RESPONSE TO BEIS CONSULTATION REFORMING THE FRAMEWORK FOR BETTER REGULATION

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Comments on UK Trade Policy: TBT, Standards and Market Distortions

C O N T E N T S

Response to Consultation on Better Regulatory Framework for UK

The following comments are intended to support the UK's regulatory review agenda in the specific areas of Technical Barriers to Trade, Standards and Anti-Competitive Market Distortions, but to put this in the wider context of how domestic regulatory settings interact with external trade policy. We include analysis of the trading partners with the most developed rules in these areas which is primarily the US and the EU.

Reduction of Anti-Competitive Market Distortions

These comments are framed in light of the following basic proposition. Many countries, including the EU, the US and the CPTPP members have embraced competition on the business merits as the organizing economic principle, which is key to a productive and innovative economy. This principle is also embedded in the OECD (specifically in its regulatory toolkit and Competition Assessment). Competition on the merits relies on regulation and legislation being as pro-competitive as possible, consistent with regulatory goals. Pro-competitive regulation and legislation tend to maximize economic welfare (measured by consumers' plus producers' surplus) and the rate of economic growth.[1] When anti-competitive regulation and legislation are allowed to fester, deadweight losses (pure net reductions in net economic surplus) are imposed on the economy. Such losses are generally associated with lower rates of economic growth and innovation. Accordingly, it is vital to better align regulatory promulgation mechanisms in all the UK's trade agreements between the UK and its trading partners.

We believe that if competition assessments are used to evaluate from a market standpoint the welfare losses generated by regulations (both present and future), this will help ensure that regulation is as pro-competitive as possible. We advocate that the appropriate measure or metric by which these assessments should be made is their impact on consumers' and producers' surplus. It should be noted that regulatory barriers that serve as trade barriers as well have consumers' and producers' surplus effects in the markets where they appear, as well as producers' surplus impacts in other markets. Furthermore, in order for assessments of this type to actually be workable, early public release of proposed regulations is key, and so transparency is a vital part of the generation of pro-competitive regulation. The goal is to produce a regulatory climate designed to grow economies based on non-zero sum, mutually beneficial economic transactions among firms.[2]

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[1] Existing empirical research is consistent with the proposition that more pro-competitive regulatory environments and robust competition law are associated with higher economic growth, *ceteris paribus*. *See, e.g.,* Alessandro Diego Spoliti, "Competition and Economic Growth: An Empirical Analysis for a Panel of 20 OECD Countries," MPRA Paper No. 20127 (Dec. 2009), *available at* http://ideas.repec.org/p/pra/mprapa/20127.html (product market liberalization and labor market deregulation associated with an increase in total factor productivity, and reduction of market rigidities is associated with enhanced innovation); Steven J. Nickell, "Competition and Corporate Performance," 104 Journal of Political Economy 724 (1996), *available at* http://ideas.repec.org/a/ucp/jpolec/v104y1996i4p724-46.html (stronger competition is associated with a significantly higher rate of total factor productivity growth); Niels Petersen, "Antitrust Law and the Promotion of Democracy and Economic Growth," Max Planck Institute for Research on Collective Goods (Jan. 2011), *available at* http://www.coll.mpg.de/pdf_dat/2011_03online.pdf (antitrust law has a strongly positive effect on the level of GDP per capita and economic growth).

[2] We note that a number of EU member states (including, for example, Bulgaria, Romania, and Croatia) already have mandatory competition assessments as part of their regulatory reform processes. Such mechanisms (in these and

We also recognize that a number of member states of the EU (such as Bulgaria, Romania, and Croatia) already have mandatory competition assessments as part of the regulatory reform process, so the UK's policy approach with respect to its external trade policy should not be inconsistent with its relationship with the EU.

1. Anti-Competitive Market Distortions ("ACMDs")

Anti-Competitive Market Distortions are the "behind the border" barriers that adversely affect both trade and domestic markets. Various attempts have been made to deal with them, but none have proved very successful because: (1) trade methods tend to focus on whether the measures are discriminatory, as opposed to anti-competitive; and (2) domestic competition agencies typically lack the political power and tools to ensure pro-competitive regulation. We believe that the UK's external trade policy represents a great opportunity to make progress on the systematic reduction of ACMDs. Since many if not all the UK's key partners prioritized for FTAs profess to be states whose economies are based on competition on the merits as a normative economic organizing principle, they ought to be in favor of attempts to promote pro-competitive regulation, and eliminate ACMDs where possible. We thus advocate an agreement to eliminate ACMDs between both jurisdictions in any UK FTA, as well as through domestic regulatory reform.

Anti-Competitive Market Distortions are typically government regulations, or legislation which impedes competition, or distorts a competitive market. Examples fall into categories which are as follows (non-exhaustive list)[3]:

2. Restrictions that raise barriers to entry or expansion in a market

Increased barriers to entry reduce competitive pressures on existing firms in the market, potentially resulting in higher prices, lower quality of goods, and reduced innovation. Barriers to exit should also be considered, as they turn investments into sunk costs, thus increasing the risk associated with entry.

Restrictions that increase barriers to entry can take several forms, including (but not limited to) those below:

(i) Restrictions that give monopoly rights to a firm

(a) Only one firm or a limited set of firms are permitted to provide certain goods. The effect may be to reduce competitive pressure and facilitate collusion among these firms.

other jurisdictions) might help inform the development of future competition-based regulatory and legislative review processes.

[3] This list is drawn from the work of the International Competition Network's project on Competition Assessment, and is available at www.internationalcompetitionnetwork.org

(b) Common in agricultural marketing boards, industries seem as natural monopolies, etc. In addition, historically, government-owned companies have often enjoyed monopolies in their respective market(s).

(c) Exclusive rights may be given to encourage infrastructure investments or research. The idea is that the guaranteed revenues that come from the granted market power encourages the firm to make investments in infrastructure that it would otherwise not have made.

(d) Exclusive rights may also be intended to achieve social goals, such as narrower control and monitoring of the consumption of certain substances (e.g. alcohol).

(e) May also be used as a means of subsidizing some sort of universal service – the monopoly creates the profits to ensure expanded service (e.g. postal service, where profitable routes are used to subsidize mail delivery to remote locations).

(ii) Restrictions on which firms are permitted to compete in the market

(a) Even where the regulation does not grant an exclusive right, it may unnecessarily limit which firms can compete in a market.

(b) Firms may be required to conform to certain business models (e.g. must be structured as a partnership; clinic cannot be co-owned by non-practitioners, etc.)

(c) Foreign ownership restrictions.

(d) Minimum mandatory set of services must be offered.

(e) "Set-asides", allocating a portion of supply to a particular type or class of suppliers.

(iii) Restrictions that limit access to essential infrastructure, resources, or facilities

(a) Often related to exclusive rights, discussed above.

(b) May take the form of access to facilities such as airports (particularly slots) or towers for antenna, infrastructure such as electricity cables, pipelines, resources such as natural resources (e.g. fishing rights) or regulated resources (e.g. agricultural quotas), etc. May also include rights-of-way, e.g. access to underground below city streets to install cables.

(c) Incumbent firms (especially traditional government-sanctioned monopolies) may enjoy preferential access to infrastructure, resources, or facilities that are needed to effectively compete in a market.

(d) May be mitigated by mandating access at a regulated price. However, such regulated prices may also lead to margin squeezing and other anti-competitive behaviors.

(iv) Restrictions which stop the free flow of goods and capital across borders

(a) May take the form of prohibitions or taxes on the import of goods from other jurisdictions.

(b) Such restrictions may also take the form of unnecessary regional standards, e.g. requiring that products be packaged or presented in a certain way (e.g. requiring margarine to be coloured white).

(c) Business location requirements, or requirements to have local establishments or facilities.

(d) Reduces the number of firms in a given geographic area, giving them more market power.

(e) Licensing or educational requirements

(f)) Professions may require minimum educational standards or practical experience. These restrictions are often stricter than what is needed to protect consumers, and serve instead to exclude some practitioners from the market. For example, professionals from other jurisdictions with equivalent expertise to domestic practitioners may be nevertheless forced to retrain.

(g) Regulatory standards that impose a significant cost for compliance, e.g. rigorous product testing requirements, or forced adoption of certain technologies.

(h). Financing constraints – firms often need to rely on external financing to start up a business. Thus, any significant restrictions on the free flow of investment capital can become a barrier to entry.

3. <u>Restrictions that control how firms are allowed to compete in a market</u>

(i) Market regulations that favor certain firms over others.

(a) Government-owned companies and/or traditional monopolies may be given preferential treatment, e.g. rights of first refusal on contracts or sales, more generous terms of sale, preferential access to restricted facilities or infrastructure, etc.

(b) Standards for product quality can be set in such a way as to favour some firms over others, e.g. requiring a particular technology, or strict standards that require investments beyond the reach of small competitors.

(c) Where new restrictions are being implemented in a market, regulation may allow existing firms or practitioners to have a permanent or temporary break from the new restrictions. So called "grandfather clauses" can unfairly favor incumbents over new entrants. Generally these are more problematic where the relief for incumbents is long-term, although it will depend on circumstances of each market.

(ii) Price controls

(a) Regulations may set specific prices, or otherwise influence how prices can be set in the market. Often put in place for natural monopolies, such as utilities, telecom, transport, etc. Often used in conjunction with government-granted monopolies, to help control high prices that would otherwise result from market power.

(b) When maximum prices are set, firms' incentives to innovate by providing new and/or high-quality products can be substantially reduced. Also, suppliers may be able to coordinate their prices around the maximum price.

(c) Minimum prices may be set to discourage consumption of certain goods, e.g. alcohol, gasoline. They may also be used as a means of protecting small suppliers from "unfair" competition by larger firms that can achieve better economies of scale.

(d) When minimum prices are set, low-cost suppliers are prevented from winning market share by undercutting their rivals.

(iiii) Control of non-price terms of sale

(a) Non-price terms of sale, such as contract lengths, warranties, servicing, and inducements, can also be an important part of a product offering. They may also be an important part of promoting products.
(b) Regulations that restricts such terms can eliminate a viable avenue of competition and reduce choices available to consumers.

(iv) Restrictions on quantity

(a) Regulations may also control the amount of quantity of a good that can be produced by each firm (e.g. quotas). Measures restricting supply below competitive levels will either increase prices to consumers or lead to the undersupply of products. If instead supply is set above competitive levels, this can result in oversupply of products and inefficiency.

(v) Restrictions on advertising

(a) Advertising restrictions are common in regulated professions, often seem as essential to maintaining the dignity of the profession and consumer confidence.

(b) Restrictions on advertising for undesirable products or to vulnerable groups may also be implemented.

(c) Restrictions on false or misleading advertising not usually a problem – if anything, such restrictions provide consumers with the ability to make better choices and improve competition.

(d) May be restrictions on comparative advertising (where firms explicitly compare their price, quality, etc. against their competitors' offerings) or non-comparative advertising (general statements about the firm's products, without comparisons to others'). Restrictions may also be imposed on the medium and channels used for advertising, e.g. can only advertise to wholesalers, not directly to retailers.

(e) May restrict advertising of many items of significant value to consumers, including prices, hours of operation, technical specifications, etc.

(f) May have a disproportionate impact on new entrants, as they prevent the firm's ability to tell consumers about their presence in the market and price and quality of their products.

4. Restrictions that shield firms from competitive pressure

(i) Regulations that exempt the activity of a particular industry or group of suppliers from the operation of general competition law

(a) Particular sectors may be exempt from the general competition law, especially government-owned companies. Such companies are free to engage in a number of anti-competitive acts – cartels, abuse of dominance, etc.

(b) They may or may not be subject to sector-specific legislation. Where such sector-specific legislation contains industry-specific limits on anti-competitive behavior, concerns may be reduced.

(ii) Regulations that permit firms or practitioners to exchange information or communicate each other's intentions, which may reduce their incentives to compete. Such regulations may inadvertently facilitate cartels between firms.

(a) Regulations that create self-regulated professions can be problematic. On the one hand, professionals can ensure that sufficient standards are put in place to protect the public and adapt to new technologies and social policies.

On the other hand, self-regulated professions often adopt rules that reduce incentives or opportunities for members to compete, e.g. price restrictions and advertising restrictions. Unduly strict qualification requirements may restrict entry, especially from professionals trained in other jurisdictions. Self-regulated professions may also jealously guard their scopes of practice from practitioners in related fields.

Voluntary standards and suggested guides can be less problematic than required restrictions but can still be used by members to collude.

Powers may be delegated to a single entity that operates as both the regulatory body and as an industry association advocating for its members, creating a conflict of interest. It is preferable for regulatory functions to be given to an independent body where possible.

(b) Regulations that require firms to publish information on their outputs, prices, sales, or costs. Such publications can significantly aid in formation and maintenance of cartels – facilitates monitoring for defections.

(iii) Restrictions that limit the amount of profits that a firm may collect, or the market share it may accumulate. Such restrictions (e.g. rate-of-return regulation) prevent firms from benefiting from achieving efficiencies, taking risks, and innovating, reducing their incentives to do so.

(iv) Restrictions that control the choices available to consumers.

(a) Limitations on which firms consumers may buy from discourage entry into the market by other firms. Remaining firms have less incentive to vigorously compete, as consumers have effectively become a captive market.

(b) Limiting information available to consumers means that they may mistakenly choose firms that do not provide optimal price or quality. This enables sub-optimal firms to stay in the market. Often related to advertising restrictions, previously discussed above.

5. Regulatory Promulgation and Cost-Benefit/Impact Analysis

(i) Systems of Review

UK external trade policy is an opportunity to craft a set of regulatory promulgation principles that bind trading partners to meaningful competition assessment of new regulations. Both US cost-benefit analysis, European impact assessment and OECD competition assessment recommend taking into account the effects of proposed new regulation on competition and markets. This is not to say that there should not be any regulation where competition is harmed, but rather that there should be a process whereby such competition costs are made explicit, so regulators and legislators can

render better informed decisions. We believe that this process should contain the following elements, which, if missing, could be subject to binding dispute settlement.

The Executive Orders that set up the US federal regulatory review process, coordinated by the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget, specifically references the need to assess the impact of new regulation on competition. Those orders must be read in light of the Congressional Review Act ("CRA"), which defines a "major rule" as one that will result in at least one of 1) an annual effect on the economy of $100 million or more; 2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of US-based enterprises to compete with foreign-based enterprises in domestic and export markets.[4] Executive Order 12866 provides that a major rule is a rule that may "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." In both cases, the role of the rule's impact on competition is a very important factor to consider.

In the CRA, each one of the relevant categories can be interpreted as a competition assessment test of sorts. Although these have largely been interpreted in terms of compliance costs, their impacts on competition are potentially far more significant. Yet, despite this emphasis on competition, competition assessment in the US system is a comparative rarity.

There are other examples of legislation requiring impact assessments that can be seen to be competition assessments in fact. Section 654 of the Treasury and General Government Appropriations Act, 1999 (P.L. 105-277, 5 U.S.C. § 601 note) requires federal agencies (other than GAO) to assess their pending regulations that "may affect family well-being" to determine whether the proposed benefits of the action justify the financial impact on the family. Family well-being includes many other social issues to be sure (such as whether legislation impacts the marital bond, the strength of the family etc), but it is clear that financial impact on the family of particular regulation must mean some measure of consumers' surplus loss. As noted in Regulatory Analysis Requirements; A Review and Recommendations for Reform (Christopher Copeland, April 23, 2012), "Section 1022(b)(2)(A) of the Dodd-Frank Wall Street Reform Act (12 U.S.C. § 5512) establishes certain "standards of rulemaking" for the newly established Consumer Financial Protection Bureau (CFPB). Specifically, it states that the Bureau "shall consider—(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas."" This section illustrates once again a competition test associated with regulations under Dodd-Frank, which would evaluate the impact of

[4] 5 U.S.C. s 804 (2)

those regulations on consumers. Section 15(a) of the Commodity Exchange Act (7 U.S.C. § 19(a)) requires the Commodity Futures Trading Commission (CFTC) to consider costs and benefits before issuing certain regulations, and states that those costs and benefits "shall be evaluated in light of - (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations." This focus on competitiveness and efficiency (in particular the latter) is once more an assessment based on consumers' and producers' surplus.

(ii) The Importance of Transparency

Transparency is often regarded as an optional extra – a nice thing to have in the regulatory promulgation process to ensure that the public's views are being heard. However, transparency is not an extra, but rather a vital part of the regulatory promulgation process. Without it, the proper regulatory assessments cannot be done. In the US, the Administrative Procedures Act of 1946 requires agencies to publish Notices of Proposed Rulemaking and give interested persons an opportunity to comment for at least a thirty day period. Internally, there are a number of statutes that require agencies to alert other members of the government to their proposals early in the process. These include the Negotiated Rulemaking Act of 1990, and the CRA, which requires major rules to be delayed for 60 days pending a review by GAO and the Congress. Executive Order 12889 on the NAFTA requires agencies to provide a 75 day comment period for technical regulations or SPS measures. Transparency is necessary in the case of competition assessments, in particular because competition agencies will need to collect some survey evidence from market participants in order to determine the competitive effects of the proposed regulation.

It is therefore important that in the context of the TTIP, there be transparency in comment periods and adequate periods during which the public can review proposed regulations so that their comments can meaningfully contribute to the regulatory promulgation process.

(iii) Competition Assessment of New and Existing Regulations

The domestic regulatory review process cannot be looked at in isolation as it does have an impact on external trade policy. The UK goal should be to lower anti-competitive market distortions whether they are found in trading partners' markets or domestically. We have noted that there is ample authority in a number of US executive orders and legislation in specific areas that suggests that competition assessment of new regulation has always been a part of the process there. Unfortunately, this has rarely been done as a practical matter, or only on an ad hoc basis. The UK therefore has an opportunity to be world leading in this area and advocate competition assessment as part of the regulatory process. We note that in the European Union, various member states have competition assessment as a mandatory part of the regulatory promulgation process. Essentially, competition assessment evaluates the harm to the competitive market as measured in producers' and

consumers' surplus losses, which result from particular proposed regulations or legislation. These losses are particularly destructive to a nation's economy, because they are deadweight losses which result in wealth being destroyed (not merely transferred). Successful competition assessment requires a process that allows early input based on real drafts of regulation and legislation. While the fact of the assessment should be mandatory, other regulators and legislators should be free to follow its recommendations or not. Where they choose not to follow the recommendations of a competition assessment, they should explain their reasons for so doing in writing. We recommend that the sectoral regulator or relevant legislative committee must either accept the competition assessment and attempt to re-regulate in ways that are less anti-competitive, or must give a rational justification for continuing on the regulatory pathway that is damaging to competition. We anticipate that a simple statement that the view of the regulator is that the benefits outweigh the costs with some reasonable justification would be sufficient to satisfy this requirement. We believe that such a statement, by itself, will over time have domestic impacts that will ultimately lead to better and less anti-competitive regulation.

(iv) Legislation

Competition agencies should be involved in the legislative process as well as the regulatory process. In the case of legislative committees, the competition agency should be asked to testify before the committee to explain the anti-competitive harms of legislative proposals. Failure to invite the competition agency to give public testimony would be a violation of these core principles.

(v) Sectoral Regulation

In the case of sectoral regulators, the regulator should have met with the competition agency and engaged in a sufficient dialogue to ensure that a reasonable regulator would be informed of the competition assessment, and be in a position to weigh it against the alleged benefits.

We believe that the advantage of this approach is that it will force the kind of discussions that must ultimately lead to more, rather than less, pro-competitive regulation and thus will start turning deadweight losses into surpluses. We are hopeful that this process will lead to a virtuous circle as regulators and competition agencies work more seamlessly together.

6. Assessing Legitimate Regulatory Goal

The proposed regulatory goal should not be a general carve-out for any sort of prudential regulation but should itself be public, and transparent, and should be tested against the harm it is intended to correct. If the importance of the regulatory measure is x, the question is whether x is the least restrictive regulatory measure possible to achieve the goal. An example helps us understand how this would work in practice. Suppose the harm relates to the quality of air. An appropriate regulatory response would be to limit the air particulates emitted by producers. That response's effect on the harm can be measured and will be very fact specific based on which producers the ban applies to, and whether the differential

impact of different kinds of particulates. We can construct a matrix which illustrates the different harms and impacts that are relevant thus:

Impact of regulation, R(1) on harm = x(1)	Impact of regulation R(1) on competition = y(1)	Impact of regulation R(1) on trade = z(1)	Impact of regulation, R(1) on property rights = m(1)
Impact of regulation, R(2) on harm = x(2)	Impact of regulation R(2) on competition = y(2)	Impact of regulation R(1) on trade= z(2)	Impact of regulation, R(2) on property rights = m(2)
Impact of regulation, R(3) on harm = x(3)	Impact of regulation R(3) on competition = y(3)	Impact of regulation R(1) on trade = z(3)	Impact of regulation R(3) on property rights = m(3)

This matrix can be used by policymakers to determine regulatory choices within each area. It should be noted that impact on trade and impact on competition are not the same thing. Impact on property rights protection is also different. The productivity simulator which Competere has developed enables us to separate out impacts on trade, competition and property rights.

There is no simple balancing of each of these values, but it will help policymakers to come to right decisions by using this matrix approach. Harms can be measured in a number of ways including loss of human life, hospitalization, loss of wealth creating activities by human beings. Some harms may be weighted differently from others. This would be a policy decision. For example, a decision would have to be made about the cost to human life or hospitalization versus damage to ecosystems, loss of endangered species or animal welfare.

7. Comment on Climate Change, Energy Policy and International Trade

As the UK prepares to host the all-important COP26 climate change conference, the impact of regulations designed to correct the harm caused by anthropogenic climate change on international trade brings various government objectives into conflict. Imposition of trade restrictions such as an ex-ante tariff as is the case in the EU border tax adjustment measures (CBAM), or those contemplated by other countries contravene a fundamental WTO principle that there should not be trade discrimination on the basis of the manner in which products are produced rather than the products themselves. There is good reason for this principle as different trade treatment based on how products are produced risks serious damage to international trade flows as countries take issue with particular production methods that might be lower cost than they themselves are capable of. Furthermore, incumbents who would benefit from such a tariff can easily manipulate the process so that their competitors are placed at a disadvantage. We should therefore embrace such discrimination only as a very last resort.

The question is whether there is another mechanism that could be employed which deals with the harm being caused by irreversible, anthropogenic climate change. In order to understand this, it is first crucial to understand the harm that we are seeking to mitigate.

It is important to base the regulatory response on a legitimate and justifiable, publicly stated regulatory goal. In this case, it is harmful emissions of a particular country that can must be set to a level at which the negative impacts of climate change are a) no longer irreversible, and b) limited to a level that is deemed acceptable to society. With regard to b), the analogy is with clean air and clean water where a certain tolerance to harmful substances is acceptable because there is a diminishing return associated with going from minor to zero concentration, but there is an equivalent exponentially increasing cost imposed on society of this transition.

(i) Harm Caused by Anthropogenic, Irreversible Climate Change

Irreversible, anthropogenic climate change can cause great damage to ecosystems and to the loss of human habitats, leading to considerable economic damage not all of which can be mitigated against through movement of these systems. To the extent harm is caused, the quantum of harm can be correlated to the total volume of harmful emissions in the atmosphere.

(ii) Does the Policy Proposed Reduce the Harm?

Not all policy proposal would actually reduce the stated harm, and some would reduce it in different ways to others. For example, one policy proposed is for an ex-ante border tax adjustment. Such a mechanism would only lower the overall level of emissions if the result of the border tax is to reduce production on a global basis. If the mechanism simply displaces trade from countries that impose the mechanism to others (for example developing countries) it is unlikely to lead to a lower volume of emissions globally. If, as is the case, countries differ substantially in the intensity and volume of their emissions, then a more appropriate policy response would be a targeted ex post tariff applied to countries which can be demonstrably proven to have violated existing environmental agreements in this area, or who are otherwise systematically distorting their markets for trade advantage.

(iii) Is there a less trade restrictive measure?

If we assume a border tax adjustment to be the policy choice most likely to be adopted, even though we have shown that it is unlikely to significantly reduce the harm it is intended to address, the relevant question is whether there is a less trade restrictive way to achieve the regulatory goal. An ex post facto tariff in cases of countries that can be shown to seek trade advantage by derogating from an agreed environmental standard is a less trade restrictive way to achieve the emission reducing goal.

(iv) Is there a less anti-competitive way of reducing the harm?

A negative effect on trade and a negative effect on competition are two different but related things. It is likely that regulations that damage competition, also distort trade, but this is not always the case. It is therefore important to have a separate analysis to determine impact on competition in the relevant market. The first question to ask is what is the relevant product and geographic market for the regulation proposed. We can answer this question by adopting the Small but Significant Non Transitory Price

Increase ("SSNIP") test from antitrust analysis. If SSNIP (which would typically be a ten percent increase in price) were to be applied as a result of the regulation to a particular product would consumer source a different product. In the cases of an ex ante or an ex post tariff, the question would be if the price increase would cause consumers to source domestic product (which is likely) or whether they would use a product from a different market (equally likely). If they would, the relevant market should be reclassified to include those other products. Hence the market is likely to be the global market for the particular product and its available substitutes. The regulatory approach is less likely to have an anti-competitive effect for products where there are many available substitutes, and where there is availability of those substitutes in multiple markets. This suggests the potential for exemptions and waivers in case of anti-competitive effect for particular products. An analogy here would be with the waivers under the Buy America Act from the 1930s in the US where if the application of the provisions leads to an increase in price, then it can be set aside by the federal government. This mechanism could also be deployed in the case of any climate change mitigation policies.

(v) What is the Clearly Stated, Legitimate Regulatory Goal

The European Green Deal provides that the goal of the border adjustment tax is to prevent carbon leakage in a WTO compliant manner. The EU acknowledges it is increasing its climate ambition and has expressly stated that they seek to ensure through the CBAM that producers do not start producing in other countries and exporting into the EU. These goals do seem to be different from a policy goal to reduce emissions globally which is the higher-level climate policy goal. This combination of goals together forms the "Policy Goal."

(vi) Would the Policy Achieve the Policy Goal?

The Policy Goal, even if achieved would not appear to have any impact on overall global emissions, as it has no effect on production and trade that occurs outside the EU, something the EU acknowledges in its paper.

(vii) Are there less anti-competitive ways of achieving the policy goal?

One alternative is that proposed in the Trade and Agriculture Commission report to DIT on import policy. This proposal, which commanded the full support of all the Commissioners suggested that where the parties to a trade agreement had agreed a particular set of environmental standards, and one party derogated from these for trade advantage that would constitute an anti-competitive market distortion enabling the aggrieved party to impose a tariff.

8. Interaction with External Trade Policy: Reconciling EU and US Approaches

As noted elsewhere, domestic regulatory choices have a powerful impact on international trade policy and cannot be readily separated. This is particularly true in areas like standards policy. Since the UK has a trade agreement with the EU, and is negotiating one with the US, it is important that its approaches in the area of regulation and standards are consistent.

The overall governing principle which we set out in this paper is that both parties' laws, regulations and standards should be set in the most pro-competitive manner possible consistent with a legitimate and publicly stated regulatory goal. That said, we recognize that different standards could have negative impacts on business trading across the wider transatlantic area (US-UK-EU). We believe that it is important that the UK adopts a regulatory recognition approach, and does not succumb to the EU's regulatory harmonization approach.

(i) Regulatory Promulgation

Both the UK and EU have agreed to a Good Regulatory Practice chapter in the EU-UK TCA which broadly encompasses much of what is discussed in this paper. Similar provisions in the US-UK FTA would not be inconsistent with this approach.

(ii) Standards

There is more scope for inconsistency in the standards area. The EU standard setting approach consists of membership of the key standard setting institutions, CEN, CENELEC and ETSI. By contrast the US generally adopts a less centralized approach which can lead to better regulatory outcomes because of regulatory competition, but is also difficult to understand for exporters into the US market. It is often said that these approaches are mutually irreconcilable. However, our view is that they can be reconciled if we adopt a sectoral approach.

(iii) **Electrical Goods Sector as an Example**

Different sectors vary significantly, but we have highlighted a sector where regulatory promulgation in the EU is closest to the pro-competitive regulatory framework we advocate (in our view), and therefore where there is the greatest scope for a mutually consistent agreement across the US-UK-EU zone.

A fundamental challenge is the fact that the US regards its standards as international, because the TBT 6 Principles apply to them, and regards the EU's as regional and not international standards because the TBT 6 Principles do not apply to them.

The UK negotiators will be looking for a sweet spot where UK standards can be interoperable with US standards in some way, as well as ensuring no barriers between the UK and EU. In order to reduce barriers with the EU, some in the electrical goods sector will want the UK to remain members of CENELEC for electrical goods, but the US and UK negotiators will be mindful of the fact that the US will want to see UK recognition of US standards as well as underlying product regulation where possible. It is possible that the US could seek in the UK-US FTA some mechanism whereby they could obtain some input into CENELEC for US (non-EU companies).

The UK would like the EU to recognise not only conformity assessment but also its product standards, and where possible its underlying regulation. The UK will ground these issues in the WTO TBT agreement. The TBT agreement covers technical regulation, standards and conformity assessment. The WTO TBT Agreement is designed to balance the need for members to regulate in the health and safety space for products, as well as to avoid unnecessary trade barriers. Under the TBT Agreement, countries may not implement their technical regulations in a way that violates the non-discrimination principle and shall be no more trade restrictive than necessary to support a legitimate regulatory objective. Members should also use relevant international standards where they exist or are imminent as a basis for their technical regulation. On conformity assessment, the TBT encourages parties to recognise each other's conformity assessment where possible.

The UK's goals in the TBT area are unlikely to change from the EU's goals in terms of safety of products. The UK's underlying regulation and TBT standards must objectively deliver these goals. Under the WTO TBT Agreement, members should seek to recognise these standards and even underlying regulations in this case.

This would also be true for the US-UK relationship.

This is the only way of simultaneously inter-operating between US and EU standards. This requires the UK not to be a promoter of EU (or for that matter US) standards around the rest of the world. Mutual recognition should be based on an existing international standard. If both countries are basing their standards on international standards, there should be mutual recognition.

Key Issues: Both the UK and US will want to ensure as pro-competitive a set of standards and underlying technical regulation as possible. The US achieves this by relying on voluntary standards that compete with each other. Regulatory competition is more likely to lead to welfare enhancing outcomes than regulatory harmonisation. The EU relies on more of a top down standards setting system where standards are agreed by the SSOs and any inconsistent standards are withdrawn. This makes for greater administrative simplicity, but not necessarily for a more pro-competitive solution.

Potential Solution

A potential solution may lie in using the UK-US FTA to allow the US to work with the UK to correct what it regards as deficiencies in the EU system with respect to the TBT Six Principles. The UK could remain a member of the EU standards bodies, but agrees with the US in the UK-US FTA to rectify the EU's deficiencies under the six principles by:

(a) Allowing any US body to be a member of the UK representative in CEN/CENELEC and ETSI.

(b) Providing longer notice periods to the US of EU SSOs activities, plus comment periods so the UK and US can take a common position.

(c) Ensuring that membership of UK SSOs which are participants in EU SSO systems is on a non-discriminatory basis.

(d) Ensuring that EU processes do not privilege EU undertakings

(e) Ensuring that the EU SSOs produce relevant standards which are performance (and not production) based.

(f) Ensuring that the US SSOs participate more fully in the ISO/IEC process.

In the electrical goods sector, this would enable the UK to demonstrate to US bodies that it did have a meaningful impact on the development of EU technical standards (which it maintains it does not do now). The US is also concerned about the Dresden and Vienna Agreements under which there is fast track IEC adoption of CENELEC standards on the basis that this "limits opportunities for non-EU stakeholders to contribute to the development of standards at an early stage".[5] This concern could be assuaged by allowing access to EU bodies through the UK-US FTA.

The US also has concerns regarding the EU's conformity assessment programme, where each member state has a single national accreditation body (specifically at Regulation (EC) 765/2008 and Decision 768/2008. US accreditation bodies have long complained about the stifling of competition at the accreditation level and how this bars US bodies from market access in the EU. The UK-US FTA could allow participation of US bodies in the UK's accreditation system. The US would like the ability to test and certify products for the EU market outside the EU, and it may be possible to also use the UK-US FTA to allow US bodies to do that testing in the UK or using UK-US bodies to lower time to market for US entities. The US is also concerned that the EU's FTAs include provisions where the other partner agrees to apply only standards that have been generated by bodies in which the EU plays what the US would characterise as an outsize role.[6] Here again, the UK-US FTA could be more open as to which standards generated by which bodies could be applicable in both the UK and US markets. The way to handle this issue is to lower the "outsize role" by enabling US bodies to play a role, if they wish to play it and to allow the UK-US FTA to enable this more, as opposed to seeking to change the institutional bodies that are engaged in these issues.

[5] US National Trade Estimate, March 31, 2021

[6] See for example, EU-Japan FTA, Article 7.6

Dual Regulatory Proposal

The UK has suggested the potential for dual regulatory approaches in a number of different settings (most recently in the Northern Ireland Command Paper). A dual regulatory regime could work in the following manner:

(i) Goods may be produced to two different regulatory regimes' requirements.

(ii) A mutual recognition agreement is agreed between both parties for recognition of conformity assessment (testing), market surveillance and also underlying product regulation.

(iii) Goods may then be produced to the requirement of either regime, as long as it satisfies the rules of either, with ordinary customs controls and a minimum of physical checks. Any mark that is required to enable products to be placed on the market can be given.

(iv) Goods may be placed on the market from either Party for onward export to a third country provided that they can be proved to satisfy the requirements of that third country regime in the party where the product is produced.

Looking to the specific flows in the jurisdictions of the US, EU and UK, as well as considering how these flows implicate Northern Ireland, we can assume the following:

(i) Assume three different applicable regulatory environments in the US, EU and UK

(ii) Goods manufactured compliant with R1 can be put in the market in the US; R2 for the UK, and R3 for the EU.

(iii) Parties may negotiate Mutual Recognition Agreements (MRAs) to cover conformity assessment, market surveillance and underlying product regulation. The UK is advised to seek maximal MRAs with the US starting with the eleven areas which were prioritised in the US-EC MRA, 1998 (of which only 2.5 have been covered). It is also advised to do the same with the EU, understanding that the EU has indicated that it is much less likely to grant MRAs to the UK.

(iv) Assuming maximal MRAs covering all three dimensions, products could be manufactured in the UK to UK regulations which could then be accepted in the US with documentary checks and minimal physical checks. Products could also be manufactured to comply with R1 which could be tested in the UK, and which could then be placed on the market in the US upon proof of UK compliance.

(v) Assuming no MRAs between the UK and EU, then products satisfying R3, and tested in the EU could be produced in the UK and placed on the market in the EU.

(vi) Assuming no MRA, products satisfying R2 could be placed on the market in NI provided they were "not at risk", and products satisfying R3 would be required if they were "at risk". This dual regulatory proposal would require a substantial change to the NIP, in line with the suggestions in the NI Command Paper.

(vii) If the negotiated solution between the UK and EU under the NI Command Paper negotiations was more in line with the NIP as it currently stands, then goods entering

NI would have to satisfy R3, but how you prove that compliance would potentially differ as between "at risk" and "not at risk" movements. In that case, evidence-based systems to prove compliance would become more critical.

9. Recommendations

We recommend that focus be paid to the manner in which regulations are promulgated and the impact of regulation and legislation on competition, and also on international trade. Simply put, regulation should be the least anti-competitive and least trade restrictive consistent with a legitimate, publicly stated and measurable regulatory goal.

In the area of international trade, we believe that international trade agreements should include commitments to good regulatory practices as set out above. We also believe that sharing of reports on competition assessments of legislation and regulation between the UK and its trading partner agencies is also warranted. In the area of dispute resolution, we think that some of level of dispute resolution is needed as long as it is limited to whether the competition assessment has been performed, and to ensure that it has been taken account of by the relevant regulator. Where the regulator does not take account of it, this would be permissible as long as the regulator provides a rational justification in writing.

10. Conclusion

While regulatory authorities on both sides of the Atlantic and around the world have paid lip service to the concept of competition assessment, we believe that there is a unique window of opportunity to better embed these concepts into the regulatory promulgation process in the UK and perhaps also in the AUKUS countries. Certainly the UK could use its regulatory reform agenda to be a market leader in the area of good regulatory practice and ensuring that regulations damage competition and trade as little as possible. By doing this, deadweight losses in our economies that result from anti-competitive market distortions created by regulation and legislation can be eliminated and new wealth can be injected into the economy at a time of great need. It may be that by joining up regulatory goals in trade negotiations and regulatory reform at home we can better ensure good regulatory results. Dispute settlement in trade agreements will be a key lever. Holding ourselves to account in the manner in which competition assessment is included in regulatory and legislative analysis will go a long way to ensuring that pro-competitive legislation and regulation consistent with regulatory goals is more likely in the future.

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