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# A new UK/EU relationship in financial services

A bilateral regulatory partnership



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## A new UK/EU relationship in financial services – A bilateral regulatory partnership

The proposals in the UK Prime Minister's speech on 17th January and the White Paper on 2nd February will require a new construct for cross-border regulatory coordination between the EU and the UK, which will operate in a complex legal and regulatory environment (outside the EU/EEA single market). CMS and the Legatum Institute Special Trade Commission have produced a joint report which looks at how the new UK/EU partnership might work in the field of financial services. The report aims to move away from binary and simplistic discussion (such as 'passporting' versus 'equivalence') and to contribute to the development of a more informed consensus. The partnership concept that the report envisages is flexible to cater for all political outcomes and is highly negotiable. The report seeks to explain and illustrate the spectrum of possibilities, but it does not attempt to fix on detailed measures or on the priorities for each sub-sector/area of FS. We would like to acknowledge the contribution of various recent reports in this field<sup>1</sup> which have been very helpful in the writing of this report.

The key findings of the report are summarised in this brochure. A copy of the full report is being made available on the [RegZone](#).

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<sup>1</sup> These include [Barnabas Reynolds/Politeia](#); [FSN Forum/Norton Rose Fulbright](#); [IRSG/Hogan Lovells](#).

## Key findings

### Avoiding confusion

The debate about Brexit and financial services has been confusing for the public and practitioners. Much of the jargon in use means different things to different people. Brexit will require a joint approach combining the practice and terminology of free trade negotiation on one side and the world of European financial services regulation on the other.

We have coined the expressions 'dual regulation coordination' (or 'DRC') and 'dual regulation barriers' (or 'DR barriers') to enable us to address cross-border supply (in the broadest possible sense) and to reference the broad variety of barriers from a host state regulatory regime and the measures used to coordinate dual regulation between home and host state (and thereby eliminate or reduce these barriers). We wanted to include all of these measures and not to use the language of any one example (such as 'passporting', 'substituted compliance', 'home state regulation/supervision', 'deference', 'mutual recognition' and so on). We also wanted to differentiate between the **measures themselves** (which are the objective/benefit to be achieved/agreed); and the **criteria or pre-conditions** for the application of such measures (such as findings of 'equivalence', 'comparable regulation', 'justification by quality of regulatory regimes', 'harmonisation' and so on).

We have referred to a 'DRC agreement' between the UK and EU to address DRC measures. This is intended as a neutral term but it could be described using other terminology such as treaty/accord, MRA or mutual recognition/bilateral/super equivalence.

The status quo – cross-border financial services under the WTO, single market and other regimes (Chapters 2 to 5)

### Full host state regulation/dual regulation is a major barrier to cross-border/foreign operation

When FS firms seek to provide financial services from their home state into another country (the host state) or from within the host state, they face substantial barriers from the host state regulatory regime (DR barriers). In some cases these barriers **preclude cross-border modes of supply altogether**. A firm may require host state authorisation which is only possible if it establishes a local branch; a host state may refuse to authorise a branch and may require a local subsidiary to be used. In other cases, regulatory requirements may conflict making cross-border supply or international infrastructure impractical. Additional DR barriers are a mix of financial barriers (ineffective use of capital and resources), operational difficulties (maintaining multiple entities, licences and compliance operations) and associated cost.

DRC measures remove or mitigate these DR barriers.

### There are three policy parameters at play (forming a triple policy axis)

These are –

- Trade policy (i.e. external commercial policy), including WTO and the broader spectrum of open access versus protectionism.
- Regulatory policy in financial services and its prudential objectives in terms of consumer and market protection and financial stability including risks to the host state posed by incoming firms under DRC.
- Competition aspects – the competitive dynamic of incoming firms and the impact of regulation on competition.

These 3 policy perspectives are all at play and feature throughout the report.

### **Market access (in WTO/FTA terminology) is not the real or immediate priority for financial services – an agreement on DRC is required**

Financial services firms, like other service providers, face 'behind the border barriers' to cross-border supply around the world. Outright discrimination against foreign firms (such as quantitative or economic limits) is one example of these barriers. Chapter 2 of the report analyses multilateral WTO/GATS obligations and modern FTA terms as they apply to financial services.

Modern free trade agreements (such as CETA and TPP) provide **market access** rights for financial services firms in many business lines and prohibit discrimination against foreign firms. However, they normally permit the host state to impose its regulation (such as requirements for local authorisation and capital) under WTO terms on 'national treatment' and the 'prudential carve-out'. Extensive mutual recognition has been limited to the goods sectors.

No FTA (with the EU or between other states) has involved significant DRC measures in financial services. Colloquially put, there has never been a real (i.e. substantive) free trade agreement in financial services.

Discussion of 'market access' rights in financial services (as used in WTO/FTA terminology) is to miss the point; after Brexit UK FS firms doing business with EU states and EU firms doing business with the UK will face substantial new DR barriers as dual regulation is re-imposed, unless DRC measures can be agreed. The conclusion of Chapter 2 is that the application of default WTO rules (i.e. the financial services commitments in the EU's WTO schedules) will not assist materially in this regard; nor would an EU/UK agreement based on the most advanced FTAs in the field (such as CETA). An agreement on DRC is required.

### **There is a broad spectrum of potential DRC arrangements**

Chapters 3 to 5 of the report look at the practicalities of FS cross-border business and the impact of dual regulation and DR barriers. This covers the 3 main modes of supply under the WTO/FTA regime – cross-border supply (mode 1), consumption abroad (mode 2) and commercial presence i.e. via a branch or subsidiary (mode 3). Chapter 4 looks at a range of different DRC arrangements both within the single market and elsewhere. The DRC options are far from binary – there is a broad spectrum of possibilities (in terms of what may be proposed and what may be agreed in a DRC agreement).

### **EEA states operate extensive single market DRC internally; firms/infrastructure operating across the EEA/UK will face substantial new DR barriers at Brexit**

The single market 'passport' is a package of, mainly prudential, DRC to create a 'single licence' for firms from any of the 31 EEA states which is valid for the entire EEA; this now covers most FS infrastructure and sectors/activities. It is based on harmonisation (on a minimum or maximum basis) of applicable rules. The package has many elements, but it is possible to have 'passports' with less DRC (as well as reduced scope). Some passporting was originally introduced with less DRC. The single market also has **important DRC in many areas other than 'passporting'**.

At Brexit the UK will become a 'third country' under the EU regime and UK firms/infrastructure will lose this single market DRC and face new DR barriers in relation to their EEA business; EEA firms would lose the DRC in relation to their UK business. The loss of single market DRC will also be a new DR barrier to pan-European 'hubbing' (most especially out of the UK).

If one considers the most extreme scenario where EU level DRC was not replicated at all (by any of the states - via agreement or equivalence findings etc.) – then cross border supply (mode 1) which is currently free and frictionless will become completely prohibited in many scenarios, particularly for supply into countries such as France. In these cases, suppliers will have to move onshore (i.e. switch to mode 3) and use a local subsidiary (or a branch, where permitted) and obtain local authorisation. Those operating via branches under mode 3 may be able to switch to dual authorisation status (which is much less efficient than the single licence) but in some cases will have to establish a free-standing local bank/insurer/subsidiary (which is likely to involve even greater cost). Critical UK based international infrastructure would also be impacted.

EU/EEA groups would face similar barriers but would (on the basis of the current UK treatment of foreign/TC firms) benefit from a more open approach – compared to say France – e.g. for modes 1, 2 and 3 (for branches). UK/TC groups may switch business from single licence supply from UK entities to an EEA subsidiary and then use its single licence as a hub across EEA states.

Operations would also be impacted by a **loss of DRC in other areas** e.g. where firms would be prohibited from using foreign services (e.g. benchmarks) or would suffer adverse capital treatment or increased costs from a loss of DRC. A number of structures which firms adopt to address DR barriers (such as fronting/bridging, back to back transactions, outsourcing and delegation) may be impacted by a loss of DRC.

**TCFs (such as firms from Switzerland) face high DR barriers to EU/EEA business and enjoy very limited DRC (when compared to single market participants)**

Without EEA membership, Swiss firms face high DR barriers to EU/EEA business and DRC is limited.

**DR barriers and available DRC vary considerably from one EU/EEA country to the next - a complex mix mostly of national rules but also involving international arrangements and EU measures**

DRC available to Swiss firms is a complex mix of national member state DRC, a bilateral Swiss/German accord on UCITS, a bilateral 1989 EU/Swiss Treaty on direct non-life insurance branches and EU level harmonisation of external treatment/TCFs (Switzerland follows a large proportion of EU FS legislation and gains available EU equivalence based DRC) some of which reflects international arrangements. Swiss firms therefore take advantage of DRC available to any third country, DRC that is available to third countries that are 'equivalent' (under both EU level and individual member state national DRC arrangements) and some 'Swiss only' DRC under 2 bilateral treaties/accords – one with the EU and the other with one individual member state, Germany.

There are a mix of DRC channels and structures; there are a variety of international arrangements (plurilateral and bilateral) – as well as WTO style market access, there are formal international treaties on DRC (see the 1989 insurance treaty above) and less formal DRC accords, sometimes at a regulator level (see the 2016 accord below). There are EU level third country DRC measures (e.g. 'equivalence' based DRC and some other harmonisation which may increase barriers) and national level DRC arrangements (see below). The latter often operate at a regulator level and on the basis of regulator to regulator arrangements.

Both the DR barriers (including local 'perimeter rules') and the available DRC vary extensively from one EU/EEA state to the next. Some EEA states are more protectionist, such as France; others are relatively more open, such as Ireland (and indeed the UK). Some have systems for registration/authorisation for cross-border service supply; some have exemptions, whilst others seek to require suppliers to come onshore to obtain local authorisation.

Mapping by CMS of the DR barriers and available DRC for TCFs across the EU/EEA shows the extensive variances from one EU country to the next and the complexity for TCFs doing business with the EU/EEA. For UK firms trying to assess this matrix and the potential DR barriers that they will face at Brexit, two key ingredients are unknown – the extent of bilateral DRC to be agreed (i) between the UK and EU and (ii)

between individual member states and the UK. There is also uncertainty as to how EEA states' domestic level DRC policy will be applied to the UK (and vice versa) and whether EU equivalence based DRC (under current EU legislation) will be available at Brexit. Some of this is 'passport-type' DRC, and some is DRC in other areas. These apply only to a limited FS scope and with limited DRC; the passport DRC elements are limited in scope and depth.

EU legislation gives various powers in relation to bilateral accords – for example the Swiss/EU treaty above and the 2016 European Commission/CFTC accord on central counterparty regulation. The latter arose under the auspices of the G20/FSB and was implemented by equivalence findings by the EU under EMIR and comparability findings by the US under Dodd-Frank respectively. Existing powers are, however, limited in scope.

**An extreme loss of DRC at Brexit should be 'unthinkable', but the negotiations will determine the breadth and depth of DRC that survives**

Due to the variety of DRC channels, Switzerland/EEA has greater DRC (see below) than in the extreme scenario above for the UK. A comprehensive loss of EU/UK DRC at Brexit in the extreme scenario above would make no sense for the EU or UK. It would represent a total failure of negotiation and a reversal of recent global cooperation on financial stability. We would like to think that this scenario falls into the category of the 'unthinkable' and that DRC must continue; the uncertainty is really about how broad and deep that DRC will be.

**The UK should not rely upon unilateral EU findings of UK 'equivalence' and the DRC under these processes would not be a satisfactory alternative to the broader transposition of DRC**

If the UK were to leave the EU without any agreement, UK firms in some lines of business and for certain modes of supply would be assisted by the EU determining (on a unilateral basis) prior to Brexit, that relevant UK regulation was 'equivalent' and thereby activating, for the benefit of UK firms, EU external DRC measures. This, however, would not prevent the re-introduction of most of the many substantial DR barriers which have been eliminated between EEA states (because of the limited scope of EU external DRC). The unilateral basis of the DRC measures would mean that they could be withdrawn at a later stage without recourse. The UK should not rely upon unilateral EU findings of UK 'equivalence' (see further below re a baseline accord). The DRC under these processes would not be a satisfactory alternative to the broader transposition of DRC (see below re the implementation of DRC by the EU).

### **There is a danger that the description of the new treaty as an 'FTA' could lead to a misunderstanding as to the scope and scale of what is being proposed**

There is a danger that the description of the new treaty as an 'FTA' could lead to misunderstanding of the scope and scale of what is being proposed. If, for example, the negotiations were to start by taking recent EU FTAs (such as CETA and TTIP) as a start point/precedent, this would miss the point entirely. Whilst these agreements are helpful in certain respects, they lack the substantial DRC which is necessary between the UK and the EU. It is important that the terminology does not confuse this message.

### **A new UK-EU partnership (see chapter 6)**

#### **We recommend a two-pronged approach in financial services – looking at market access and DRC separately**

In the field of FS we believe it is best to think of a two-pronged approach – dealing with market access and DRC largely separately (at least initially). This reflects the different approaches and caters for the possibility of interim measures being required. We consider the potential terms of a UK/EU DRC agreement in the report; this is a **bilateral** agreement for **reciprocal** DRC measures.

#### **The DRC agreement cannot follow CETA and simply establish a committee to deal with DRC – detailed DRC measures must be in place for Brexit**

Detailed DRC measures should be in operation from Brexit without any gap. If DRC is lost at Brexit, firms will have to react accordingly relying on contingency planning; re-establishing DRC at a later stage may come too late for these businesses.

#### **The UK can and should offer full harmonisation with the entire EU acquis<sup>2</sup> - but potentially limited to internal rules**

The UK is proposing to transpose all EU single market rules (across all sectors and including cross-sectoral (in trade parlance, horizontal) rules such as employment); it can therefore offer complete homogeneity with EU standards, in form and substance, as the start point.

It is also committed to implementing all upcoming EU legislation in the period up to Brexit (including the period after Article 50 notice has been given). This includes major reforms such as MiFID II, the development of the EU regime via decisions of the CJEU and new binding technical standards and ESA guidelines.

<sup>2</sup> Other than the treaties, the customs union/common commercial, agriculture and fisheries policies and foreign policy type parts of the acquis.

The transposition of FS rules falls into various categories, including:

#### **— EU 'internal' harmonisation independent of EU/EEA dual regulation coordination can be transposed onto a domestic law basis unilaterally**

The UK can proceed on a unilateral basis to 'port' all EU derived internal regulatory requirements (whether directive or regulation) onto a domestic law basis; this applies to any EU rules which can stand alone without dual regulation coordination. This requires extensive and painstaking work and raises some policy issues such as the status of post-Brexit judgements of the CJEU, but it can be completed without any agreement with the EU.

#### **— EU provisions which establish or reflect dual regulation coordination cannot be transposed unilaterally and must await the negotiations**

Some EU provisions, however, concern or are based upon dual regulation coordination between EU/EEA member states. The UK does not know to what extent these will need to be adapted, transposed or replaced (with other cross-border arrangements or domestic only provisions). Preparations under the Great Repeal Bill will need to treat these provisions on a provisional basis (on a worst case scenario of no agreement between the UK and EU) but with a process for implementing the final terms of the DRC agreement.

#### **— EU rules on third country firm treatment**

There are some EU harmonised requirements for the treatment of third country firms. Some apply to all third countries and others differentiate on the basis of 'equivalence'. These include not only the limited passport rights for firms from equivalent third countries but also requirements for branches of insurers from all TCs and recent proposals requiring intermediate EU parent undertakings for large TC bank groups. The UK would need to decide whether to port or mirror these requirements on a domestic basis i.e. to continue treating third country firms within the parameters of EU requirements. Some of these could be ported unilaterally; others involving DRC dependent on European Commission decisions on equivalence are less likely to be ported. The latter would require an agreement effectively to maintain the UK's external regime as part of the EU/EEA external regime (e.g. making TCF registration with ESMA under MiFIR valid for UK business). The UK may, however, decide that some aspects of the third country requirements would not be ported over or would not be maintained outside the period of interim measures, for example to avoid constraining the UK's external policy vis a vis non-EU/EEA countries (see Chapter 8 for a new framework under FSMA for external relations DRC).

— **The roles of the ESAs in direct regulation (for example in regulating specialist firms, such as rating agencies, and ESAs’ emergency powers)**

This may involve assigning current EU level roles/powers to the PRA or FCA, but DRC might involve other options, for example, some element of ESAs’ authority might be recognised in the UK.

**There is strong economic case - for both the EU and UK – for transposing full DRC at the outset and certainly for any interim measures**

There is a strong economic case – for both the EU and UK - for transposing full DRC (as it currently applies within the single market) at the outset. There is unparalleled regulatory homogeneity between the UK and the 27 EU states.

**The UK should make its case for DRC – in trade, regulation and competition policy terms**

Pure politics and horse trading across sectors may well feature in the negotiations. In principle however, the case for DRC will rest on the triple axis (see above) of external trade policy, effective cross-border regulation and competition. The UK may seek broader/deeper DRC than certain EU states may be inclined to seek.

The UK can make its case at all three policy levels – its open policy towards foreign firms and the proposed mutual access and treatment for EU firms (in trade policy terms), the lack of risk to EU states from DRC on account of the UK’s effective supervisory and domestic regulatory regime and its close proximity to EU harmonised rules and the UK’s approach to fostering competition in the FS sector. On purely regulatory grounds, the UK could argue against full recognition of the EU regime on the basis that other states have not adopted the robust post-crisis measures that apply in the UK banking sector (e.g. ring-fencing and the senior managers regime). The UK can make it clear that, notwithstanding these differences, it is prepared to trust regulation in the 27 EU states by continuing DRC.

**Even if the scope of DRC was likely to be limited eventually, there would be a strong case for maximising DRC under any interim measures**

If Brexit is implemented in two stages, there would be a strong case for maintaining DRC under the interim measures. This would have two objectives – to avoid any DRC being lost for the interim period, if it was possible that it might be agreed under the final deal, and to provide help in the transition (particularly, for example, if there was not to be a sufficient period of adjustment for firms between interim measures being confirmed and their coming into effect).

**There may be a logic for a baseline accord approach to entrench key DRC at the outset but with greater DRC to be agreed later**

There may be key elements of DRC which can be agreed at the outset as an ‘early harvest’ in the negotiations (because they are non-controversial/not really in doubt). Both sides may wish to establish an early reciprocal accord as a baseline agreement of DRC that is agreed and guaranteed at the outset (and therefore taken out of the negotiations). These might relate to international commitments on FS infrastructure (for example under the G20/FSB arrangements, the 2016 accord between the European Commission and the CFTC on CCP regulation would need to be extended to include the PRA/UK on a tripartite basis or by bilateral accords) and might cover all DRC currently available to third countries under existing EU FS legislation. Hopefully, these measures would be non-controversial. Broader/deeper DRC could then be negotiated as part of the new partnership/relationship.

**The objectives of the DRC agreement should be agreed at the outset**

The objectives of the DRC agreement should be agreed at the outset. These should cover regulatory cooperation in the broadest sense with the objective of securing effective regulation and reducing DR barriers –

- Facilitating and providing the legal framework for supervisory cooperation (including information exchange and supervisory colleges) between, on one side, the PRA/FCA and, on the other, the ESAs and national regulators.
- Cooperation on the development of the regulatory regime and regulatory reform including in relation to international standards.
- The adoption of specific DRC measures at the outset and the arrangements for DRC in the future (as considered below).

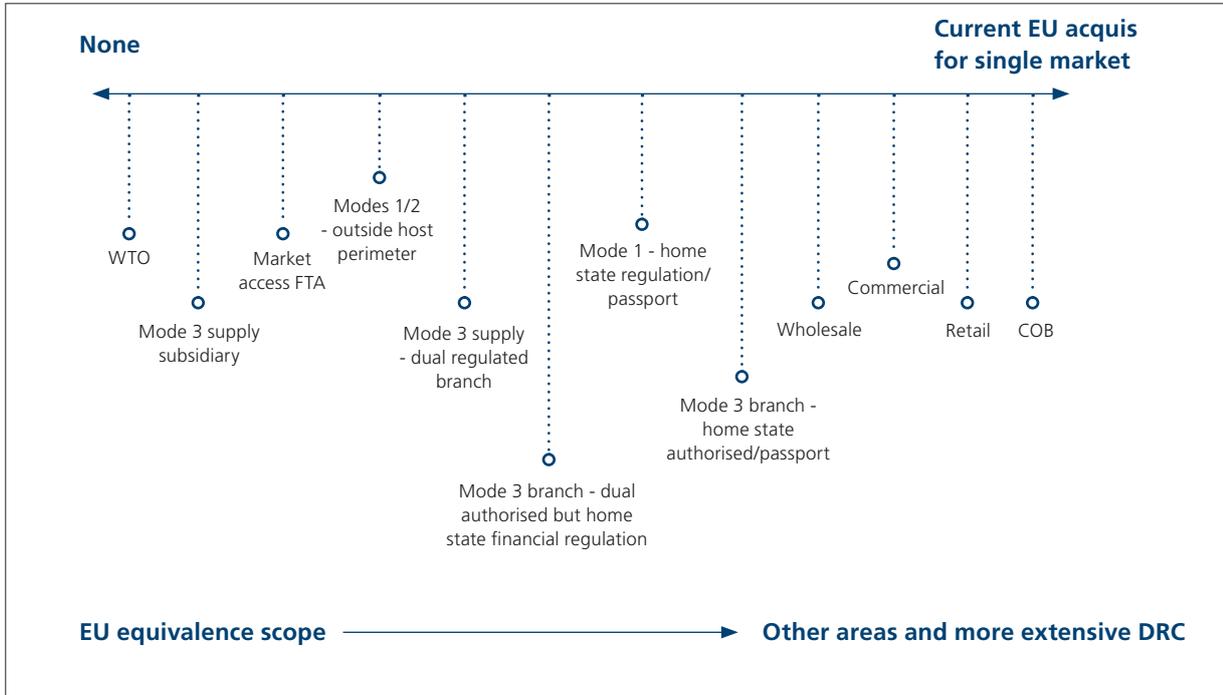
This could acknowledge a joint desire to maintain mutual access and regulatory cooperation between the two sides and to maximise DRC consistent with avoiding host state risks from ineffective home-state regulation or in competition terms.

**Financial stability should be a common objective in the negotiations**

In recent years, regulatory reform has focused on financial stability and the mitigation of systemic risk. These issues have been addressed at international, EU and national levels. The objectives for the DRC agreement should include financial stability based on a technical and objective basis of what DRC, in the broadest sense, can contribute. For example, it is difficult to see any basis, consistent with G20 financial

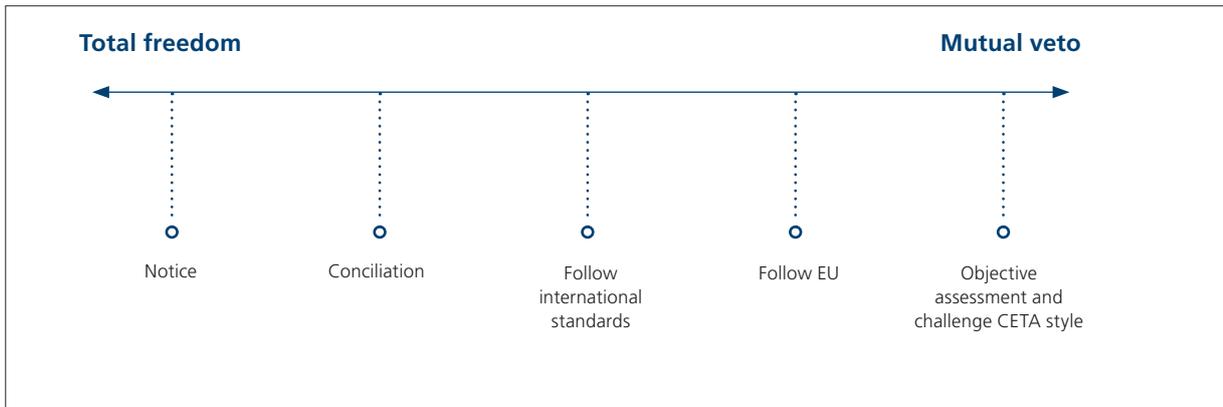
Charts to illustrate key findings

DRC scope and depth illustrations\*

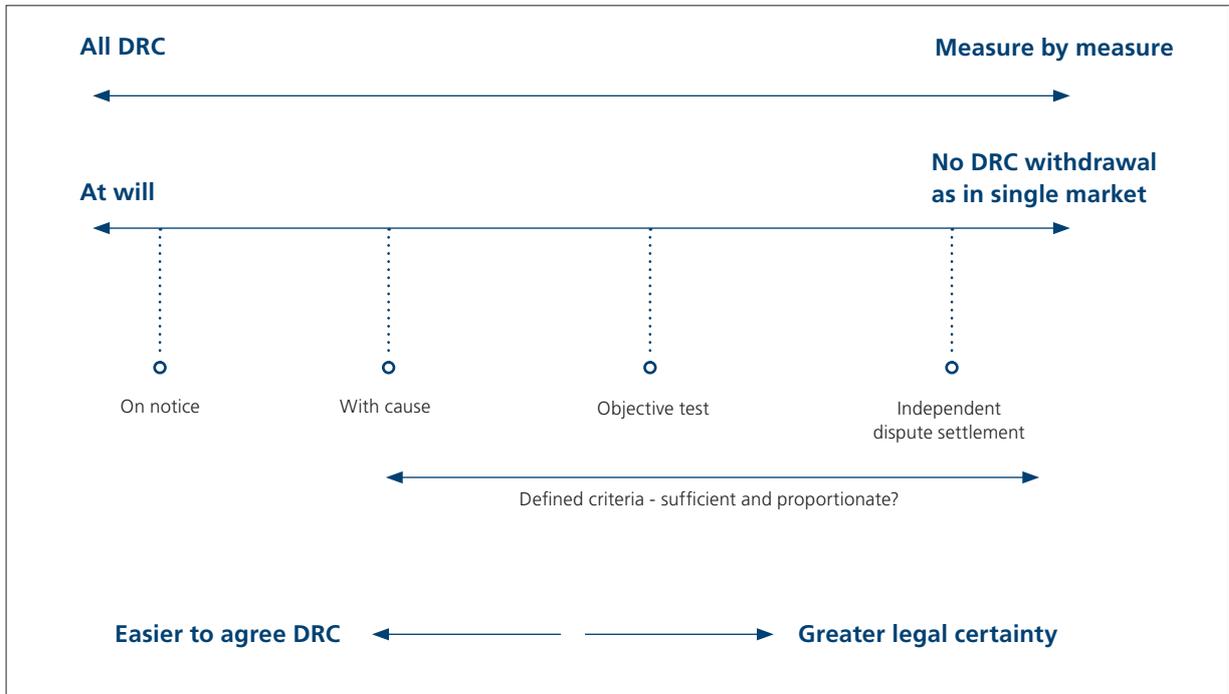


\* See chapter 6 of the full report for a detailed explanation.

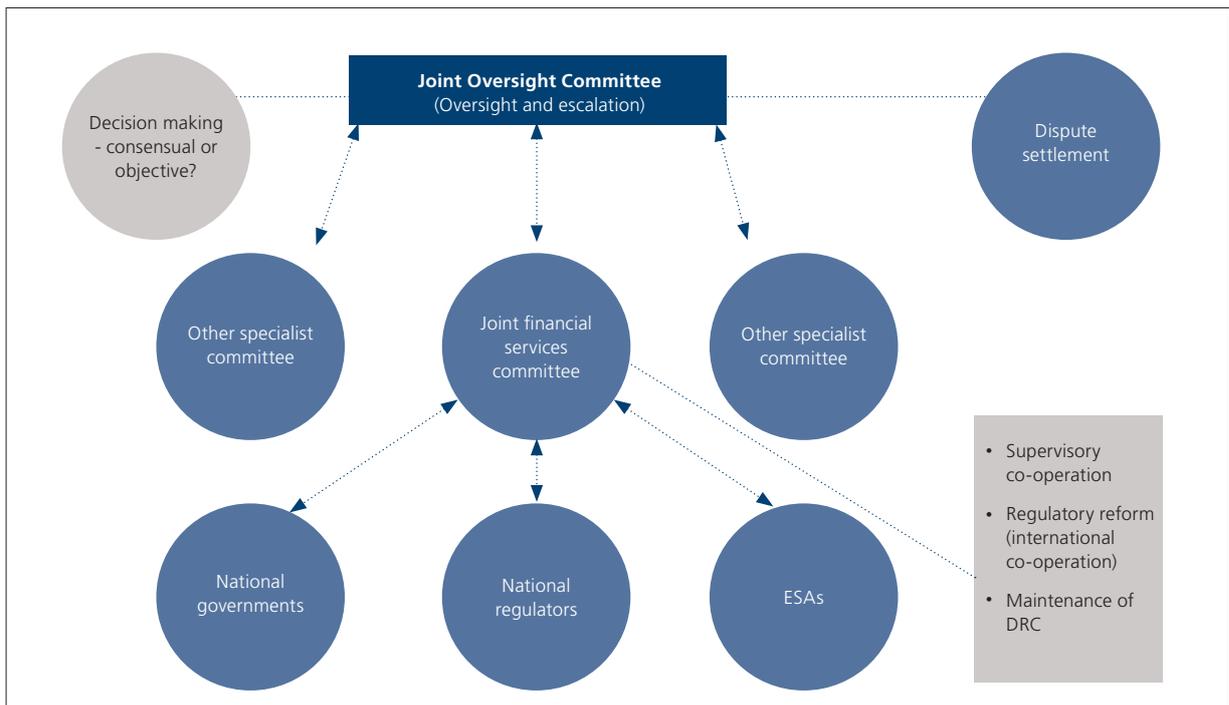
Rules freedom



## DRC withdrawal



## FTA-style Governance – How DRC could fit



stability commitments, for the EU withholding DRC for UK central counterparties<sup>3</sup>. This should be apparent even before one considers broader concerns that fragmentation of the City would have an adverse impact on financial stability and on the financing of the European economy. Any potential plans on the EU side for the clearing/settlement of euro-denominated transactions should not threaten these arrangements.

### **We have looked at three parameters for the DRC agreement – DRC scope, rules freedom and DRC withdrawal**

Chapter 4 of our report combines a WTO/FTA and a regulatory perspective, looks at the different modes of supply and other areas of DRC and illustrates DR barriers.

It unpicks the different DRC techniques/measures used in each of the modes/areas (under various different international regimes including the single market). This analysis is used in Chapter 6 which looks at the proposed DRC agreement and the potential scope of DRC measures, and at rules freedom (i.e. the extent to which each side can change its rules unilaterally and/or the procedures to be followed – e.g. prior notice) and DRC withdrawal (i.e. the procedure to be followed and the criteria which might determine whether divergence should or could lead to DRC withdrawal). The spectrum of possibilities is illustrated in 3 charts above. We have not attempted to define a landing point for the DRC agreement; indeed it may vary for different areas/sectors/legislation (a ‘mix and match’ approach).

### **The current UK/EU DRC under the single market is broad in scope with substantial home state reliance; there is a wide spectrum of potential outcomes in terms of the scope and depth of DRC to be agreed for Brexit, possibly with different outcomes in different areas**

Current DRC between the UK and the other 30 states of the EEA (under the single market) is broad in scope with substantial reliance by host states (for example) on the home state regulation of incoming firms. As the charts illustrate (and Chapter 4 of the report explains in detail), there is a wide spectrum of potential outcomes in the scope and depth of DRC which may be agreed in any one area. Different DRC may apply area by area and in any one area variances are possible, so for example full single market DRC might be replaced by restricted DRC in one mode of supply but full in another or there might be no DRC for another mode. Greater DRC may apply to wholesale and less to retail. Mode 3 branches may be permitted but the extent of DRC may be less than under the single market. DRC may apply to prudential regulation but not to conduct of business etc.

<sup>3</sup> See, for example, FSB’s 2010 report [Implementing OTC Market Reforms](#). The report describes CCPs as critical infrastructure and states ‘the need to ensure non-discriminatory access to CCPs’.

The possibilities are far from binary and may differ from one area and mode to the next.

### **Regulatory divergence should be permitted, not prohibited, and must be catered for in the DRC agreement**

Neither side will have a veto over the regulatory rules of the other side; the UK, as a third country with a substantial financial services sector, cannot be bound in perpetuity to all EU FS legislation as it emerges. A permanent EEA style model of ‘follow all EU measures’, as accepted by Norway, Iceland and Liechtenstein, would not be practical or desirable for the UK. Divergence is therefore a possibility eventually which must be catered for in the DRC agreement. Unless the agreement prohibits divergence which would threaten DRC (which we also do not think is practical or desirable), the agreement must cater for the possibility of DRC withdrawal (as well as increased/new DRC measures).

Even in areas where the EU harmonisation has been controversial, such as Solvency II (see the [current TSC enquiry](#)), the UK may well decide to maintain the EU derived regime (and not, for example, revert to the previous domestic FSA insurer prudential rules), subject only to some relatively narrow issues where divergence is seen to be desirable (and which may be resolved with the EU). Post-Brexit freedom to move away from EU harmonisation, as ported across for Brexit, may not therefore be exercised to a significant extent in the short to medium term; the question of future rules may be a greater source of divergence, but DRC should not be sacrificed unless and until substantial divergence poses real and unacceptable risk. This should not be based on narrow concepts of matching or equivalent rules but on a substantive assessment of regulatory outcomes and whether the host state would be exposed to unacceptable risk by relying on less effective regulation in the home state. The report refers to these as the principles of sufficiency and proportionality – i.e. that the assessment is relative to the risks involved (as one sees in other DRC arrangements such as the Bank of England’s differentiated policy on third country bank branches).

### **The UK can consider various and varied options for ‘mirroring’ EU requirements and maintaining close proximity to EU harmonisation**

The UK can consider various options where it wishes to maintain close proximity to EU harmonisation. This could be a commitment in the DRC agreement or it could be a unilateral policy decision for the UK. In the former case, it could be binding or an expression of intent and could be limited in time (e.g. for the interim measures period) or to specific pieces of EU legislation. Proximity could be defined in various ways; it might also treat the existing

acquis/ported rules at Brexit differently from rules introduced after Brexit.

The UK can offer full EU compliance at Brexit. In principle the UK could offer continued complete conformity (at some level or at least in some areas) and full single market DRC at the outset and for interim measures. Under the final arrangements the UK might be under no legal obligation to maintain EU derived requirements but might choose to do so in practice - thus ensuring related DRC was not at risk.

### **The spectrum for the DRC withdrawal basis is very broad with many options**

There are many different options for the process, procedure and the basis and extent of DRC withdrawal following divergence (or otherwise). There are attractions in seeking objective criteria (as to whether divergence has resulted in an unacceptable increase in risk for one side - as a host state relying on home state regulation of incoming firms) and even of making this subject to independent assessment, such as via dispute resolution/arbitration.

There are potential dangers, however, in that such an approach may be difficult to define and result in the parties being nervous of agreeing extensive DRC. Outside the single market DRC is often agreed (successfully) on a more consensual basis and with arrangements subject to termination on relatively short notice periods.

### **Implementation of DRC on the EU side will be more complex than in the UK; it must go beyond current EU legislation**

The DRC agreement can be implemented in the UK via domestic legislation. This would dovetail with the transposition of the EU acquis in the Great Repeal Bill. DRC in the acquis would have been stripped out and would effectively be replaced by new procedures, processes and transition and the new DRC regime (see Chapter 8 of the report re a new framework under FSMA for external relations and DRC).

Implementation on the EU side is more complex. The normal basis for the EU (and other countries) entering into DRC accords appears to be essentially consensual. This may enable each side to utilise its domestic procedures to implement the accord (procedures which may be open to other countries and have their own DRC withdrawal criteria/mechanisms) rather than specific powers for the bilateral relationship. One can, however, envisage less consensual approaches (such as reliance on international standards or even objective standards) being used and even a mix of approaches for different DRC. (Although there may be a trade-off between increased legal certainty and limiting the DRC that either side feels comfortable operating on a non-consensual basis.)

The DRC agreement should not be limited to DRC which is already subject to EU level measures. The DRC agreement needs to include DRC that is not currently provided for under EU FS legislation (in terms of equivalence based DRC, or agreements, with TCs) and potentially to put DRC on a different basis to existing TC DRC powers. It would be illogical to regard the present set of EU TC DRC provisions as the limit of DRC measures to be agreed with the UK. EU level harmonisation of TC DRC is patchy and many areas are un-harmonised/differ at member state level. More extensive DRC is logical for both the UK and the EU states. DRC is not a case of 'privileged access' one way or the other if it is supported by the necessary regulatory cooperation.

Implementation will raise technical legal issues on the EU side and might involve further EU harmonisation or member state level arrangements. Depending on the level of DRC agreed with the EU, it may also be necessary/desirable to address DRC barriers at an individual EU state level (for example, in relation to un-harmonised aspects of member state TCF treatment and related DRC). This might be coordinated within the DRC agreement or be covered in separate **national DRC agreements**. There is a precedent for the latter – the Swiss/German agreement on UCITS distribution<sup>4</sup>. The flexibility of international law should be used to address the restraints and difficulties that arise under Article 50 and the rest of the EU treaties.

### **The EU and UK should promote the development of dual regulation coordination standards**

This topic has recently been considered by Andrew Bailey - [Free trade in financial services and global regulatory standards: friends not rivals](#). In the new UK/EU partnership, both sides should commit to work together for the development of international standards (which are currently more developed in banking than, say, in insurance).

There should also be a new focus on international prudential standards as a mechanism for dual regulation coordination, to reduce the barriers from dual regulation and stimulate trade and competition. However, the UK should not rely only on the EU, but also its relationship with the US, and other financial services centres such as Switzerland, Hong Kong and Singapore to help develop undistorted standards. Conduct of business, however, is likely to remain the preserve of the host state.

The UK should be taking the lead in promoting this policy; the success of UK/EU partnership could provide further momentum. In future a distinction might be drawn between international standards of broad application around the world and higher standards where a smaller group of countries use these to agree dual regulation coordination.

<sup>4</sup> The [agreement](#) entered into force in 2014 to implement a simplification in the marketing of Swiss securities funds (*Effektenfonds*) in Germany, and German UCITS in Switzerland.

### **A DRC agreement will be required as any broader re-structuring of international and European regulation cannot be guaranteed**

There are a variety of longer term possibilities for re-structuring international and European<sup>5</sup> regulation/ DRC arrangements but the UK cannot be confident that these reforms can be achieved in time for Brexit. A DRC agreement is therefore very likely to be necessary.

### **The conclusion of a DRC agreement would be consistent with WTO requirements**

The conclusion of a DRC agreement would be consistent with WTO requirements including MFN, market access and national treatment obligations and there would be no need to cast the DRC agreement:

- in terms similar to recent FTAs such as CETA, or
- by reference to WTO market access terminology or with WTO dispute resolution.

There are GATS obligations regarding recognition of prudential measures, licensing, qualifications and similar, under which recognition granted to one country must be made available to other WTO members who meet the same criteria of equivalence, implementation, oversight and procedures for information sharing, so it would in theory be necessary for other states to have the ability to apply for the same DRC. However, if there was reluctance on either side to countenance other countries participating in DRC, there is an exception in the GATS MFN obligations for bilateral arrangements that form part of an agreement with 'substantial sectoral coverage' that eliminates all discrimination in the areas covered. The DRC agreement is therefore likely to be consistent with the GATS obligations if it operates as part of/under an FTA umbrella. Unlike the GATT in respect of trade in goods, the GATS does not expressly extend this to cover interim measures<sup>6</sup> pending an FTA but in practice, sectoral and bi-/plurilateral liberalisation is possible under the GATS 'built-in agenda' which looks to progressively liberalise services trade through a process of 'requests and offers' between WTO members. This could be deployed to mitigate the risk of challenge from other members if DRC were not to be made available to them during any interim period. This is an issue that warrants further consideration, including in the context of the WTO's ongoing work on services liberalisation. Existing EU DRC legislation is already on the basis of open access to countries who meet the applicable criteria, but GATS obligations would impact how the EU implemented the agreement on other DRC and how the UK implemented DRC in its domestic regime (see above and Chapter 8 of the report).

<sup>5</sup> There has been some speculation that the new UK/EU agreement might eventually become a new model for the EEA/ EFTA states.

<sup>6</sup> The FMLC has undertaken to address these issues (including the question of WTO and MFN compliance). See FMLC letter on the EU exit and transitional arrangements [here](#).

### **WTO is a pre-existing eco-system which could be used for comprehensive DRC between the EU and the UK (outside the single market)**

The EU regime (which is plurilateral) is an entire legal order and has the deepest and most comprehensive legal eco-system. It operates both at EU level and by permeating the domestic law/legal system of each EU member state – with its own court, the CJEU, direct application and precedence of EU law in a member state's domestic regime and national courts, ESA powers under EU treaties/legislation, European Commission powers to enforce DRC against member states via infringement action, fines etc. This provides deep and broad legal protection for both state parties and non-state parties and a very high degree of legal certainty for DRC. The extension of the EU single market under the EEA agreement affords relatively deep and broad protection for EU players in the 3 EEA/EFTA states and vice versa, but in various respects legal certainty is less than within the EU (for example because EU regulations are not directly applicable in EEA EFTA states and there have been significant delays and difficulties in implementation). The agreement has different institutions on the EEA side – the EFTA Court, EFTA Surveillance Authority etc.

The legal order of EFTA under the EFTA agreement is more restricted and is not directly relevant, given that the EU is not a member (nor currently is the UK).

The WTO provides a legal eco-system for FTAs. This is much shallower than the EU legal order and it does not permeate the domestic law of its members. An FS firm cannot enforce or rely upon the DRC terms in domestic proceedings. It does, however, provide a pre-existing framework and treaty basis with some institutional structure and a dispute resolution mechanism for state parties and some limited scope for non-state party redress and further potential under the investment court approach (as was agreed in the investor state dispute settlement provisions of CETA) and the broader developments which the EU has proposed. This could enable private sector parties of each side, such as FS firms, who have invested in the other to have rights to challenge host state requirements, at least in relation to their investment in the host state via branches and subsidiaries. The UK and EU would need to consider carefully the application of dispute settlement (including any such private sector rights) to the DRC arrangements.

The third option is an international law treaty, or some lesser accord, outside these structures and any pre-existing mechanism for redress and dispute resolution. The EU has entered into a variety of external agreements under different names – such as partnerships, cooperation agreements – some described as 'deep' and others as 'comprehensive'<sup>7</sup>. The recent Ukraine agreement was an 'association agreement' which

<sup>7</sup> [EU External Agreements - HoC library](#)

incorporated an FTA but this does not offer a different legal eco-system or more advanced dispute resolution.

### **The DRC agreement could be incorporated into the FTA umbrella (from the start or after a period of interim measures)**

The DRC agreement could operate within the comprehensive EU/UK FTA under the WTO regime, unless or until any new and more appropriate legal eco-system can be established. For financial services, the FTA would have well developed provisions both for market access (see below) and a DRC agreement.

The comprehensive FTA would have separate sector specific schedules, including one for financial services which would include market access commitments. The position of the DRC agreement might be similar to Mutual Recognition Agreements (MRAs) in the goods sector, in that it would be incorporated into the FTA umbrella/WTO regime and would sit alongside the market access commitments. There would be considerable flexibility for DRC to be free-standing or to be subject to dispute resolution and other WTO/FTA mechanisms and approaches.

### **Institutional approach**

The chart above shows a possible high level structure for the UK/EU partnership, based on recent FTAs such as CETA but covering the key functions for DRC – supervision, regulatory reform and development of the regulatory regime, centralised regulatory roles, authorisation of specialist firms and emergency powers etc., and enforcement and implementation.

### **Market access provisions in the FTA would be ambitious in breadth and magnitude**

The market access commitments in the WTO financial services schedules for EU states are limited; they are qualified by a large number of differing reservations by individual member states in the WTO schedule (and in FTAs such as CETA, although the number of reservations in recent FTAs, and the actual regulation in individual member states indicate that the current state of openness is better than the WTO schedule indicates). The UK has relatively few reservations. There has been only limited progress in financial services schedules of recent FTAs. Whilst DRC is the priority, we would also envisage the UK seeking market access commitments in the FTA financial services schedule which were more ambitious in breadth and magnitude than previous FTAs (and the current WTO obligations of EU states).

### **Market access provisions in the FTA would operate alongside DRC/the DRC agreement**

Market access commitments would be negotiated and agreed in the financial services schedule. These would operate alongside DRC. To the extent that in any given business/mode of supply there was no applicable DRC, market access would operate in the usual way, with host state regulation applying. Where a form of business/mode of supply was subject to both market access and DRC, there would be no conflict but the DRC would probably go much further than the market access provision.

### **Some standard FTA and GATS terms may need to be adapted**

The incorporation of the DRC agreement into the FTA umbrella would require careful consideration of the application of FTA/WTO terminology and mechanisms to DRC (such as the standard FTA/GATS terms, for example, on national treatment and the 'prudential carve out').

## **Timeline and legal challenges (Chapter 7)**

### **Early agreement of a legal road map, timeline and key principles for Brexit is important for both private and public sectors in all EU states**

There are challenges in the legal construction of Brexit and the timeline. Both sides would benefit from early consensus on a legal road map for Brexit which provides assurance for individuals and firms in the UK and the rest of the EU (and for their government departments and the EU institutions themselves) that change will be managed to ensure they are given sufficient lead times to adapt. Agreeing the structure of the Brexit package and the negotiation process, timeline and dependencies is important to reduce legal and negotiation risk.

### **Early agreement on sufficient lead times is critical**

The FS industry has indicated the need for a 2/3 year period for adjustment to the new regime (once this is finally settled and the implications understood).<sup>8</sup> Until the position on expiry of Article 50 notice is known, as that date gets closer, uncertainty increases and FS firms/infrastructure providers (both UK and in the rest of the EU/EEA) must move further in implementing their contingency planning. It is therefore critical for all concerned to know how they can plan on the basis of sufficient lead times for any changes. Agreement on this issue needs to emerge at an early stage in the negotiations.

<sup>8</sup> See the evidence before the Treasury Select Committee [here](#) and the TSC Chair's summary [here](#) (regarding the 'three year standstill' at the end of the Article 50 period).

Brexit may take effect in one big bang where current single market DRC is switched off and the new DRC is switched on at the same time or in a two-step process with a period of interim DRC arrangements after single market DRC is switched off and then a later switch to the final DRC regime. In either case, the lead times would need to run from the point when FS firms could understand with sufficient certainty the changes involved at the next/each stage. Currently firms have to plan for a change in DRC at expiry of the Article 50 notice (i.e. at about 31/3/19).

The roadmap needs to address a variety of negotiation risks including the risks (of delay or failure) in member state ratification. Failure to secure ratification of an FTA normally results in the status quo continuing (or reverting to the prior position before provisional application of the FTA), but the dynamic is different with Brexit because the agreement is to replace current arrangements, such as single market DRC, which will terminate at Brexit.

#### **Various techniques are available to ensure acceptable lead times for FS firms/infrastructure**

It may be that there is a 'big bang' moment when withdrawal terms and a comprehensive agreement for the future EU/UK relationship (having been agreed and ratified) all come into effect together on the date when the UK leaves the EU (either in 2019 or at some later date following prolongation).

There are, however, various scenarios where for one reason or another this big bang synchronised moment does not happen and the Brexit process is implemented in two (or more) stages. Planning has to take account of this possibility (however desirable the big bang approach may or may not be).

In order to avoid a change of DRC at the expiry of the Article 50 notice, it would be necessary to maintain single market DRC in operation by one or more of various techniques. These include standstill/stop the clock e.g. via prolongation of full EU membership or of EEA<sup>9</sup> membership or some other mechanism to maintain single market DRC (sometimes referred to as 'standstill' or 'grandfathering' – see below - of the single market regime). Here the necessary lead time confirmation is early confirmation that there will not be any change to DRC at expiry of the Article 50 notice. There is also the possibility of staged changes to DRC, but here sufficient lead time involves sufficient notice both of the date of the change to DRC and the details of the new DRC arrangements that will apply.

<sup>9</sup> EFTA membership would not impact the relationship with the EU and is not services focused.

#### **Transitional arrangements must include DRC but market access could revert to WTO terms/schedules**

If Brexit occurs in stages, the market access and national treatment commitments of the EU under its WTO schedules, and the actual state of openness in EU and member state law, could provide a viable default position for market access during any interim or transitional period. This would not, however, assist with DRC. Any transitional arrangements must address DRC and the lead time issues above.

There may be advantages in having a separate DRC/FS agreement at this stage. The recent Advocate General's opinion in the Singapore case, if followed by the court, may offer some assistance in that it finds that financial services is an area where the EU has exclusive competence and measures can be agreed without the need for member state ratification which applies to 'mixed agreements' (which causes delay and implementation risks as seen recently with CETA).

There are a variety of legal orders for (interim) DRC – from accord type arrangements at a regulator to regulator level to an international treaty. It will be even more difficult to establish a new legal and institutional order in time for interim DRC arrangements. Interim DRC arrangements would be compliant with WTO rules by either being open to other countries to negotiate their accession to them if they also have equivalent regulation, oversight, implementation of regulation and procedures for the sharing of information, or by forming part of an overall arrangement with 'substantial sectoral coverage'.<sup>10</sup>

During any interim period, it seems sensible for the UK to consider some greater degree of continuation of/ participation in the EU FS regime in terms of some or all of –

- Continuation of current EU harmonisation/rules as at Brexit.
- Adaption and evolution of these rules in line with post-Brexit development by ESAs, CJEU etc.
- Adoption of new EU FS legislation – within certain parameters. Divergence would therefore only arise in the interim period in respect of new EU legislation and even then only if that legislation strayed beyond these parameters (e.g. discriminatory or not consistent with previous single market principles etc.). Given the lead times for the adoption and implementation on new legislation, the UK will be familiar with the likely pipeline during the interim period.

<sup>10</sup> As required by Article V GATS.

- Continued ESA cooperation if necessary via new legal basis.
- Arrangements to maintain/replicate ESAs' central role re specialist firm regulation and emergency powers and CJEU.

Further work is being undertaken by the TSC inquiry on transitional arrangements<sup>11</sup> and it is hoped that this will evaluate the international law mechanics and institutional arrangements for any interim measures.

### **'Grandfathering' may assist but is not the same as full DRC**

Grandfathering could be applied to FS firms (as it could to residency rights of individuals); i.e. all FS firms currently operating pursuant to passport notifications into/out of the UK would be 'grandfathered' in the host state and would not need to seek local host state authorisation at Brexit (i.e. the single licence which they are currently relying on would not be lost and they would have more time to apply for any host state authorisations they would require under the new regime). Grandfathering in this way would differentiate between firms - only existing firms would be covered and only to the extent that they are currently 'passporting'. This is different from, and more limited than, any interim measures which seek to maintain the single market DRC itself (which would cover new firms/passporting etc.). It seems that most discussion of grandfathering has envisaged the maintenance of the full DRC regime. There may be an additional need for grandfathering of firms in some limited circumstances.

## Looking beyond the EU (Chapter 8)

### **The UK will need to identify all DRC measures which UK infrastructure/firms currently enjoy under the regulatory regimes of all non-EEA countries and take steps to ensure these are maintained at Brexit**

The UK will rectify its WTO schedules for Brexit and is considering the EU negotiated FTAs under which the UK currently operates. In the FS sector, however, DRC measures under the regulatory regimes of third countries are a more immediate priority. The UK will need to identify all DRC measures which UK firms currently enjoy under the regulatory regimes of all non-EEA countries. In many cases these arrangements may have been made at an EU level and/or are based on the UK's membership of the EU and may therefore be at risk at Brexit.

<sup>11</sup> See HoC transitional enquiry [here](#) and below re FMLC work on transitionals and WTO/GATS.

These range from critical infrastructure DRC, such as DRC for central counterparties with countries such as Australia, Japan and the US (see above), to less formal arrangements/policies. The full transposition of the EU acquis should assist in gaining any necessary bilateral agreement with the countries concerned.

### **The UK should explore a DRC agreement with Switzerland which goes beyond maintaining current DRC (and potentially agreements with a broader FS/prosperity zone)**

The UK will need to consider its policy on the EU DRC arrangements with third countries and whether to maintain these e.g. via new arrangements – for example the treatment of Swiss insurer branches under the 1989 Swiss/EU agreement and the treatment of US CCPs under the 2016 accord. There is high degree of regulatory homogeneity between the UK and Switzerland. The UK should explore a bilateral DRC agreement with Switzerland that enhances, and not merely maintains current DRC.

The UK can also consider (perhaps as part of its initial scoping of future FTAs) bilateral DRC agreements with the US and other countries with well developed, modern and open regulatory regimes, such as those found in Australia, New Zealand and other countries that may wish to form a 'Prosperity Zone'. Ultimately this might even form a plurilateral FS zone.

### **We recommend a new framework under FSMA for external relations and DRC**

The UK has no single and comprehensive statutory basis for DRC arrangements with countries outside the EEA<sup>12</sup>, and some policy aspects fall to PRA and FCA. (For EEA countries, the UK currently deals with the single market DRC under the ECA 1973, various statutory instruments and within the PRA/FCA rulebooks).

We recommend that the UK consider putting DRC and external regulatory policy (which currently hangs off the EU level policy and legal arrangements where these exist) on a more formal/comprehensive statutory basis under the FSMA umbrella. This would be the domestic basis for concluding and implementing DRC agreements. Individual DRC measures would be implemented at the relevant level in the FSMA hierarchy – i.e. statutory instruments and/or at the level of PRA/FCA (via rulebook provisions, policy statements and the day to day operation of the DRC regime). This regime could be used for DRC agreements with the EU and with individual EU/EEA states, as well as with countries outside the EEA.

<sup>12</sup> See, for example, FSMA 2000 sections 272-283 re recognised overseas schemes, and section 292 re overseas investment exchanges and clearing houses.

Once outside the EU/EEA, the UK could establish new criteria and a modern policy for DRC. This would replace the piecemeal policy (part EU and part domestic) that currently applies. DRC would be on a reciprocal basis and could, in principle, be open<sup>13</sup> to any country which satisfied criteria as to market access (in WTO/FTA terms), competition (and the absence of state aid, market distortions etc.), sufficiency of home state regulation, observance of international standards on tax/money laundering, and the various practical and legal elements for regulatory cooperation. The criteria for 'sufficiency of home state regulation' could reflect the principles described above in Chapter 6. In practice, only those countries with well-developed regulatory regimes would be eligible for extensive DRC and considerable discretion would need to be retained.

## Brexit outcomes without the comprehensive partnership (Chapter 9)

### **Without an agreement, there would be a patchwork of differing national practices and DR barriers**

The extreme scenario is explained above. The DR barriers that firms would face would depend in large part on the differing laws and practices of individual states. EU standardisation in this field is limited in scope. Some DRC elements would depend on unilateral action by both the EU and by national regulators.

### **The idea of 'trading on WTO terms' in FS is a misnomer; the terms have no material impact on dual regulation**

The idea of trading on WTO terms in FS is a misnomer; market access obligations for FS are of limited use because they provide no real DRC at all. 'WTO terms' would not prevent the EU states from re-imposing extensive dual regulation and DR barriers.

<sup>13</sup> This may assist with GATS compliance.

## **CMS Legatum matrix for plotting cross-border requirements, DR barriers and DRC**

CMS has undertaken many projects plotting cross-border regulatory requirements for a broad range of FS firms, sectors and countries. These include TC firms doing business in/across the EU/EEA, operations within the single market and supply into countries outside Europe. In preparation for Brexit, we are using these techniques and the analysis from our report to develop a CMS Legatum matrix. This can be used to plot the position under each of the WTO modes of supply 1, 2 and 3 - for UK firms conducting business with any of the 30 EEA states (country by country) and for EEA firms conducting business with the UK. It enables plotting of all requirements (EU derived and domestic) and the DR barriers that result, the current DRC arrangements, and the impact of DRC withdrawal at Brexit and of proposed/agreed DRC measures including WTO/FTA obligations.

## Evolution of the UK regulatory regime (Chapter 10)

### **Brexit should be a spur to ensure UK regulation is pro-competitive**

Much of the regulatory regime has escaped effective scrutiny to ensure it meets pro-competitive criteria. The UK has not been able to scrutinise and adapt the EU legislation which is now to be ported onto a domestic law basis; it is not clear that the OFT/CMA review regime<sup>14</sup> has been effective for those rules that are not EU derived. The enhanced competition objectives and powers of the UK regulators cannot currently infringe EU harmonisation. In the medium term (i.e. after Brexit and probably after any period of interim measures) the UK should consider a one-off comprehensive/holistic review of the entire regime (both legislation and rules) and whether to improve on-going scrutiny of new requirements.

<sup>14</sup> See competition scrutiny under FSMA 2000 Chapter 4 sections 140A-H (previously sections 159-164 and 302-310).

**There should be no divergence from detailed EU requirements pre-Brexit; there should be no policy to lower standards after Brexit. Divergence in the longer term will only arise from the UK seeking effective standards balanced with the objectives of pro-competitive regulation and an international focus on maximising DRC**

The UK has led in many areas of FS regulation and the EU has followed. The opportunities for the UK, post-Brexit, are not to lower standards (in some form of regulation-driven trade war) – an expectation that is misplaced, runs contrary to the UK's track record and the realities of consumer politics today. The long term opportunity is to ensure the UK has the correct balance of effective, pro-competitive regulation and an international focus on maximising DRC.

**The UK can become an international beacon for pro-competitive regulation in FS**

After Brexit, the UK will be able to promote the pro-competitive agenda internationally. A sharper distinction could be drawn between the regulation of international/cross-border firms and those that only operate domestically (as Andrew Bailey proposed). This split approach to regulation could apply to the development of international prudential standards (which would be more clearly applicable to international firms alone) and can also be incorporated into the UK's domestic regime, so that UK regulation of domestic firms is more tailored to domestic requirements.

## Glossary

<b>A</b>	<b>Article 50</b>	Article 50 of the Treaty of the European Union (sets out the process by which a Member State may withdraw from the EU)
<b>B</b>	<b>Brexit</b>	The UK's prospective withdrawal from the EU
<b>C</b>	<b>CCPs</b>	Central Counterparties
	<b>CETA</b>	EU-Canada Comprehensive Economic and Trade Agreement
	<b>CFTC</b>	Commodities and Futures Trading Commission
	<b>CJEU</b>	Court of Justice of the European Union
	<b>CMS</b>	CMS Cameron McKenna
	<b>COB</b>	Conduct of Business
<b>D</b>	<b>Dodd-Frank</b>	The Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173,) is a piece of US legislation passed in response to the 2008 financial crisis.
	<b>DRC agreement</b>	Proposed agreement between the UK and EU to address DRC measures
	<b>Dual regulation barriers or DR Barriers</b>	Variety of barriers from a host state regulatory regime which affect cross-border activity/supply in any modes. Examples include full host state regulation - most often the barriers are a mix of financial barriers (ineffective use of capital and resources), operational difficulties (maintaining multiple entities, licences and compliance operations) and associated cost.
	<b>Dual regulation coordination or DRC</b>	Measures used to coordinate dual regulation between home and host state to ensure effective and efficient cross-border activity/supply in any of the WTO modes. Such measures contribute to the mitigation/elimination of dual regulation barriers. Examples include EU-wide harmonisation in certain areas, and techniques such as mutual recognition and home state supervision.
<b>E</b>	<b>EBA</b>	European Banking Authority
	<b>ECA 1973</b>	European Communities Act 1972
	<b>EEA</b>	European Economic Area
	<b>EFTA</b>	European Free Trade Association
	<b>EIOPA</b>	European Insurance and Occupational Pensions Authority
	<b>EMIR</b>	European Market Infrastructure Regulation
	<b>Equivalence</b>	Test used (though not in an identical fashion) by the EU to evaluate third country jurisdictions' regulatory/supervisory regimes in a given area to determine if sufficiently equivalent to EU regulation in order for DRC measures to apply.
	<b>ESAs</b>	European Supervisory Authorities, i.e. EBA, EIOPA, and ESMA
	<b>ESMA</b>	European Securities and Markets Authority
	<b>EU</b>	European Union
<b>F</b>	<b>FCA</b>	Financial Conduct Authority
	<b>FS</b>	Financial Services
	<b>FSA</b>	Financial Services Authority
	<b>FSB</b>	Financial Stability Board
	<b>FSMA</b>	Financial Services and Markets Act 2000
	<b>FTA</b>	Free Trade Agreement

<b>G</b>	<b>GATS</b>	General Agreement on Trade in Services
	<b>Great Repeal Bill</b>	<a href="#">Bill</a> designed to repeal the European Communities Act 1972 and transpose EU law into domestic law
<b>H</b>	<b>Hubbing</b>	Using a single legal entity and/or location to provide financial services across a number of different jurisdictions – a process which is much assisted for EEA jurisdictions by Single Market DRC and in particular the Single Market passport
<b>M</b>	<b>MFN</b>	Most Favoured Nation principle under the rules of the WTO
	<b>MiFID</b>	Markets in Financial Instruments Directive (Directive 2004/39/EC)
	<b>MiFID II</b>	Markets in Financial Instruments Directive recast (Directive 2014/65/EU) and MiFIR due to enter into effect in 2018.
	<b>MiFIR</b>	Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014)
	<b>Mixed agreements</b>	An agreement, in the context of Article 50, in which Member State and EU competencies are engaged. In most cases, ratification of the agreement must be completed by Member States before the Council of the EU will conclude the agreement.
	<b>Modes of supply</b>	Classification used under WTO rules for different types of supply – cross-border, consumption abroad, commercial presence (branch or subsidiary), and movement of natural persons.
	<b>MRA</b>	Mutual Recognition Agreement
<b>P</b>	<b>Passporting</b>	The right to conduct financial services business in an EEA/EU Member State on a services basis or through a branch. The pre-conditions for passporting vary under various pieces of EU FS sectoral legislation (in some instances there is no right to passport).
	<b>PRA</b>	Prudential Regulation Authority
	<b>Prosperity Zone</b>	A high standards, plurilateral agreement among countries that are disposed to accept the foundational pillars of a liberal, open economy— property rights protection, open trade at the border, and competition on the merits inside the border. These countries could agree among themselves a set of rules that optimised their respective environments and broke down barriers to trade. For more information on the prosperity zone, see the Legatum Institute report <a href="#">here</a> .
<b>S</b>	<b>Solvency II</b>	Recast Directive on the taking-up and pursuit of the business of Insurance and Reinsurance (2009/138/EC) (Solvency II).
<b>T</b>	<b>TCF</b>	Third Country Firm
	<b>Third Countries (TC)</b>	A term used by the EU to denote a country that is not a member of the Union/EEA.
	<b>TPP</b>	Trans-Pacific Partnership. Proposed FTA widely considered at the time to be the most advanced liberalisation of financial services yet achieved in an FTA (outside of the EEA). The parties are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States (until January 23, 2017) and Vietnam.
	<b>TTIP</b>	Transatlantic Trade and Investment Partnership. Proposed FTA between the EU and US.
<b>W</b>	<b>WTO</b>	World Trade Organisation

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## About

### About The Legatum Institute

The word 'legatum' means 'legacy'. At the Legatum Institute, we are focused on tackling the major challenges of our generation—and seizing the major opportunities—to ensure the legacy we pass on to the next generation is one of increasing prosperity and human flourishing.

We are an international think tank based in London and a registered UK charity. Our work focuses on understanding, measuring, and explaining the journey from poverty to prosperity for individuals, communities, and nations.

In an ideal world the journey from poverty to prosperity for anybody would be one way: away from poverty and towards prosperity. In reality it is not. While poverty is not an inescapable trap, neither is prosperity an inevitable destination.

Our pursuit of prosperity goes beyond the material. We believe that true prosperity is a combination of economic and social wellbeing. Our annual **Legatum Prosperity Index** uses this broad definition of prosperity to measure and track the performance of

149 countries of the world across multiple categories including health, education, the economy, social capital, and more.

The Prosperity Index is a powerful tool that shows us how prosperity is forming and changing around the world. This provides a greater understanding of those nations that are becoming more prosperous as well as those that are becoming less prosperous and, crucially, what lessons we can draw from them.

Our research work, born out of our metrics, identifies and advocates for policies and practices that move individuals, communities, and nations from poverty to prosperity. Our analysis and our policy solutions are founded on robust evidence.

Policy solutions have to match the scale of the problem identified. We believe that truly transformational policy-making comes from a solid foundation of measurable data covering both the social and economic policy research areas in order to tackle the major challenges, and harness the major opportunities of our generation.

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### **About the Special Trade Commission**

The Legatum Institute Special Trade Commission (STC) was created in the wake of the British vote to leave the European Union. At this critical historical juncture, the STC aims to present a roadmap for the many trade negotiations which the UK will need to undertake now. It seeks to re-focus the public discussion on Brexit to a positive conversation on opportunities, rather than challenges, while presenting empirical evidence of the dangers of not following an expansive trade negotiating path. Find out more at [www.li.com/programmes/special-trade-commission](http://www.li.com/programmes/special-trade-commission)

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