



**Priorities for a New EU-UK
Economic Partnership**

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About the U.S.-UK Business Council

The U.S.-UK Business Council provides a platform for companies with significant equities in both the U.S. and UK markets to share views on issues arising from the Brexit negotiations, including the reset of relations between the United Kingdom and the European Union, as well as the future shape of U.S. commercial ties with both the UK and the EU.

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In an increasingly regulated world, Covington has an exceptional ability to help clients navigate their most complex business problems, deals, and disputes. What sets us apart is our ability to combine the tremendous strength in our litigation, investigations, and corporate practices with deep knowledge of policy and policymakers, and one of the world's leading regulatory practices.

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Priorities for a New EU-UK Economic Partnership

Introduction and Overview

As the Brexit negotiations unfold, the business community is eager to ensure that economic disruptions are minimized. Millions of jobs on both sides of the Channel rely directly on EU-UK trade and investment flows. Both economies would be hit hard by a “cliff edge” scenario, with an immediate return to WTO tariffs and regulatory uncertainty governing cross-border trade in goods and services.

The U.S.-UK Business Council represents companies with large investments—directly responsible for hundreds of thousands of jobs—in both Britain and the EU. Our members have a significant stake in the outcome of these negotiations, and we aim to provide information that will help negotiators minimize the adverse effects of the reset in UK-EU relations. This includes forging a close economic partnership between the EU and UK implemented following a suitable transition period.

Understandably, the terms of an orderly UK withdrawal must be finalized first. Employers, workers, and governments must agree on a fair and equitable system to protect citizens’ rights to work and migrate after Brexit occurs. A fair financial settlement must be calculated, and the critical issue of the border between Ireland and Northern Ireland must be resolved to minimize friction in commerce and travel across the island of Ireland.

Once sufficient progress has been made on these issues, attention must turn quickly to the contours of the future relationship. This will be essential to minimize uncertainty for workers, employers, consumers, and citizens alike. In this context, we are pleased that the UK government released position papers on several important issues, and we are similarly encouraged by the proactive approach of the European Commission to negotiate a deal that works for all of Europe, pursuant to the European Council’s negotiating guidelines.

We have identified several key issues that must be addressed in the context of a future EU-UK economic partnership agreement. These include: market access for goods; customs and trade facilitation; data protection and data transfers; financial services; intellectual property rights; movement of labor; and regulatory cooperation.

In each of these areas, we have crafted short briefs that articulate the real world challenges businesses face, and suggest creative solutions.

- **Market Access for Goods: Tariffs and Non-Tariff Barriers & Customs Procedures, Rules of Origin, and Trade Facilitation:** The EU and UK should endeavor to negotiate a **broad zero-tariff trade agreement** and a **seamless customs regime** that reduces unnecessary administrative burdens and limits delays at the border, setting a global standard in trade facilitation.
- **Data Protection and Data Transfers:** The UK must ensure it remains compliant with EU laws, including **achieving adequacy status under the General Data Protection Regulation** to allow data to continue to flow freely.
- **Financial Services:** A **comprehensive transitional arrangement** will be vital to ensure companies' ability to continue to seamlessly service their customers. The two sides should endeavor to maintain full regulatory equivalence via an **ongoing financial services regulatory dialogue**.
- **Intellectual Property Rights:** We encourage the UK to remain in the **Unified Patent Court** and to provide an orderly transition to convert **EU Trademarks and Community Designs Rights** into UK registrations.
- **Movement of Labor: EEA nationals in the UK (and British nationals in Europe) should retain their current rights,** and new flexible procedures should be crafted to ensure the continued ability for seasonal workers, intra-company transfers, and skilled workers to move across Europe with minimal impediments.
- **Regulatory Cooperation:** The UK and EU are starting from a point of full regulatory convergence, but maintaining equivalent regulatory outcomes in the years ahead will require effective mechanisms for **joint consultations and review**, as well as a commitment to seek **common approaches to new issues**.

The private sector has ambitious expectations for the future EU-UK economic partnership. The U.S.-UK Business Council stands ready to help negotiators understand the practical issues at stake, and to achieve solutions that safeguard prosperity and growth across Europe.

Market Access for Goods: Tariffs and Non-Tariff Barriers

Introduction

Market access is at the core of any preferential trade agreement. Its terms define the depth, quality, and economic value of any future relationship—in this case between the EU and the UK. This paper assesses both the tariff and non-tariff aspects of market access, and makes recommendations for each in the context of an EU-UK Free Trade Agreement (“FTA”). It also touches on implications for existing deals with preferential partners.

I. Tariffs

A major issue for the future EU-UK relationship will be to define how both sides intend to deal with sensitive areas relating to tariff barriers. In the case of the EU—and thus at present also for the UK—the most protected sector is agriculture, where the most sensitive products are subject not only to high, sometimes triple-digit tariffs, but also to quantitative limitation, in the form of tariff rate quotas (“TRQs”). In a market where current trends point to sharpened global competition and ever thinner profit margins, even low single-digit tariffs may have a serious impact on the competitiveness of many products. Therefore, tackling the issue of tariff barriers, both from an EU-UK and UK-third country perspective, is important both for agriculture and beyond.

A. EU-UK

As the UK has indicated its intention to leave both the EU Single Market and the Customs Union, the two sides will need to negotiate a bespoke FTA to govern future trade. In any such future accord, the EU is likely to link the existence of such an agreement with commitments by the UK to maintain reasonably high levels of external protection regarding tariffs with third countries. Any major drop in the UK’s external tariff protection will decrease the economic value of the UK market for the EU, as, for instance, EU agricultural products would then face increased pressure from third-country goods in the significant UK market. By contrast, for the UK, external tariff protection is not a sensitive area. Rather, it is considered as a valuable card in future negotiations with the U.S. and other major agricultural exporters. As such, the outcome of the EU-UK talks regarding tariffs will define the EU’s position when it comes to the terms of access to its own market for other sectors, such as industrial products or services.

Adopting a “business as usual” approach through the agreement of such an FTA as quickly as possible, with a suitable transition period to implement any

new regulatory requirements and customs checks, would provide companies in both the EU and the UK with much sought-after certainty.

We recommend that: the UK seek a broad zero-tariff agreement for goods trade with the EU, and that the EU refrain from unduly tying the UK's hands on future trade deals.

B. The EU's Preferential Partners

In the UK's relations with the EU's current preferential partners, the situation is of similar complexity. From the moment of Brexit, the UK will no longer benefit from the EU's existing FTAs, as this will mean leaving the EU's customs territory, the legally defined territorial limit of all existing FTAs. Therefore, if the UK wishes to benefit from similar agreements, it will need to launch new negotiations with each partner country.

Under the EU's current agreements with other developed countries, there are either no tariffs for industrial products, or these are in the process of gradual reduction towards zero. In cases of developing country and transition economy partners, FTAs are normally asymmetric, giving higher and longer lasting import protections for the partners than for the EU.

We recommend that the UK adopt a similar approach in its negotiations with existing EU FTA partners.

C. WTO

As the UK departs the EU, both the UK and EU will need to agree with WTO trade partners the repartition of existing EU tariff schedules between the EU-27 and the UK. The point of departure for the UK would be the current EU's tariff bindings, but when it comes to sensitive areas (such as the WTO-bound agricultural TRQs), their division between the UK and the EU-27 will require delicate negotiations.

A protracted negotiation, without clarity on the UK or the EU's status, would create significant uncertainty, and would harm both the UK and EU economies. This should be avoided at all costs. Instead, the UK, EU and WTO should provide for transitional arrangements to enable the necessary negotiations to take place and to provide business certainty until the new schedules can be negotiated and ratified.

II. Non-Tariff Barriers

The most significant barriers to market access in trade among developed countries are not tariffs, but rather non-tariff barriers (“NTBs”). This is true for various sectors, including: industrial products, where measures such as technical regulations, standards, conformity assessment and testing procedures can cause additional costs, delays and complications for exporters; agricultural products, subject to burdensome health and veterinary rules, which can prohibit imports; or divergent health, environmental, and consumer protection regulations, adopted without regard for whether the regulations effectively achieve comparable safety outcomes.

We recommend that any bespoke trade deal between the EU and the UK encourage deep levels of ongoing sectoral regulatory cooperation – *i.e.*, especially in those sectors with a strong export interest (cars, chemicals, pharmaceuticals, *etc.*).

The point of departure for these talks will be the EU’s current regulatory regime, since the UK will have transposed the EU *acquis* into British law. As such, the EU and UK will start from a position of full regulatory convergence. Thereafter, as with tariffs, it can shape the regulations within its national jurisdiction as it sees fit. The further the UK’s regulatory regime moves away from that of the EU, the more NTBs could burden bilateral trade. Therefore, it is vital that the UK-EU FTA encourage strong and lasting regulatory cooperation.

The business community has long argued that the EU—and the UK—should accept a broader range of international standards as a direct avenue to lowering NTBs with other countries, including the United States.

As the UK sets up a new independent regulatory regime, it should prioritize information sharing and regulator-to-regulator dialogues with third countries, including the EU and U.S., to ensure high standards while minimizing commercial disruptions arising from NTBs. This will help the UK quickly achieve a best-in-class regulatory system while simultaneously encouraging investment and minimizing unnecessary divergences.

Recommendations

The continued uninterrupted flow of trade post-Brexit is essential for both the EU and UK economies. To secure this, and to avoid burdens generated by tariffs and NTBs, we recommend the following -

- The UK should seek a broad zero-tariff agreement with the EU; and the EU should not unduly tie the UK's hands on future trade deals
- The UK should adopt a similar approach to the EU in its agreements with other countries, including:
 - For developed economy trade partners, provide for either no tariffs or a gradual reduction towards zero for industrial products; and
 - For developing and transition economies, provide for asymmetric FTAs, granting higher and longer lasting import protections for the partners than for the UK.
- The UK and EU should minimize NTBs by negotiating a trade deal that encourages ambitious levels of ongoing sectoral regulatory cooperation
- The UK should explore the potential to recognize a broader set of standards than the EU does in specific sectors.

Customs Procedures, Rules of Origin, and Trade Facilitation

Introduction – The Basic Parameters of Post-Brexit Trade in Goods

Market access gained under preferential agreements depends on commonly-agreed customs procedures, trade facilitation, rules of origin and administrative arrangements. It is vital that the post-Brexit EU-UK relationship addresses each of these issues with clarity. The ease of trade flows will greatly influence the conditions of operation for EU and UK companies, as well as those based in third countries, including the U.S. It is especially essential to simplify trade procedures for small and medium-sized businesses looking to benefit from close and integrated trade partnerships.

It remains to be seen how the issue of a customs border between the UK and EU will be addressed, and whether such a border will be required either from the day of Brexit, or after the conclusion of a meaningful transition period as a new UK-EU trade agreement takes effect. Following are recommendations on the formalities that the U.S.-UK Business Council would like to see govern future EU-UK trade specific to: rules of origin, the conditions for origin cumulation, and trade facilitation post-Brexit.

I. Customs Borders and Controls: Seamless Regime and Cooperation Should be Safeguarded

Detailed rules and procedures for customs controls are always essential parts of preferential agreements, including those of the EU. These are necessary to ensure that third party products are subject to the requisite regulatory and border controls. They are as much core parts of the agreements as the terms for tariffs and non-tariff measures.

From the date of Brexit, the practical conditions, infrastructure and staffing of new customs borders to avoid major disruptions to trade will be vital, and these present major practical challenges. An effective customs arrangement will require significant investments in financial and human resources, and also that serious political challenges are resolved, particularly in relation to the Irish and Gibraltar borders.

This is of particular concern for members of the U.S.-UK Business Council, as many U.S. products or components enter the EU Single Market through UK ports or airports, or cross the Channel into Britain from the EU.

It is important that the agreement between the EU and the UK ensures, to the greatest extent possible, smooth trade flows, close to the current regime, i.e., minimizing administrative burdens, time constraints, customs obligations and tariffs,

and maintaining seamless cooperation between EU and UK authorities.

II. Rules and Certification of Origin and Cumulation

Regardless of the administrative arrangements to facilitate the flow of goods, it will be necessary to determine their origin and apply all the related procedures accordingly. We recommend that, post-Brexit, the EU's existing—increasingly Europe-wide—origin rules and certification procedures continue to apply. In this case there would be no difference in the rules applicable for goods sent from the UK to the EU and vice-versa.

This could be achieved by the UK joining the “Pan-Euro-Mediterranean” system of cumulation and origin. This sets out in detail the benefits and major simplifications enjoyed by the participating European FTA partners. We recommend that the post-Brexit EU-UK trade arrangements provide for identical rules of origin to those currently applied in the EU. This would enable the UK to participate in the “Regional Convention on Pan-Euro-Mediterranean preferential rules of origin” (“PEM Convention”), much like Switzerland, Norway, and the Balkan countries, among others, do today.

A major advantage of the PEM regime is the possibility to step beyond the traditional bilateral cumulation, such that components produced in one of the FTA partners and built into a final product in the other partner, can be counted as originating within the FTA. Thus, the final product can be exported back to the first partner without any hurdles under any of the schemes set up for production chains (as outward or inward processing procedures). Under the PEM Convention, this advantage is extended to “diagonal” cumulation, whereby all components produced in any of the participating countries are considered as originating ones and can be freely used for production in, and duty-free exported to, any member country of the Convention. There is just one limitation: the benefits of the system apply only for industrial products falling under Chapters 25-97 of the Harmonized System (“HS”), while the more sensitive agricultural sector is subject to stricter origin rules. Most agricultural products must be “wholly obtained”, i.e., all of their major components must originate from one of the partners of a (bilateral) FTA.

Alternatively, should this not prove possible, the UK and EU could agree more ambitious, bespoke origin rules. This would enable the UK manufacturers to use a higher proportion of products originating from third countries. This too would require significant political ambition, but should be considered as part of the UK-EU deal, should the PEM option not be available. Given the significant amount of products that cross the EU-UK border several times before going to market in final

form, getting the rules of origin right in any future UK-EU trade agreement is critically important.

III. Trade Facilitation: The EU-UK Relationship Should Reflect Ambitious Trade Facilitation Standards

In addition to special arrangements with European FTA partners, the EU has long attempted to find ways to facilitate global trade generally. At the WTO's 2014 ministerial conference, clearer multilateral provisions for the various aspects of customs-related rules and procedures were adopted worldwide in the "Trade Facilitation Agreement" ("TFA").

The TFA spells out in detail the necessary measures and procedures to promote efficient conditions and globally-applied standards for goods crossing borders. These are based on the processes, technical solutions, and best practices already regularly applied among developed countries. The Agreement covers measures that will be important to address in the EU-UK context for expediting the movement, release and clearance of goods, including those in transit. Apart from the provisions linked to general good administrative practices (transparency, publication of all relevant information, opportunity to comment on draft regulations, possibilities for appeal, etc.), there are specific rules and guidelines for such issues as fees and charges applicable on trade, cooperation among customs authorities and border control agencies, movement of goods under customs control, and freedom of transit.

The EU and UK—together with partner countries include the U.S.—should work together to ensure that post-Brexit UK-EU trade facilitation measures go well beyond the minimum baseline set out in the TFA, to jointly establish the highest possible standards that maximize efficient border management. This will help serve as a global standard for what trade facilitation measures should look like.

Proposals should include, but not be limited to: a commercially meaningful de minimis level; effective risk-based targeting; single window development and interoperability; regulatory and data modernization; mutual recognition; removing tariffs and fees for temporary imports, such as pallets, containers and crates, and any other instruments of international traffic; and avoiding the imposition of additional requirements such as new phytosanitary standards.

Recommendations

To facilitate EU-UK trade post-Brexit, we recommend that:

- On customs control and borders, a seamless regime between the EU and the UK be safeguarded, by ensuring that any EU-UK agreement reduces unnecessary administrative burdens, time constraints, customs obligations and tariffs, and maintains seamless cooperation between EU and UK authorities;
- On rules of origin and certification, the UK join a PEM Convention-type agreement; and
- On trade facilitation, the UK and the EU come up with a high-quality agreement that goes beyond the TFA, to set a global standard.

Data Protection and Data Transfers

Introduction – UK Data Protection Law

The European Union's updated rules governing data protection and data transfers for EU Member States, the General Data Protection Regulation (GDPR)¹, will be directly applicable in the UK from May 25, 2018. The UK Government has confirmed that the UK will implement the GDPR.

Recently, the UK Government announced its intent to introduce a New Data Protection Bill² which will transpose the requirements of the GDPR into domestic law along with the Data Protection Law Enforcement Directive. Additionally, the Information Commissioner's Office, the UK's privacy regulator, is taking steps to help companies prepare for the many changes GDPR will require.

The territorial scope of the GDPR means that UK businesses—as well as U.S. companies operating in the UK—that offer goods and services into the EU or deal with EU citizens will be subject to the GDPR in any event.

While the UK government has signalled a commitment to maintaining privacy protections under GDPR, it is not yet clear how they will remain aligned with EU requirements in practice following Brexit. This uncertainty is a cause for concern in the business community. While we are encouraged by the UK Government's August 2017 proposal³ to seek an adequacy decision and maintain an ongoing relationship with EU regulators on data transfers and protection, it is important that such an arrangement be agreed early in the negotiating process.

We urge the UK Government, therefore, to not only continue with the full implementation of the GDPR by May 2018, but also to ensure that UK's post-Brexit data protection framework remains aligned with the GDPR. This will provide important assurances to the business community that data transfers across the Channel, to and from the EU, can continue without interruption.

¹ 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.

² [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635900/2017-08-07_DP_Bill - Statement of Intent.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635900/2017-08-07_DP_Bill_-_Statement_of_Intent.pdf)

³ <https://www.gov.uk/government/publications/the-exchange-and-protection-of-personal-data-a-future-partnership-paper>

I. Post-Brexit UK-EU Data Flows

Under EU law, data is free to flow throughout the EU so long as data protection rules are complied with. The transfer of personal data out of the EU is restricted under the Data Protection Directive and, as of May 25, 2018, the GDPR.

Following Brexit, the UK will be a “third country” under EU data protection law as it will no longer be part of the EU. Under current and future EU rules, data can be transferred out of the EU to “third countries” only where (i) the recipient country’s data protection regime has been deemed “adequate” by the European Commission (adequacy has been interpreted by the Court of Justice of the EU as requiring an “essentially equivalent” regime to EU law)⁴ or (ii) other “appropriate safeguards” implemented at a firm level (*e.g.*, contractual clauses or “binding corporate rules”) that guarantee the protection of EU citizens’ personal data when it is transferred out of the EU or (iii) under specific derogations, including consent or contractual obligations.

It will be important for the UK government to quickly seek and secure an adequacy decision from the European Commission, ideally on day one of Brexit. The firm level measures mentioned above are all resource-intensive and are either too limited in scope or fail to provide legal certainty. Without an adequacy decision, there is a significant risk of business disruption in both the UK and the EU. Implementation of GDPR-level privacy protections into UK law will be a critical factor as the EU assesses the adequacy of the UK’s data protection regime.

The invalidation of the EU-U.S. Safe Harbor agreement and protracted negotiations and challenges related to its successor, the EU-U.S. Privacy Shield, indicate that the European Commission and the EU courts will likely also review the UK’s domestic data retention and surveillance law and practices (prior iterations of which the CJEU has declared incompatible with EU law),⁵ implementation of EU cybersecurity rules,⁶ and implementation of sector-specific data protection rules (*e.g.*, in electronic communications (*i.e.*, the e-Privacy Directive⁷ and proposed e-Privacy Regulation)). The UK Government should be mindful that the derogations and discretions that the

⁴ Case C-362/14 *Schrems v Data Protection Commissioner* (paras 73-74).

⁵ Joined Cases C-203/15 *Tele2 Sverige AB v Post-och telestyrelsen* and C-698/15 *Secretary of State for the Home Department v Tom Watson and Others*.

⁶ Directive 2016/1148 of the European Parliament and of the Council of July 6, 2016, concerning measures for a high common level of security of network and information system across the Union.

⁷ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

UK enjoys as a Member State (*e.g.*, on national security) regarding how it implements and applies EU law may not be readily available as a “third country” following Brexit. How the UK works outside of these EU Member State derogations and discretions as a “third country” could inform the prospects of being deemed adequate by the EU. Moreover, if the UK has its own domestic law version of the GDPR following Brexit, it will also need to deem the EU’s data protection regime “adequate” in order to allow data to move from the UK to the EU.

An adequacy decision by the Commission and by the UK will take time to achieve. In order to avoid the flow of data between the UK and EU being disrupted on “day one” of Brexit, governments, policy makers and other stakeholders should address this issue early in the negotiating process to ensure clarity and certainty for the business community. This would enable businesses in both the UK and EU to plan effectively for the post-Brexit environment. The continued legality of data transfers should be included in any transition measures which are agreed to during the upcoming negotiations. Existing alternative ‘firm-level’ arrangements would not provide this certainty.

II. Post-Brexit UK-U.S. Data Flows

As an EU Member State, the UK benefits from EU adequacy decisions for third countries such as Canada, Israel, Switzerland and, notably, the United States. The UK also benefits from other arrangements that the EU has concluded with third countries, such as the EU-U.S. “Umbrella” Agreement, that facilitate the sharing of law enforcement data in the fight against serious crime and terrorism. However, following Brexit, the UK will no longer be a party to these arrangements. The UK Government should prioritize negotiating and concluding data sharing arrangements with countries subject to existing EU adequacy decisions or EU agreements, either on a bilateral (UK-third country) or trilateral (UK-EU-third country) basis.

In particular, in order to ensure personal data stored in the UK can continue to be sent to the United States, the UK Government will need to assess whether it can accede to the EU-U.S. Privacy Shield and the EU-U.S. “Umbrella” Agreement or instead conclude a separate bilateral UK-U.S. arrangement. Maintaining or replicating these arrangements will be essential for data flows between the UK and the United States. The UK Government should be mindful of the impact that UK-third country arrangements could have on the European Commission declaring the UK “adequate.”

III. Future Regulatory Regime in the UK

As discussed above, post-Brexit, the UK will be free to enact its own data protection rules, subject to its own domestic law limitations. The UK Government should, however, refrain from changing its rules to the point that its ability to conclude

arrangements with the EU and the United States is jeopardized. In any event, UK businesses trading with the EU will continue to be subject to the GDPR, even if the UK domestic laws change.

Divergences could threaten the ability to secure the free flow of data between the United States and the UK. This would not only undermine the daily activities of many U.S. companies seeking to do business in the UK and EU, via a UK base, but also undermine the UK Government's goals for the growing digital economy in the UK.

Recommendations

Leaving the EU and the EEA will move the UK outside of the EU data protection framework. This could create serious uncertainty and disruption for U.S. companies doing business in the UK and across the EU. This uncertainty could prove problematic not just for the UK but also for companies and customers in the EU.

The UK, EU and the United States have a shared interest in avoiding a “cliff edge” scenario whereby there are disparate regulatory frameworks and where personal data cannot be shared freely between the UK-EU and UK-U.S. To that end, we recommend the following:

- Full implementation of the GDPR into UK law by the May 2018 deadline and continued alignment of the UK to the GDPR post-Brexit.
- Ensure the UK achieves EU adequacy status for personal data transferring from the EU to the UK. Other legal mechanisms are limited in scope, expensive, and do not provide legal certainty. This may require scrutinizing the UK's data retention and surveillance rules, ensuring the UK implements and continues to align with EU cybersecurity and sector-specific privacy rules.
- Ensure that an agreement between the UK and the EU is in place by the time the UK exits the EU in March 2019. If an adequacy agreement is still being negotiated then an alternative transitional arrangement will be required in the short term to ensure trade is not disrupted and data flows are not interrupted.
- Ensure that UK-U.S. data flows are not disrupted. The UK should prioritize an agreement with the United States alongside the EU ensuring the continued flow of data. The UK should aim to replicate the data sharing arrangements with the United States that are currently in place between the EU and the U.S., or it should negotiate to accede to those EU-U.S. arrangements as a third party.

Financial Services

Introduction

The financial services industry is one of the world's truly global industries. The interconnectedness of U.S. and UK financial markets and the transatlantic flow of capital are the bedrock of key global financial markets, including cross-border banking, foreign exchange, derivatives and asset management. Moreover, the U.S. and the UK are each other's largest foreign investors, with U.S. direct investment in the UK valued at \$593 billion in 2015. Because of London's prominence in global financial markets and importance to the U.S., the financial services industry deserves special attention in the framework of the Brexit negotiations. In short, a Brexit deal that is harmful for the financial services industry, or an inability to reach a deal, would hamper EU, UK and U.S. capital markets, as well as the real economy worldwide.

I. Transition Arrangements

The potential loss of passporting rights for UK-based financial services firms conducting business in the EU and using the UK as an "entry gate" into the EU single market is particularly troublesome. The potential impact is going to be particularly significant for financial services firms (including U.S. firms) that distribute products and services across the EU from a UK subsidiary. Companies that service the UK from subsidiaries located in other member states also face the threat of significant impacts.

To ensure an orderly Brexit and give certainty to firms and consumers, it will be important to have early clarity on transition arrangements. Without such clarity, firms that have previously taken advantage of these passporting rights will have to plan for the worst case scenario, i.e. no agreement on market access at the end of the Article 50 negotiation period. To continue to serve EU clients and avoid a disruption in service, firms will therefore need to consider relocating certain activities and establishing or expanding legal entities in the EU27.

The timetable for implementing such contingency plans is challenging, particularly as other market participants will be working to the same deadline. Moreover, the additional costs and burdens due to business reorganization may push some firms to abandon certain business activities or reduce their UK and/or EU footprint. For example, activities such as correspondent banking are likely to become more difficult and less profitable.

Recommendation: Comprehensive transitional arrangements for the financial services sector should be crafted. This is important in order to protect financial and economic activity and to avoid business disruption, thus preserving the

functioning of financial markets and the financing of the real economy.

Transition arrangements should cover the period from Brexit to the date the future trading relationship comes into force. They should also take account of the time needed for firms to adapt to the new relationship

II. Market Access

The maintenance of mutual access to each other's financial services markets and infrastructure is paramount to ensure that financial firms (EU, UK, and U.S.), their customers, and the multitude of service providers to such institutions do not experience a cliff edge situation where Europe as a global financial services and investment destination is penalized, businesses are hit hard, and major policy projects like the Capital Markets Union (CMU) are substantially weakened.

Ad hoc equivalence/limited third country regimes cannot be seen as a solid, comprehensive and long-term solution. Equivalence/third country regimes are restricted in nature - they are only present in some pieces of financial services legislation (e.g., in MiFID II, but not in UCITS). Moreover, where equivalence is foreseen, it normally does not cover all key aspects and provisions of a specific piece of legislation. Being at the full discretion of the EU, equivalence decisions are unilateral and run the risk of being affected by political considerations. MiFID II third country determinations are now held up pending resolution/progress with Brexit.

Recommendation: Future UK-EU market access should be embedded in a legally binding agreement on the basis of mutual recognition. This should be underpinned by regulatory cooperation.

Appropriate dispute resolution mechanisms will need to be established to deal with any future regulatory divergence. This may necessitate the establishment of a permanent financial services dialogue between the UK and EU.

III. Supervisory Provisions

The recently published European Securities and Markets Authority (ESMA) opinion setting out general principles for consistency in authorization, supervision, and enforcement related to the relocation of entities, activities and function from the UK aims at avoiding supervisory arbitrage risks. ESMA wants to avoid the establishment of letter-box entities in the EU. To do so, it sets out a number of principles, including setting up stricter conditions for authorizations, reasons for relocation, outsourcing and delegation, etc.

Importantly, ESMA’s principles state that “outsourcing and delegation to third countries is only possible under strict conditions.” The principles are relevant for all EU financial services legislation where outsourcing and delegation play an important role (e.g., MiFID II, AIFMD, etc.).

Recommendation: While the importance of supervisory considerations to ensure financial stability should be recognized, unduly restrictive provisions would prevent businesses from providing much needed services and would ultimately fragment the market and increase costs, especially if unduly onerous restrictions are imposed upon outsourcing into and/or from the UK. It is thus paramount that market participants’ considerations are appropriately taken into account in the EU’s supervisory approach to relocations from the UK.

IV. CCPs Supervision

The European Commission’s recent legislative proposal on Central Counterparties (CCPs) supervision in the framework of the European Markets Infrastructure Regulation (EMIR) review includes more stringent provisions for the supervision of third country CCPs deemed systemically significant. Moreover, it includes a “location policy” element for third country CCPs which are deemed of “specifically substantial systemic significance” for the financial stability of the EU. This includes a provision enabling ESMA to determine that a third-country CCP is of such systemic importance that the Commission should adopt legislation providing that such CCP may only provide services in the EU if it establishes itself in an EU member state. This is particularly relevant for the clearing of Euro-denominated derivatives transactions currently based in London. However, it is also relevant for any third country CCP, including U.S. entities. Moreover, there are questions around the impact of the recent proposals on the EU-U.S. agreement on the equivalence of each other’s CCPs regimes, and on possible retaliation by the U.S.

Recommendation: While the importance of supervisory considerations to ensure financial stability should be recognized, unduly restrictive provisions would prevent businesses from providing much needed services and would ultimately fragment the market and increase costs, especially if unduly onerous restrictions are imposed upon outsourcing into and/or from the UK. It is thus paramount that market participants’ considerations are appropriately taken into account in the EU’s supervisory approach to relocations from the UK.

V. Current Financial Services Policymaking

Brexit’s impact is already being felt in EU and UK financial services policymaking. Examples of this are the recent EMIR CCPs supervision proposal and the general direction of the CMU project. There are also questions relating to the impact of Brexit

on forthcoming legislative activities, such as the review of AIFMD and UCITS. Importantly, in the UK, there are calls to review British financial services regulation in light of Brexit.

Recommendation: It is important that financial services policymaking remains focused on market functioning and on the creation of deep, sound, and liquid markets, both in the UK and the EU. The UK has considerable experience in financial markets legislation which has helped shape—and improve—EU financial services legislation over time. It is important to continue making use of that expertise until the UK ceases to be a full member of the EU. Moreover, the EU financial services policy agenda should be built around the long-term objectives of economic growth and financial stability, rather than on short-term Brexit considerations.

VI. Movement of Labor

It is important to limit the impact of Brexit on Europe’s financial ecosystem and on the talent pool. Depending on the outcome of the negotiations, Brexit could halt the free movement of people between the EU and the UK, including skilled labor, due to the imposition of new immigration restrictions. Historically, London has managed to attract considerable talent to its financial services ecosystem, which is made up of banks, asset managers, insurers, fintech firms, and all of the ancillary professional services including lawyers, accountants, etc. Barriers to the free flow of workers between the UK and the EU would hamper the global competitiveness of the European financial services industry, effectively cripple important policy projects such as the CMU and negatively affect European financial services, and ultimately the European economy, in the medium-to-long term.

Recommendation: Special attention should be paid to the potential disruption to the supply of skilled labor resulting from Brexit. It is important that the UK and the EU reach a deal that allows, as much as possible, the free flow of skilled workforce from the EU to the UK and vice versa.

VII. Data Protection and Privacy/Data Retention

Brexit will have a direct impact on the free flow of data between the UK and the EU, should data privacy regulatory standards diverge on the two sides of the Channel. After Brexit, the EU will need to approve the equivalence of data protection between the UK and the EU, much in the way it is currently done with the U.S. The General Data Protection Regulation (GDPR) will be fully applicable across the EU before Brexit occurs, including in Britain. The ePrivacy Regulation is also expected to be approved before the Brexit date. Thus, at the time of leaving, the UK will have in force a system of data protection fully harmonized with the rest of the EU, both in

substance as much as in monitoring procedures. There should be no reason to create a new barrier in this area.

Recommendation: It is important to guarantee the UK-EU free flow of personal data after Brexit. The UK should ensure that it preserves in this matter the same standards it had fully accepted as an EU member state, and the EU should ensure that an equivalence authorization is in place at the very first moment after Brexit.

Recommendations

- Early clarity on comprehensive transitional arrangements for the financial services sector is essential. These should cover the period from Brexit to the date the future trading relationship comes into force. They should also take account of the time needed for firms to adapt to the new relationship.
- Future UK-EU market access should be embedded in a legally binding agreement on the basis of mutual recognition and regulatory cooperation.
- Appropriate dispute resolution mechanisms to be established to deal with any future regulatory divergence. This may necessitate the establishment of a permanent financial services dialogue between the UK and EU.
- Market participants' considerations should be appropriately taken into account in the EU's supervisory approach to relocations from the UK.
- To avoid barriers and regulatory uncertainty in global clearing and derivatives markets, the impact of proposed legislation on the EU-U.S. agreement on the equivalence of each other's CCPs regimes should be quickly clarified. Firms globally should preserve the right to continue trading in Euro-denominated derivatives.
- Financial services policymaking should remain focused on market functioning and on the creation of deep, sound and liquid markets, both in the UK and the EU. The EU financial services policy agenda should be built around the long-term objectives of economic growth and financial stability, rather than on short-term Brexit considerations.
- The UK and the EU should reach a deal that allows as much as possible the free flow of skilled labor from the EU to the UK and vice versa.
- It is important to guarantee the UK-EU free flow of personal data after Brexit. The UK should ensure that it preserves in this matter the same standards it had fully accepted as an EU member state. The EU should ensure that an equivalence authorization is in place at the very first moment after Brexit.

Intellectual Property Rights

Introduction

The UK Government's February 2017 Brexit White Paper⁸ explicitly acknowledges the importance of intellectual property rights (IPR) to exports both to the EU and globally, and the role of EU-wide regulation in protecting British intellectual property. However, it fails to address the impact of Brexit on IPR practices *per se* once the UK has left the EU, even though the potential problems are evident.

Over the course of the negotiations, the UK government should endeavor to ensure the UK can remain within the Unified Patent Court, and provide an orderly transition for the conversion of EU Trademarks and Community Designs Rights into UK registrations.

I. Unified Patent Court

The EU's Unified Patent Court Agreement ("UPCA"), once ratified by all requisite parties, will allow the Unitary Patent Regulation to come into force. The Unitary patent system will create a patent which can be granted and transferred across all participating member states, and will be litigated and enforced in a single court, the Unified Patent Court ("UPC"). The harmonized approach towards patent enforcement will allow rights holders to obtain injunctions and damages on a European-wide basis via a single legal proceeding, which should lead to less fragmentation and lower costs for rights holders than exist under the current system.

While the UPC is not an EU institution, and the UPC Agreement is an international treaty approved independently of the UK's status as an EU Member State, the Unitary Patent Regulation is an instrument of EU law that is based on the Treaty on the Functioning of the European Union, and the ultimate court of appeal within the UPC system will be the Court of Justice of the European Union ("CJEU").

Current State of Play

The United Kingdom has previously indicated that it was proceeding with preparations to ratify the UPCA, though earlier statements also suggested that the UK might review the decision in the context of the Brexit negotiations.^{9,10,11} Assuming the

⁸ <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>

⁹ UK Government, "UK signals green light to Unified Patent Court Agreement", Press release, November 28, 2016, available at: <<https://www.gov.uk/government/news/uk-signals-green-light-to-unified-patent-court-agreement>>.

UK does proceed with ratification, IP-rich industries are in a state of uncertainty as to what will happen on Brexit day. Under the Unitary patent package as currently drafted, only EU member states can participate in the unitary patent system. The UKIPO is still in a consultation phase, and the UK's position on whether to seek to remain in the unitary patent system may not be immediately evident. Nor is it clear whether the member states would modify the system to permit UK participation.

Recommended Approach to the UPC Post-Brexit

U.S.-UK Business Council members value legal certainty and want to see minimal disruption to the system. Intellectual property rights are of paramount importance to innovative industries reliant on their protection. Negotiators should find a way for the UK to remain a member of the UPC. The alternative—i.e., continued operation of the current system of domestic UK patent litigation for national and European patents, in parallel with litigation of unitary patents in the UPC—would be an adequate second-best.

Option 1: The UK Remains a Full Member within the UPC System

Proceeding with ratification of the UPCA and negotiating to remain in the system after Brexit would yield a number of benefits. The UK would give weight and credibility to the UPC, and the system would be more widely used if it covers the UK. This would also allow British judges to participate, and one of the seats of the UPC is scheduled to be in London. It would be disruptive to the system to move this court post-Brexit. Further, having the UK participate in the system over the long term would grant rights holders legal certainty and clarity regarding the status of their UK rights post-Brexit.

This approach carries with it real political challenges. All member states would need to agree to allow the UK to stay within the UPC system after it leaves. Also, the UPCA provides in unequivocal terms that the CJEU will be the ultimate court of appeal for the system. This is at odds with the UK Government's current position that post-Brexit, the UK would no longer be under the jurisdiction of the CJEU.

A potential solution would be to reach an agreement with other UPC members to allow a non-member state to participate in the system, and for the UK to accept

¹⁰ UK House of Commons, Science and Technology Committee, “Minister questioned on managing intellectual property and technology transfer”, January 11, 2017, available at: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/science-and-technology-committee/news-parliament-2015/intellectual-property-ev4-16-17/>.

¹¹ Managing Intellectual Property, “UK on Course to Ratify UPC Agreement”, March 30, 2017, available at: <http://www.managingip.com/Article/3687198/Managing-Patents-Archive/UK-on-course-to-ratify-UPC-Agreement.html>.

limited jurisdiction of the CJEU to hear appeals from the UPC, as is currently envisaged. The House of Commons Select Committee highlighted in a March 2017 report that, “there are procedural matters—such as jurisdiction, determining the applicable law, and recognition and enforcement of judgments—for which conceding a small role for the CJEU could be necessary for continued and mutually beneficial cooperation.”¹² Arguably, the UPC system could qualify as such an exception: the subject matter would be limited to appeals from the UPC; it would result in mutually beneficial cooperation; and would grant IPR holders certainty. The UK ceding to the CJEU jurisdiction over the limited subject matter of appealed patent litigation would be a small price to pay for innovative industries, both in the UK and worldwide, to reap the benefits of the UK’s membership in the UPC.

Option 2: Leave the System and Implement Parallel Protections

The UK could ratify the UPC and the system would enter into effect with the UK as a participant, but then the UK could actively choose not to negotiate to remain part of the system post-Brexit. Alternatively, it might want to remain but fail to convince the other member states to allow it to continue to participate. The possibility that the UK could enter the system and then be ejected causes uncertainty for patent holders. All would face a lack of clarity overnight as to what would happen to the UK elements of their unitary patents. Would they still be enforceable in the UK? What about ongoing litigation, or pan-European injunctions which have already been granted by the UPC?

Prior to the opening of the UPC, patent holders have a time period in which to choose to opt existing European patents and patent applications out of the court’s jurisdiction, meaning these patents would continue to be litigated in the national courts of different member states. Companies can make different choices for different European patents within their portfolios but would need to opt out any given European patent from the entire system, as it is not possible to opt out a European patent solely in relation to the UK. The uncertainties as to what would happen to the UK elements of unitary patents might encourage more companies to opt out their existing European patents. If this were the case, it might mean the UPC is less widely utilized and potentially less respected.

II. EU Trademarks

The status of EU trademarks within the UK post-Brexit is currently unclear. A process to allow owners of EU trademarks to convert their rights into UK Registrations will need to be put in place. Ideally this process should not entail re-

¹² UK House of Commons, Justice Committee, *Implications of Brexit for the justice system*, 15 March 2017, pg. 16-18, available at: <<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf>>.

examination but will need to include appropriate mechanisms for those in the opposition period or under opposition as well as an opportunity for seniority claims for pre-existing UK rights. The international trademark system (*Madrid System*) will still allow protection of trademarks in up to 113 territories including the European Union.

III. Copyright Protection

The UK should continue to uphold the highest standards on copyright protection, following the principles as set forth in the Berne Convention. The British government released a five-year strategic plan in 2016, *IP Enforcement 2020*, prioritizing the reduction of online piracy. The exact scope of the initiative is unclear, however, it promises to introduce a code of practice for intermediaries and to combat the proliferation of unauthorized streaming perpetuated by set-top boxes, an issue whose legal status is unclear in most EU countries. The UK should also continue to play an integral role as copyright policy evolves in the region, especially as the European Union continues to craft its Digital Single Market initiative.

IV. Trade Secrets

The UK independently exceeds the minimum standards of the EU Trade Secrets Directive, indicating that no major change will likely occur. However, as protection of trade secrets continues to be an emerging issue throughout the globe, the UK should continue to lead and chart the path forward on enforcement against trade secrets misappropriation.

V. Community Design Rights

Currently, UK applicants can register designs via the European Registered Community Design (“RCD”) process. Rights apply across all 28 member states and are obtained from the EU Intellectual Property Office in Alicante, Spain. A single application is enforceable throughout the EU. Uncertainty exists regarding the likely situation following Brexit, as RCDs may cease to apply to the UK. Consequently, transitional provisions will be required to convert existing RCDs into national UK Registered Designs. Such a process ideally would be automatic and without impact on the original filing or priority date.

An alternative mechanism to register design rights is the Hague Agreement Concerning the International Deposit of Industrial Designs (“the Hague Agreement”). It provides for the international registration of designs and is administered by the World Intellectual Property Organization (“WIPO”). Applicants need to be resident or a citizen of a state covered by the Hague agreement. The EU (rather than the UK) is the contracting party to the Geneva Act (1999). The UK would therefore need to accede to the Geneva Act prior to Brexit, in order to ensure

that UK residents or citizens can retain the right to apply for an International Design application. Following a public consultation in 2015, the UK Government indeed signaled its intention to ratify the Hague Agreement in a national capacity. This will allow registration in over 65 territories via one single design application.

VI. Other Issues

Brexit will likely impact the scope of IP licenses, franchise agreements, co-existence agreements and other IP contracts, especially those concerning EU-wide rights and obligations. There will be a need to review or renegotiate current contractual agreements and in particular to ensure that these agreements continue to have their intended effect outside the UK post-Brexit.

With regard to infringement proceedings, UK courts will lose the power to grant pan-European injunctions, and will no longer be a venue of choice for litigating European IP infringements. It will be necessary for parties to run concurrent infringement proceedings in both the UK and the EU. UK brand owners currently rely on the EU IP Enforcement Directive to make a single EU customs recordal. This enables customs officers in every EU member state to seize, detain and destroy potentially infringing goods. Post-Brexit, this may not be available to UK rights holders unless specifically addressed in negotiations.

Recommendations

To ensure the needs of business are met, the UK government must consider how best to protect intellectual property rights.

- The UK should remain a member of the UPC; or if UPC membership is not a viable option, the current system of domestic UK patent litigation for national and European patents should continue to operate, in parallel with litigation of unitary patents in the UPC.
- A process should be created to allow owners of EU trademarks to convert their rights into UK Registrations
- Transitional provisions should be implemented to convert existing European Registered Community Designs into national UK Registered Designs, automatically and without impact on the original filing or priority date; or that the UK accede to the Geneva Act prior to Brexit, to ensure that UK residents or citizens can retain the right to apply for an International Design application under the the Hague Agreement.

Movement of Labor

Introduction

Members of the U.S.-UK Business Council are concerned about the potential impact of Brexit on the future employment status of (i) nationals from the European Economic Area (“EEA”) residing in the UK and (ii) UK nationals residing in the EEA. The continued movement of labor with minimal disruption is vital to the future economic prosperity of both the UK and the EU.

The UK Government has made clear its intention to control and limit migration from the EU27 member states and has said it will implement a process to manage immigration in the national interest.

Mutual agreement on citizens’ legal status must be achieved as soon as possible to ensure business continuity. An immediate goal of the Brexit negotiations should be clarity on the exact date new immigration rules will apply. The UK also will need to spell out in detail how it plans to phase in a new immigration policy for EEA nationals who arrive after the mutually agreed cutoff date. EU27 member states will need to provide similar assurances for British nationals residing in their countries.

I. Skilled and Unskilled Workers

Companies doing business in the UK and the EU27 rely to a significant degree on the free movement of labor to fill skills gaps and provide goods and services to customers and partners. Interruptions to this system could increase costs significantly, increase the time required to provide goods and services, and encourage companies to consider alternative markets for future investments.

To date, much of the conversation has focused on skilled workers, due to the immediate impact Brexit could have on financial services, the technology sector, and advanced manufacturing in particular. These sectors benefit from the ability to move employees around Europe with relative ease and little or no advanced planning. This is especially important to fulfill short-term contract responsibilities.

The UK is also home to many R&D centers that serve regional or global business needs. These facilities are highly dependent on the freedom to recruit researchers from across the EEA. The UK acknowledges that its strengths in science and innovation depend on free movement of research and technical talent. Assuming Britain retains membership in the program, for example, it should commit to freedom of movement for researchers fulfilling Horizon 2020 grants.

According to a study by the Oxford Migration Observatory, more than 80% of EEA nationals currently in manufacturing jobs in the UK would not qualify to come to the UK under current immigration rules as applied to third country nationals. The law will need to provide a solution to this problem.

Finally, it is important to underscore that an emphasis on skill-intensive sectors does not provide a full picture. Many other sectors, such as the hospitality and agricultural/horticultural sectors, rely on both skilled and unskilled workers (whether permanent or seasonal) from EEA countries. For example, over 59,000 nurses and physicians in the UK's National Health Service are EEA immigrants.

II. Current Immigration Rules and Challenges

The private sector has been clear about the consequences of tighter immigration controls. Applying the UK's current third country immigration controls to workers from EEA countries immediately after Brexit would be problematic for a number of reasons.

First, it would result in the loss of a pool of rights for many individuals—not limited to EEA nationals and potentially including UK nationals too. From a practical perspective, this could cause both skilled and unskilled workers from EEA countries to reassess whether the UK is the right place for them.

Moreover, the UK Government does not have the resources to process the vast number of visa applications it would be faced with the day after Brexit.

Above all, immediately applying these restrictions would have severe business implications for UK-headquartered companies and international investors alike that rely on multinational workforces. For these reasons, a new system is needed which acknowledges the complexities that Brexit will create from an employment and immigration perspective.

III. Proposed Solutions

In June 2017, the UK Government proposed¹³ a five-year residency requirement for EEA nationals to achieve a “settled status” that would grant them equivalent rights to those accorded to British citizens. What remains unclear is the date before which European nationals need to have arrived in the UK in order to be eligible for this status. The exact requirements for achieving settled status also need to be clearly spelled out.

¹³ <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu>

To limit the impact on business, we recommend a phased implementation scheme to apply immediately after Brexit for any new immigration system that will apply to EEA nationals. This would allow a new work permit system to be designed in close consultation with stakeholders and then be rolled out at a later date. Such a scheme will be especially important if the UK government opts for a complete overhaul or reform of the current immigration rules, so that there ultimately will be one set of rules which applies to all non-UK nationals, regardless of country of origin.

Simply applying the current system which applies to non-EEA nationals for EEA nationals would not only be burdensome for businesses, but also for the UK Government. Without appropriate schemes to enable businesses in certain sectors to continue operating as they do currently, there is a real risk of (i) the cost of certain goods, including necessities like food, energy, and transport, being pushed up, and (ii) certain commercial activity leaving the UK altogether.

We recommend that any new residency and immigration rules that the UK establishes should address at least the following issues:

- a) **Resident citizens' rights:** The legal protections and rights of EEA nationals resident in the UK and British nationals resident in EU27 member states must be mutually agreed as early as possible to minimize business uncertainty.
- b) **Flexible working arrangements:** Many companies with operations in both the UK and Europe are accustomed to moving their employees around with relative ease. These companies also often promote from within, and the transfer of talent between countries is an integral element of their professional development. Such companies will need a quick and flexible inter-company transfer procedure. The current UK third country immigration process is neither quick nor flexible, and likely would stifle business if applied to EEA nationals too. Flexibility will be particularly important for professional services providers who may need to transfer staff, often at short notice and for significant periods of time. It is essential that the post-Brexit settlement between the UK and the EU enable flexible deployment of staff in this manner.
- c) **Seasonal work:** In some sectors, seasonal working arrangements for EEA nationals have been in place for many years, and businesses are heavily reliant on these individuals returning each year. Such arrangements should be protected.

Recommendations

In order to ensure business continuity and preserve investment and job creation across the UK and the EU, the U.S.-UK Business Council recommends that:

- A phased implementation scheme should be put in place, to apply immediately after Brexit, in order to give time for a new work permit system to be designed, consulted on, and rolled out.
- Any new UK residency and immigration rules should provide for a quick and flexible inter-company transfer procedure enabling flexible and frictionless deployment of staff across the UK and EU
- Seasonal working arrangements for EEA nationals in the hospitality and agricultural/horticultural sectors should be protected.
- The status of EEA nationals already working in the UK should be protected, offering them protections that match their current rights.
- The UK should retain its membership in the Horizon 2020 program and commit to honoring freedom of movement obligations for researchers and academics engaged in those research projects.

Regulatory Cooperation

Introduction: Avoiding New Regulatory Barriers

Given the deep economic integration between the U.S., UK, and the EU, members of the U.S.-UK Business Council are deeply invested in the outcome of the UK's negotiations to withdraw from the EU. While the will of the British people is to be respected, the Council is convinced that the negotiations should lead to a framework that creates as little regulatory friction and commercial disruption as possible to U.S.-UK-EU trade. If not, the cost for citizens, businesses, and governments will be immense. Significant disruptions will adversely affect supply chains and lead to changes in investment and employment strategies on both sides of the Channel.

To attain as seamless trade as possible post-Brexit, the removal of tariffs and continued customs facilitation is merely a first step. The real challenge for highly integrated economies are regulatory obstacles such as labelling requirements, manufacturing licenses, marketing authorizations, and other non-tariff barriers (NTBs). To avoid the re-emergence of such NTBs, the Council believes ongoing meaningful regulatory cooperation between the EU and the UK is indispensable.

I. Ongoing EU-UK Regulatory Cooperation

The U.S.-UK Business Council champions regulatory cooperation that identifies and progressively eliminates unnecessary regulatory divergences. This creates savings for governments, citizens, and businesses, while safeguarding public policy objectives as regulators share information and learn from each other what works.

The withdrawal of the UK from the EU carries significant risk. Guided by political considerations, after more than 40 years of intense regulatory cooperation through European integration, the UK is now engaging in a process that may lead to more regulatory barriers, rather than fewer. The re-emergence of regulatory barriers between the EU and UK must be avoided. To achieve that goal, the Council proposes an EU-UK legal framework composed of at least the following elements:

- A new and bespoke EU-UK agreement that goes beyond existing EU association agreements or deep and comprehensive free trade agreements. To reflect the novelty of this agreement, it should be based on Article 8 of the Treaty on European Union ("TEU") governing relations with the European neighborhood.
- The agreement should contain sector-specific arrangements covering goods, services, capital, persons, horizontal policies, and relevant additional measures.

Regulatory cooperation and convergence can be tailor-made to EU-UK political preferences for each policy area, but the overall ambition should be deep and dynamic in nature.

- The bespoke agreement should promote establishment of joint EU-UK institutions that can carry out a number of crucial tasks, *e.g.*, managing the scope of cooperation; notification and negotiation of future regulation; and monitoring and enforcement.

II. Forging A Bespoke Agreement

The Lisbon Treaty added a new provision (Article 8 TEU) to European law calling for the establishment of deep and enduring economic and political relations between the EU and non-member states in the European neighborhood. It reads as follows:

1. The Union shall develop a special relationship with neighboring countries, aiming to establish an area of prosperity and good neighborliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

The Council proposes to conclude the new EU-UK agreement on the basis of this provision. First, the article has never been used before as a legal basis, reflecting the unique relationship that the EU-UK should build going forward. Secondly, although the UK will withdraw from the “process of creating an ever closer Union among the peoples of Europe,” the EU and UK clearly share a desire for close and peaceful relations among neighbors. Third, Article 8(2) TEU expressly permits reciprocal rights and obligations, joint activities, and thus institutions that will regularly consult as new regulations are considered.

Whatever the outcome of EU-UK negotiations, the level of regulatory cooperation will likely be less intense than membership of the EU’s internal market. A single EU-UK ‘Neighborhood Agreement’ would act as an umbrella treaty, and provide a solid legal and political basis for continued regulatory cooperation.

III. Sector-specific regulatory cooperation

Regulatory cooperation seeks to minimize divergences and increase coordination of policy objectives and regulatory outcomes. Defining elements include the following:

- Scope of regulatory cooperation (e.g., an entire sector, or only a specific aspect of manufacturing in that sector);
- Depth of regulatory cooperation (e.g., mutual recognition versus a regulatory dialogue)
- Definitions, common terminology, and agreed data
- Institutional arrangements and extent of (binding) decision-making powers of these institutions
- Mechanism to manage future regulatory developments
- Binding dispute settlement mechanisms

The U.S.-UK Business Council acknowledges that the Single Market is indivisible and that there will be no sector-by-sector participation. Nonetheless, it is self-evident that even within the EU, the degree of regulatory cooperation differs across member states in some sectors. The same will be true for the future EU-UK relationship.

In light of this, the Council proposes that the EU-UK agreement be composed of eight pillars of EU-UK cooperation. Within each, regulatory cooperation will apply to a degree suitable to the political and socioeconomic interests of the EU and the UK:

- Goods, *e.g.*, pharmaceuticals, chemicals, medical devices, electricity, consumer goods
- Services, *e.g.*, ICT, telecommunications, audiovisual, legal, postal, aviation;
- Capital, *e.g.*, financial instruments, company law
- Persons, *e.g.*, free movement of workers, recognition of qualifications, flexibility of inter-company transfers
- Horizontal policies, *e.g.*, competition, cross border data flows, state aid, public procurement, environment, public health
- Relevant additional policies, *e.g.*, research cooperation and funding, statistics
- Justice and home affairs, *e.g.*, judicial cooperation and recognition of judgments, police cooperation and combating crime
- Security, defense, and foreign policy, *e.g.*, combating terrorism, foreign policy cooperation

It is understood that free movement of persons is likely to be the most contentious of these issues. The Council remains convinced that the EU and UK should, within the remit of their respective migration policies, create space for the legitimate movement

of workers with minimal disruption. In today's globalized society, talent should be able to move where it is needed the most consistent with local legal requirements. This is true both for highly-skilled and less skilled workers.

In all other pillars, and certainly in goods, services, and capital, the EU and UK continue to have much in common. Legal certainty and frictionless trade are paramount in these areas. To that end, the Council calls for regulatory cooperation that is deep and dynamic; overseen and implemented by appropriate institutions; and buttressed by legally binding enforcement and compliance mechanisms.

Given the diversity of each sector, a one-size-fits-all approach is not appropriate. The pharmaceutical industry is a useful example to illustrate the proposal advocated by the Council.

Take the following hypothetical. A U.S.-based pharmaceutical company wishes to place a medicine on the EU market. The product contains a new active substance to treat cancer. Current EU rules require that company to apply for a marketing authorization to the European Medicines Agency ("EMA"). The procedure is conducted centrally, and a positive outcome leads to a marketing authorization to commercialize the drug in all 28 EU member states. After Brexit occurs, the U.S. company may have to additionally seek approval from an as-yet unknown new UK pharmaceutical regulator. Separating the UK marketplace of 64 million consumers from the EU marketplace of 500 million consumers is a process that creates risk, costs, and uncertainty. In pharmaceuticals, neither EU nor UK citizens would benefit from adding additional barriers preventing approved treatments from reaching patients.

One alternate form of regulatory cooperation would be based on the European Economic Area. For example, by virtue of the EEA agreement, Norway, Liechtenstein, and Iceland have adopted the complete body of EU medicines legislation (the "*acquis*"). When the European Commission adopts a decision approving the cancer drug, Norway will grant a corresponding national authorization within 30 days. As a result, the centralized EU procedure also provides access to the Norwegian market.

The Council does not advocate that the UK join the EEA, but, rather, proposes that the EU-UK agreement borrow elements that can help minimize regulatory frictions to trade. The EEA possesses institutions that permanently update the common body of laws, has a court system to interpret and enforce the agreement, and the extension of the internal market in pharmaceuticals is nearly seamless. A comparably intense degree of international regulatory cooperation is suitable for a number of other

sectors as well, including medical devices, civil aviation, telecommunications, electricity, and others.

IV. New Institutional Arrangements

Pursuant to the UK's "Repeal Bill," the entire body of existing EU law will be converted into UK law on Brexit day, so that the same rules and laws will apply on the day after the UK leaves the EU.

Although an important first step, frictionless free trade must also be guaranteed for the future. To that end, the Council advocates an EU-UK agreement that sets up joint institutions to carry out a number of tasks on a permanent basis, including: continuous consultations that include regulators and relevant industry representatives, as well as negotiations about future regulation; effective mechanisms to monitor implementation of jointly agreed regulatory objectives and regimes; and judicial enforcement of any EU-UK agreement and related arrangements thereunder.

Recommendations

The U.S.-UK Business Council seeks seamless trade in goods, services, and capital as a central outcome to EU-UK negotiations. This will require an ambitious and effective regulatory cooperation mechanism.

- The UK and EU should agree on a bespoke legal framework that enables deep and dynamic regulatory convergence, encompassing those sectors where the EU and UK mutually benefit from a continued close relationship. This requires that both parties either adhere to the same set of rules, or at a minimum, accept each other's rules as equivalent.
- These rules should cover all aspects of a given business sector and address as many sectors as possible, to avoid increased complexity in terms of access to each other's markets.
- Effective mechanisms for regular consultation, enforcement, and a means to jointly address newly emerging issues will be essential.