement contracts) until its formal withdrawal from the EU and/or until the end of the transition period. The GPA Parties also approved the UK's accession to the GPA in its own right after it has withdrawn from the EU, subject to the UK agreeing within three months thereafter to update its GPA schedule of commitments for goods and services to reflect evolutions within its government procurement market, such as the creation of new central and local government departments and major new public infrastructure projects such as the third runway at Heathrow and a high-speed rail network.

## **E. New UK Trade Agreements**

Approximately 40 FTAs<sup>24</sup> in which the UK participates by virtue of its EU membership will cease to apply to the UK as soon as it leaves the EU (or any transition period ends). These account for around 15% of UK exports and some are of considerable commercial value to UK and U.S.-based business, particularly the FTAs with Japan, Switzerland, Singapore, Canada, and South Korea. As noted above, some, although not all, of the third countries concerned have agreed to roll over the agreements during the transition period.

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<sup>21</sup> Including the United States, Canada, Thailand, New Zealand, Brazil, Argentina, and Uruguay.

<sup>22</sup> WTO jurisprudence has confirmed that a Member country's tariff schedule does have legal effect before it has been formally certified, see *EU – Poultry Meat (China)*, DS492, June 2017.

<sup>23</sup> [https://www.wto.org/english/news\\_e/news19\\_e/gpro\\_27feb19\\_e.htm](https://www.wto.org/english/news_e/news19_e/gpro_27feb19_e.htm)

<sup>24</sup> Including EU Free Trade Agreements, Association Agreements, Stabilisation Agreements, and Economic Partnership Agreements.

Longer term, the UK will need to negotiate new FTAs with these countries if it wishes to maintain preferential access to their markets. The terms of these agreements will depend on the terms of the new UK-EU trade relationship. The desirability of continued close alignment of UK and EU regulations may vary by sector. Other elements of a UK-EU trade agreement, such as rules of origin for trade in goods (including cumulation of origin that supports established supply chains) and mutual recognition arrangements for trade in services, could also influence the value that other countries place on access to the UK market. In short, the less integration there is between the UK and the EU the less value the partner countries may find in standalone FTAs with the UK, especially without securing additional market access concessions.

#### IV. SERVICES ELEMENTS OF A MODEL U.S.-UK AGREEMENT

As like-minded trading partners, the U.S. and UK have the opportunity to craft a 21<sup>st</sup> century world-class model agreement that reflects the openness of their respective markets and best practices, and also introduces new innovative elements. In February 2019, the Office of the U.S. Trade Representative (USTR) sent to Congress its Statement of Negotiating Objectives regarding bilateral negotiations between the United States and the UK. The statement included objectives regarding *inter alia* services, digital trade, and customs and trade facilitation. The remainder of this section sets out cross-cutting or “horizontal” private sector priorities, including additional elements that together would provide the basis of such a model agreement.

##### A. Market Access for All Modes of Service on a Negative List Basis

Services are delivered internationally in four basic ways – (1) across national borders, including via digital networks; (2) by providing the service in the firm’s home country to a service consumer who is visiting the country; (3) by providing the service directly within the consuming country through the firm’s use of a subsidiary or branch; or (4) by temporarily sending an employee to a particular market. All four “modes of delivery” are important and they are not necessarily interchangeable. Companies may need to rely on some combination of each mode to seamlessly and efficiently provide their service.

Market access commitments for services should be recorded on a negative list basis, with minimal non-conforming measures (NCMs), and subject to specific timetables for full liberalization. U.S. suppliers of services should receive treatment no less favorable than that accorded to domestic and other foreign providers of services in the UK (and vice versa).

Consistent with a negative list approach, market access commitments should ensure that any new services that become possible to trade as a result of technological innovation will benefit from market access commitments without further negotiation. Negotiations should limit the use of NCMs for new services, as has been the practice for previous U.S. agreements.

Market access commitments should provide access through the *entire* supply chain by taking into account inter-related services. While certain services individually may fall into different categories, they are often complementary to one another in providing an integrated service to consumers. Trade barriers for any one link can undermine a service as a whole. For example, the transfer of data is essential to most, if not all, services. Limiting the transfer of data would be at odds with allowing the supply of a service that depends on cross-border data flows.

Technological advances are constantly leading providers to reconsider their traditional delivery modes of choice. There are also instances where the provision of multiple services operate as, and should be considered, an integrated service which is supplied as such. At the same time, there are also questions as to whether the services at issue should be classified under a single subsector or under more than one subsector in the classification system. It is important that market access commitments take this into account and ensure that integrated services and new forms of delivery, including digital and electronic, are bound in each party’s schedule of market access commitments.

## **B. Recognition that Services are Crucial to Manufacturing and Agriculture**

Services are inextricably linked with manufacturing and agricultural production. This linkage has been spurred by a combination of factors, including global competition, the fragmentation of production, and global supply chain efficiencies, together with the expansion of information technology and the growing global digital infrastructure. The result is that manufacturers, farmers, and ranchers, are increasingly reliant on the use and provision of services.

As companies reach new markets and expand their operations, they increase their use of internal logistics, computing, telecommunications and other attendant services to manage their business. Repair, maintenance, and other product-related services are usually offered by manufacturers to supplement their product offerings (e.g. product warranty-related services). The same is true for knowledge-intensive services. This commercial reality increasingly blurs the distinction between manufacturing and service companies in the midst of the “servicification” of the economy.<sup>25</sup>

Accordingly, in contemplating the legal framework governing U.S.-UK trade, consideration should be given to negotiating goods and services in clusters – i.e., liberalizing all of the services links in supply chains for the relevant manufactured or agriculture goods. The overall benefits of specific liberalization proposals along with specific issues, such as cross-border data flows, should be carefully considered in terms of the costs and benefits for both the goods and service industries.

## **C. Investment Protections**

The U.S.-UK commercial relationship is built on investment even more than trade, and much of our trade is a product of strong cross-border investment ties. U.S. investments account for more than one quarter of all investment in the UK, and the U.S. receives 20% of all outbound UK investment.<sup>26</sup>

The UK already has an extensive network of more than 100 bilateral investment treaties that contain strong, enforceable investment obligations. U.S. negotiating objectives call for reciprocal market access, robust investment protections and strengthened dispute settlement disciplines, and “meaningful procedures for resolving investment disputes.”<sup>27</sup> An agreement with the UK should provide a high-standard level of investment protection.

## **D. Facilitating Free Data Flows and Prohibiting Localization Requirements**

Businesses in services, manufacturing and agriculture rely on the free flow of data to operate in today’s global economy. In 1994, less than one percent of the world’s population had access to the internet. Today there are approximately 3.9 billion internet users worldwide and that number

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<sup>25</sup> See generally “Everybody is in Services – The Impact of Servicification in Manufacturing on Trade and Trade Policy,” p. 16, Swedish National Board of Trade (2012).

<sup>26</sup> UK House of Commons Library, “Foreign Direct Investment Statistics,” <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8534>.

<sup>27</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26) (Trade Promotion Authority (TPA 2015)), 19 U.S.C. §§ 4201(a)(1)-(3), and (b)(4).

is expected to rise to over 4.1 billion by 2020.<sup>28</sup> Countries that are globally interconnected and can harness the internet and data flows for the good of their citizens will experience up to 40 percent higher GDP growth than those that are less connected.<sup>29</sup>

Cross-border data flows between the United States and the UK should be guaranteed. Any arrangement must include a prohibition on restrictions on data flows, requirements to use local computing facilities, or other forced localization requirements; applicable to all sectors of the economy; and in a manner consistent with the frameworks governing data protection.

In support of services through electronic channels, there must be a clear obligation to permit cross border data flows and external data storage, management, processing, and access (so, for example, users may benefit from the availability of cloud computing services), both within a firm, in its operations in other markets, and with its customers, wherever they may be located. This principle has been described in the OECD Internet policy principles and reflected in U.S. trade agreements.<sup>30</sup>

Restricting data flows as a means of protecting access to data or ensuring security is ineffective and inefficient. The effect of such an approach would be to slow the expansion of trade in all internet-dependent services, and cloud services in particular. Innovation in these services is growing exponentially and benefitting so many entities, including small and medium-sized enterprises across a broad range of sectors.

The protection of privacy and personal data are important public policy objectives and should be recognized as such in trade agreements. High-standard rules committing governments to the free flow of data do not preclude such privacy protections. Negotiators should include only narrow exceptions that enable these legitimate public policy objectives to be met without undermining their data flow commitments and data localization prohibitions.

## **E. Digital Trade**

Negotiating objectives set out in the statute granting the U.S. administration trade promotion authority includes language for mandating nondiscriminatory treatment of digital products transmitted electronically; prohibiting restrictions on cross-border data flows or imposition of localization requirements for servers; and proscribing customs duties for digital products delivered electronically.<sup>31</sup>

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<sup>28</sup> United Nations, International Telecommunications Union. Time series of International ICT Data: <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

<sup>29</sup> U.S. Chamber of Commerce, *Business without Borders: The Importance of Cross-Border Data Transfers to Global Transparency*, 2014, at 12 (citing as an example that restrictions on data transfers from the EU to the United States would reduce the EU's GDP by \$143 billion to \$235 billion)..

<sup>30</sup> *OECD Principles for Internet Policy Making* 2014, <https://www.oecd.org/internet/ieconomy/oecd-principles-for-internet-policy-making.pdf>.

<sup>31</sup> TPA 2015, 19 U.S.C. § 4201(b)(6).



The digital chapter of a future U.S.-UK agreement must include:

- Prohibitions against customs duties, fees, and other charges in connection with the import or export of digital products transmitted electronically (but internal taxes continue to be permissible);<sup>32</sup>
- Prohibitions on the application of discriminatory measures to digital products distributed electronically;<sup>33</sup>
- Requirements to ensure that data can be transferred cross-border;<sup>34</sup>
- Prohibitions on mandatory local data storage and processing covering all sectors;<sup>35</sup>
- Requirements to ensure that suppliers are not restricted in their use of electronic authentication or electronic signatures, thereby facilitating digital transactions;<sup>36</sup>
- Guarantees that enforceable consumer protections, including for privacy and unsolicited communications, apply to the digital marketplace;<sup>37</sup>
- Limits on the governments' ability to require disclosure of proprietary computer source code and algorithms. This should include not only prohibiting the disclosure of source code but also barring governments from requiring the disclosure of "algorithms expressed in that source code" unless that disclosure was required by a regulatory body for a "specific investigation, inspection, examination enforcement action or proceeding";<sup>38</sup>
- Protections for online platforms and marketplaces to host lawful speech and commerce without being treated as the originators of content<sup>39</sup>;
- A commitment to promote mechanisms that bridge national and regional privacy regimes and enable cross-border data flows, including voluntary certification schemes;
- Recognition of risk-based approaches that rely on consensus-based standards and risk management best practices to identify and protect against cybersecurity risks, and to detect, respond to, and recover from cybersecurity events;
- Promote open access to government-generated public data to enhance innovative use in commercial applications and services;

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<sup>32</sup> USMCA, Art. 19.3.

<sup>33</sup> USMCA, Art. 19.4.

<sup>34</sup> USMCA, Art. 19.11

<sup>35</sup> USMCA, Art. 19.12.

<sup>36</sup> USMCA, Art. 19.6.

<sup>37</sup> USMCA, Art. 19.7, 13.

<sup>38</sup> USMCA, Art. 19.16.

<sup>39</sup> USMCA, Art. 19.17.

- A commitment to utilize relevant international standards; not to apply measures in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and to eliminate any unnecessary differences in their respective cybersecurity risk management frameworks.
- Finally, it bears noting that the same basic trade principles of national treatment and non-discrimination apply when crafting tax policy. Such measures should not discriminate against digital services or single out companies or sectors for disparate treatment, either on a *de jure* or *de facto* basis. As presently envisioned, the proposed UK digital services tax fails to meet these important obligations.

## **F. Data Protection and Privacy**

The European Union’s rules governing data protection and data transfers for Member States are set out in the General Data Protection Regulation (GDPR).<sup>40</sup> Subject to compliance with GDPR, data may flow throughout the EU, but the transfer of personal data out of the EU is restricted. GDPR came into effect across the EU (and therefore to the UK) in May 2018.<sup>41</sup>

Following its departure from the EU, the UK will be a “third country” under EU data protection law. Data can be transferred out of the EU to “third countries” under specific circumstances, where the recipient country’s data protection regime has been deemed by the European Commission to be “adequate.” Adequacy has been interpreted by the EU Court of Justice as requiring an “essentially equivalent” regime to EU law.<sup>42</sup> The UK should urgently seek and obtain an adequacy agreement to ensure that data can be legally transferred between the UK and the EU. Failure to do so would have significant economic consequences for U.S. firms doing business on either side of the English Channel. Transfer may be permissible where other “appropriate and verifiable safeguards” are implemented at an individual company level, such as through contractual clauses that guarantee protection of EU citizens’ personal data when that data is transferred out of the EU. Finally, there may be certain permissible derogations that include consent or contractual obligations. However, these costly and complex methods will not provide sufficient recourse in a timely enough fashion to prevent disruptions without an adequacy agreement in place, nor are small and medium-sized enterprises (SMEs) well positioned to use them.

As a Member State, the UK benefits from EU adequacy decisions for third countries. For the U.S., this is addressed pursuant to the EU-U.S. Privacy Shield. The UK also benefits from other arrangements that the EU has concluded with third countries, such as the EU’s adequacy agreement with Japan and the EU-U.S. “Umbrella” Agreement, which facilitates the sharing of law enforcement data in the fight against serious crime and terrorism. Post-Brexit, the UK will no longer be a party to these arrangements. The CLOUD Act authorizes the United States to enter into “executive agreements” with foreign governments to create streamlined procedures for each country’s law-enforcement officials to access data held in the other’s jurisdiction.<sup>43</sup> The United

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<sup>40</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>41</sup> GDPR FAQs, <https://eugdpr.org/the-regulation/gdpr-faqs/>.

<sup>42</sup>Case C-362/14 Schrems v Data Protection Commissioner, paras. 73-74.

<sup>43</sup> 18 U.S.C. §2523.

States and the UK recently concluded negotiations under that statute; the agreement must now be considered by the U.S. Congress and the UK Parliament before ratification.<sup>44</sup>

Following the UK's departure from the EU, the U.S. and UK must immediately work to provide multiple pathways to ensure commercial data continues to flow freely. The UK together with the U.S. Department of Commerce and the Federal Trade Commission have agreed to enable companies certified under the EU-U.S. Privacy Shield to continue sending personal data to the United States, provided they update their privacy policies to reflect the fact that the UK is no longer part of the EU.<sup>45</sup> Failure to maintain or replicate these data protection arrangements could threaten the ability to secure the free flow of data between the United States and the UK. This would constitute a severe impediment to U.S. companies doing business both in the UK and in the EU from a UK base of operations.

### **G. Effective Cybersecurity Principles**

Malicious cyberattacks pose risks and impose significant costs and discourage the development and dissemination of ICT and ICT-enabled services. Cybersecurity remains a high priority for governments and the private sector. Preserving interoperability, openness, and a global market are important elements in pursuing policies to enhance security and combat cyber-attacks. The United States and United Kingdom should collaborate closely to address shared international cyber challenges and pursue policies aimed at creating a more secure global digital infrastructure. This can be achieved through common cybersecurity standards, incentives and principles that minimize both security threats and any trade-distorting impacts.

Given the evolving nature of cybersecurity threats, risk-based approaches may be more effective than prescriptive regulation. Accordingly, the U.S. and UK should endeavor to employ and encourage enterprises to use risk-based approaches that rely on consensus-based standards and risk management best practices to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events.

### **H. Government Procurement**

The UK has a relatively liberal government procurement policy for goods and services. It accounts on its own for around 25% of the EU procurement market. The UK is likely to make additional commitments to open its procurement market in the context of its accession to the GPA. Certain public sectors, in particular the health sector, are sensitive politically to the introduction of private sector competition and may prove difficult for United States' suppliers to penetrate, but most sectors are not. Major public infrastructure projects are underway in the UK, in particular construction of the third runway at Heathrow Airport and the expansion of the high-speed rail network. These could be important opportunities for improved procurement market access in a U.S.-UK trade agreement.

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<sup>44</sup> U.S. Department of Justice, "U.S. and UK Sign Landmark Cross-Border Data Agreement to Combat Criminals and Terrorists Online," <https://www.justice.gov/opa/pr/us-and-uk-sign-landmark-cross-border-data-access-agreement-combat-criminals-and-terrorists>.

<sup>45</sup> <https://www.privacyshield.gov/article?id=Privacy-Shield-and-the-UK-FAQs>

## **I. Transparency**

Transparency commitments should guarantee that laws, regulations, and administrative rulings are publicly available, that regulations are subject to notice and comment, and due process rights are available in connection with any administrative or licensing actions through independent and impartial judicial or administrative tribunals or procedures.

## **J. State-Owned-Enterprises (SOEs)**

State-owned enterprises should be subject to the same disciplines, on the same basis, as other domestic and foreign enterprises, including parity of treatment with respect to regulation, licensing, transparency, business operations, and public procurement. Subsidies for SOEs should also be subject to disciplines, which could facilitate global cooperation to address issues posed by non-market economies.

## **K. Temporary Entry of Service Suppliers**

U.S. service suppliers are concerned about the potential impact of Brexit on the mobility of talented workers, whether they are European nationals in the UK or UK nationals residing in the European Economic Area (“EEA”). The mobility of talented workers is a priority for many services sectors including information and communication technology services, financial services, logistics, and professional services. The current complexities of recruiting citizens to the UK from countries outside the EU means that companies may miss out on talented individuals. The UK’s current proposals to remove the cap on Tier 2 Visas, as well as the reduction of the skills requirements for candidates from degree to A-level qualifications, is a welcome move that will increase the pool of available talent. However, the proposed £36,700 minimum salary requirements<sup>46</sup> will continue to present challenges. Further guidance on the operationalization of the temporary routes for ‘low-risk’ countries could potentially offset problems that may be encountered in the wake of an end to freedom of movement between the UK and the EU.

## **L. Customs and Trade Facilitation & *De Minimis***

There are unique opportunities for a U.S.-UK agreement to set a new global standard for customs and trade facilitation that would directly support the growth of the transatlantic e-commerce market. For instance, the U.S. and UK could mutually agree that U.S. export declarations could serve as UK import declarations (and vice versa), removing duplicative red tape that would save importers and exporters considerable time and expense.

Moreover, the UK should increase its *de minimis* levels to a more commercially meaningful level for inbound shipment. This higher level should apply to imports from all origins, and not exclusively goods of U.S.-origin. Furthermore, the UK should avoid additional complications on *de minimis* imports, like requiring Harmonized Schedule codes. At no point should the U.S. consider lowering its *de minimis* level as negotiating leverage in these trade negotiations. This issue has implications not just for the customs chapter of any future negotiation, but also for

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<sup>46</sup> *TheCityAM*, “Business Groups Hit Back over £36k Migrant Salary Proposals,” <https://www.cityam.com/business-groups-hit-back-over-36k-migrant-salary-proposals/>.

services and digital trade. Adjustments to the threshold level for assessing customs duties and reducing the logistics costs of low-value transactions are significant and impact a range of issues and stakeholders, including those related to online shopping, SMEs, ecommerce platforms, and express delivery service providers.

## V. SECTOR-SPECIFIC TRADE PRIORITIES

### A. Financial Services

The United States and the UK will need to ensure, post-Brexit, that they maintain mutual access to their respective financial services markets and infrastructure in order to avoid systemic disruptions for the vast numbers of financial institutions, service suppliers, and customers that rely on the two financial markets. A meaningful transition period following the UK's separation from the EU, lasting until the implementation of an arrangement covering the future UK-EU relationship, is especially important for financial services firms.

With the exception of the carve back of Investor State Dispute Settlement (ISDS) protections and elimination of coverage of procurement, the recently concluded United States-Mexico-Canada agreement (USMCA) provides a good starting point for a future U.S.-UK financial services chapter. It includes expanded cross border financial services commitments, an updated transfer of information provision, as well as the first-ever provision prohibiting data localization for financial services.<sup>47</sup> In addition, the USMCA includes an extension of market access and national treatment to electronic payment services. Finally, it enables recourse to ISDS for certain national treatment, MFN, and direct expropriation claims in U.S.-Mexico investment disputes in financial services.<sup>48</sup>

Building on the USMCA financial services chapter, a U.S.-UK agreement should:

**(1) Foster deeper regulatory cooperation.** There is scope for more rigorous coordination and cooperation without undermining existing domestic rules and standards. Differences can be respected but also managed in the interests of cross-border investment. As appropriate, negotiation of mutual recognition agreements (MRAs) and commitments for greater regulatory cooperation should be considered. Establishment of the U.S.-UK Financial Services Regulatory Working Group is a good first step. The working group should take into account the views of financial institutions, financial services suppliers, customers and other market participants so that policy-making remains focused on the functioning of the market and on protection of sound and liquid markets.

**(2) Maximize cross-border market access in trade and investment.** The United States and the UK enjoy very open and diverse markets in financial services. An ongoing U.S.-UK regulatory dialogue, which should be codified within a future trade and investment agreement, could build on this, by enhancing volumes of cross-border financial and related professional services transactions and foreign direct investment between the United States and UK.

**(3) Recognize the importance of the evolving technological landscape.** Policymakers are increasingly scrutinizing market conduct, data transfer, cybersecurity, artificial intelligence and financial technology (fintech). These issues will require close regulatory coordination to address emerging risks without stifling technological and financial innovation.

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<sup>47</sup>USMCA, Chapter 17, Financial Services

<sup>48</sup>USMCA, Annex 17-C, Art. 2 (a)(i).

Negotiations on a new UK-EU agreement covering trade in financial services will take place during a prospective post-Brexit transition period, concurrently with U.S.-UK negotiations on a trade agreement. The UK Treasury and much of the UK financial services sector favor retaining close regulatory alignment with the EU in financial services and establishing multiple “equivalence” arrangements for financial sector activities to limit the disruption from losing passporting access to the Single Market. Some other parts of the UK Government and the industry favor the UK developing a distinct and more liberal regulatory framework from the EU to create a competitive advantage for banks, fund managers and insurers. There is no consensus view on this in the UK for the time being. Again, the terms of its future relationship with the EU are directly relevant to negotiation of a U.S.-UK agreement.

## **B. Insurance**

Any agreement should ensure strong market-access commitments, including national treatment, prohibiting measures which require foreign insurers or reinsurers to cede a portion of their business to domestic competitors, prohibiting measures which restrict access to cross border reinsurance, and prohibiting conversion of locally held foreign currency/financial assets into domestic currency. The agreement also should include strong disciplines on state-owned-enterprises, and on supply of insurance services by postal insurance entities and cooperatives in competition with private insurers. An agreement should also build on the progress of the U.S. -UK Covered Agreement<sup>49</sup>, where the UK conditionally agreed to recognition of the U.S. approach to group solvency, by committing the UK to take a consistent approach in International Association of Insurance Supervisors’ discussions to develop an insurance capital standard. Finally, any agreement should include disciplines prohibiting the nationalization of privately managed individual account defined benefit and defined contribution retirement systems.

## **C. Delivery Services**

In order to ensure U.S. and UK businesses have access to world-class delivery service options, any agreement should provide the broadest possible coverage of binding market access and national treatment for delivery and logistics services. The U.S. and the UK should ensure that some of the unique challenges associated with market dominant players in the sector (*i.e.* national postal operators) are addressed with appropriate safeguards against abuse of that position. This includes the elimination of cross-subsidization and disparate treatment in the areas of customs procedures, duties, taxes, charges, transportation regulation, and enforcement.

## **D. Electronic Payment Services (EPS)**

The parties should make market access and national treatment commitments for EPS under Mode 1 (cross-border supply) with as few limitations as possible and not place any restrictions on Mode 3 (commercial presence) market access and national treatment for EPS.

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<sup>49</sup> U.S. Department of the Treasury, “Treasury, USTR Finalize Bilateral Agreement with the UK on Prudential Measures Regarding Insurance and Reinsurance,” <https://home.treasury.gov/news/press-releases/sm570>.

#### **E. Media and Entertainment Services**

Any agreement should include provisions to liberalize media and entertainment services, including all of its sub-sectors and related services (such as advertising) and across all means of distribution. The agreement should also eliminate quotas and other forms of discriminatory treatment of films and television in all means of distribution, including online. There should be no culture carve out and any agreement should ensure non-discrimination online.

#### **F. Retail and Distribution Services**

Any agreement should provide full market access for retail and distribution services as well as national and most-favored nation treatment for all forms of distribution, including remote sales such as online, telephone, catalogue, and direct selling channels. The agreement should protect retail and distribution rights in both single and multi-brand formats, with no limits on size, geographic location, or merchandise assortment. Any agreement should also eliminate economic needs tests with regard to department stores, and should bind commitments related to foreign ownership of pharmacy operations.

#### **G. Telecommunications**

An agreement should expand telecommunications commitments beyond the Reference Paper on Telecommunications to ensure that the agreement reflects the best commitments in current trade agreements and eliminates FDI limits.



## **VI. THE LEGAL FRAMEWORK FOR U.S.-UK TRADE IN SERVICES**

On October 16, 2018, USTR notified Congress that the “President intends to initiate negotiations on a trade agreement with the United Kingdom.”<sup>50</sup> A threshold issue that remains is the extent of the UK’s authority to enter into a comprehensive trade agreement, whether such an agreement would cover both goods and services or services only, and the breadth of trade and investment rules to be included.

As the United States and the UK pursue trade negotiations, various legal instruments and fora may offer opportunities for early harvests or ultimately prove more appropriate for addressing issues in particular sectors or dealing with less or more contentious matters.

### **A. Comprehensive Agreement**

The preferred outcome for a U.S.-UK agreement would be a comprehensive agreement that includes all services, investment, and digital trade chapters in conformity with U.S. Trade Promotion Authority objectives. The subject matter of the most current trade agreements are broad and extend disciplines that affect broad elements of the economy.<sup>51</sup>

The goals of increasing trade and deepening economic integration between the U.S. and UK economies also depend on core legal issues where there is already significant alignment between the United States and the UK in terms of competition policy, intellectual property rights, labor and environmental standards, and mechanisms for the settlement of disputes consistent with basic principles of due process and transparency that are central to the rule of law. A unified and collaborative approach between the U.S. and UK would help the new agreement set global standards for addressing these important topics.

If the UK’s post-Brexit negotiating authority is limited with respect to goods and agriculture, the U.S. and UK could pursue a services-only agreement in conformity with GATS Article V.

### **B. Negotiating Authority for the U.S. and UK Governments**

On February 28, 2019, USTR published a summary of its specific negotiating objectives for a U.S.-UK trade agreement.<sup>52</sup> USTR’s summary envisions a comprehensive trade agreement that would cover trade in goods and services and would include “state-of-the-art” disciplines on digital

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<sup>50</sup> Separate Letters from Robert E. Lighthizer, United States Trade Representative, to Senator Hatch, Speaker Ryan, Senator Schumer, and Democratic Leader Pelosi, October 16, 2018 (pertaining to negotiations on a trade agreement with the United Kingdom).

<sup>51</sup> For example, the recently concluded USMCA contains 34 different chapters, 6 sectoral annexes, and 14 side letters, and establishes rules covering agriculture, goods, energy and petrochemicals, services, investment, telecommunications, digital trade, government procurement, and the movement of persons, among other areas.

<sup>52</sup> The TPA 2015 requires that the President, at least 30 calendar days before initiating negotiations with a country, publish such a summary as well as “a description of how the agreement, if successfully concluded, will further those objectives and benefit the United States.” See 19 U.S.C. § 4204(a)(1)(D).

trade.<sup>53</sup> The United States will seek the following commitments pertaining to services and digital trade:

- On services, the United States will seek rules that prohibit, across all services sectors, (1) discrimination against foreign services suppliers; (2) restrictions on the number of services suppliers in the market, and (3) local presence requirements. It also will seek specialized sectoral disciplines in certain areas. In the telecommunications sector, the United States will seek rules that promote the competitive supply of telecommunications services and provide reasonable network access for such services. It also will seek rules that that expand opportunities for U.S. financial service suppliers and improve transparency and predictability in the UK’s financial services regulatory procedures.
- On digital trade, the United States will seek “state-of-the-art” rules to ensure that the UK does not impose measures that restrict cross-border data flows and does not require the use or installation of local computing facilities, including in the financial services sector. The United States also will seek non-discriminatory treatment of digital products; commitments not to impose customs duties on such products; rules that prohibit the forced disclosure of computer source code or algorithms; and protections for online platforms and marketplaces to host lawful speech and commerce without being treated as the originators of content.

The negotiating authority of the UK to engage in any or all forms of arrangements for closer cooperation in trade and investment with the United States is not limited by the terms of the UK’s Withdrawal Agreement. Article 129.4 of the Withdrawal Agreement states that:

“... during the transition period, the United Kingdom may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union.”<sup>54</sup>

This would allow the UK to agree on a mandate for negotiating with the United States trade agreements in goods or services, separately or combined, without reference to areas of competence of the EU. The UK already has the legal authority to conclude investment treaties with third countries without reference to the EU. An agreement with the United States could not enter into force before the end of the transition period, but there is no restriction on entry into force of an agreement on an interim or final basis directly thereafter.

In the UK, the powers of the Executive include negotiating, signing, and ratifying treaties. Under the Constitutional Reform and Governance Act of 2010,<sup>55</sup> the Government has a duty to lay treaties subject to ratification before Parliament for 21 days before ratifying, but the Act does not provide for a mandatory debate or vote on ratification, and the treaty cannot be blocked by Parliament other

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<sup>53</sup> Summary of Specific Negotiating Objectives for United States-United Kingdom Negotiations, Office of the United States Trade Representative, February 2019. See [https://ustr.gov/sites/default/files/Summary\\_of\\_U.S.-UK\\_Negotiating\\_Objectives.pdf](https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf).

<sup>54</sup> Agreement on the Withdrawal of the UK from the EU.

<sup>55</sup> [Constitutional Reform and Governance Act 2010](https://www.legislation.gov.uk/ukpga/2010/25/part/2), <https://www.legislation.gov.uk/ukpga/2010/25/part/2>

than in exceptional circumstances. However, Parliament plays a key role in passing domestic legislation to implement a treaty.

Since it has not negotiated a standalone trade agreement in the forty plus years that it has been an EU member, the UK's capacity to consult stakeholders to inform its negotiating positions is limited. That said, a "Strategic Trade Advisory Group" was established in April 2019 to establish a regular consultation process. The Group has representatives from business, trade unions and civil society - including TheCityUK to represent the interests of the financial and professional services industries - and can be expected to play an increasingly important role as negotiations unfold.

### **C. Regulatory Cooperation Agreements (RCA) and Mutual Recognition Agreements (MRA)**

In addition to, or in lieu of, a comprehensive agreement, the U.S. and UK may wish to pursue RCAs or MRAs, which can function to cement baseline achievements and provide a solid foundation for advancing negotiations on more contentious issues. Such arrangements can stand alone or be complement a larger agreement.

For example, the USMCA sets out guidelines for MRAs for professional services sectors.<sup>56</sup> The signed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the USMCA each contain chapters dealing with regulatory cooperation.<sup>57</sup> RCAs can help to foster regulatory coherence through domestic mechanisms that facilitate cross-border interagency consultation and coordination associated with processes for developing and implementing regulatory measures.

For example, to facilitate trade in financial services, along with market access commitments, the agreement could include mutual recognition agreements and regulatory cooperation commitments subject to binding dispute settlement rules. The new U.S.-UK Financial Regulatory Working Group, guided by the U.S. Treasury Department and HM Treasury, is an important first step. Other sector specific areas that might be ripe for stepped up regulatory cooperation efforts and potential Mutual Recognition Agreements include accounting, engineering, architecture, cybersecurity, and visas.

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<sup>56</sup> United States-Mexico-Canada Agreement, Chapter 15, Cross-Border Trade in Services, Appendix 1: Guidelines for Mutual Recognition Agreements or Arrangements for the Professional Services Sector.

<sup>57</sup> The USMCA Chapter on "Good Regulatory Practices" defines "regulatory cooperation" to mean "an effort between two or more Parties to prevent, reduce, or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection." United States-Mexico-Canada Agreement, Chapter 28, Good Regulatory Practices, Article 28.1 (Definitions).