

# Brexit and Financial Services: the GATS Option

## Introduction

- 1.1 This briefing note is concerned with the rules of the World Trade Organization (“WTO”) as they apply to financial services. The financial services sector covers both banking (broadly defined - see below) and insurance/reinsurance services. As will be seen, the scope of trade liberalisation in relation to services is limited and, once the UK has left the European Union (“EU”) there would therefore be scope for improving access for the financial services sector through an economic integration agreement with the EU consistent with Article V of the General Agreement on Trade in Services (“GATS”). One requirement of such an agreement is that it has substantial sectoral coverage. This would prevent an agreement with the EU that is restricted to financial services (or to a select group of service sectors).
- 1.2 On 23 June 2016 the United Kingdom (“UK”) voted to leave the EU. The Government intends to start the process of negotiating the withdrawal of the UK from the EU by the end of March 2017. Under Article 50(3) of the Treaty on European Union (“TEU”) the treaties shall cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification unless the European Council, in agreement with the UK, unanimously agrees to extend this period.
- 1.3 In this briefing note we consider the position if the UK is not be able to negotiate access to the EU Single Market and will instead rely on the rules of the WTO in order to trade with other EU/EEA Member States following withdrawal from the EU. The UK Government has announced that it will seek to negotiate a preferential trade agreement with the EU, although as the shape of such an agreement is unclear, and might not be negotiated within the two years after notification under Article 50(2) TEU it is not considered here. Neither are possible transitional arrangements as the contents of any such measures are at present uncertain.

## The Current Position

- 1.4 Currently the UK is a full Member of the EU and is therefore a constituent part of the EU Single Market. This is characterised by the so-called four freedoms: free movement of workers, freedom of establishment, freedom to provide services and free movement of capital. Exceptions to these freedoms are strictly limited. The provisions of the Treaty on the Functioning of the European Union (“TFEU”) conferring these rights have direct effect and can therefore be directly relied on by individuals and firms.
- 1.5 These Treaty rights are supplemented by sectoral directives and regulations providing a legal framework for the exercise of these rights. For example, in the area of banking (which includes deposit taking and lending) the Capital Requirements Directive and Regulation impose prudential requirements. The Markets in Financial Instruments Directive (“MiFID”) imposes prudential requirements for investment firms, and Solvency

II for insurers. Insurance mediation is governed by the Insurance Mediation Directive (“IMD”). The European Market Infrastructure Regulation (“EMIR”) regulates clearing houses and trade repositories in respect of over-the-counter derivatives trading. Common to all these directives and regulations is the provision of rights of mutual recognition under which a firm authorised and regulated in one EU/EEA Member State:

- may establish a branch in another Member State in reliance on their home state authorisation; and/or
- provide services on a cross-border basis,

without the need for further authorisation from the State where they establish a branch or provide services. This is referred to as “passporting”.

- 1.6 Following withdrawal from the EU, if UK businesses are no longer able to rely on passporting rights, how would the UK’s financial services industry be able to provide services in EU Member States? It should be noted that this question only arises in the case of services that are cross-border in nature. This will be the case where the service is provided from an EU branch of a UK service provider, or if services are provided cross-border from a UK firm to a customer in the EU. Where the service is provided in the UK because the EU customer comes to the service provider there will be no cross-border element and the UK financial services provider need only comply with UK law and regulation. The Commission has taken the view that “location” of a service should be determined by reference to the location of the “characteristic performance” of the service<sup>1</sup>. However, although applied by the UK, not all EEA states follow this interpretation<sup>2</sup>; hence the need to take legal advice as to where the relevant local regulator in the Member State where the counterparty is located considers the service as being provided. The “location” of where a service is provided would be brought into much greater focus in a post-passporting regime as it would delimit the regulatory jurisdiction of UK and EU financial services regulators.

<sup>1</sup> Commission Interpretative Communication: Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive, 20 June 1997.

<sup>2</sup> FCA Handbook, SUP App 3.3.8G.

## The General Agreement on Trade in Services

- 2.1 The GATS is one of the agreements constituting the global architecture for trade liberalisation following the creation of the World Trade Organization. It seeks to liberalise trade in services between WTO Member countries, but is much more limited in the degree of liberalisation achieved than the General Agreement on Tariffs and Trade (“GATT”) in respect of trade in goods.
- 2.2 Article I:1 of GATS states that “*This Agreement applies to measures by Members affecting trade in services*”. GATS does not, however, define a service; instead, Article I:3(b) provides that services “*include any service in any sector except services supplied in the exercise of governmental authority*”.

### Provision of Services

- 2.3 The GATS identifies four modes in which services can be internationally provided:
- (a) from the territory of one WTO Member into the territory of another WTO Member (mode 1);
  - (b) in the territory of one WTO Member to the service consumer of any other WTO Member (mode 2);
  - (c) by a service supplier of one WTO Member, through commercial presence in the territory of any other WTO Member (mode 3); and
  - (d) by a service supplier of one WTO Member, through presence of natural persons of a WTO Member in the territory of any other WTO Member (mode 4).
- 2.4 These will now be explained in more detail:
- (A) In mode 1 the service is provided on a cross-border basis without any movement of the supplier or consumer. An example is legal advice provided over the telephone by a lawyer in London to a client in Beijing.
  - (B) In mode 2 the recipient/consumer of the service moves to the country of the service supplier to receive/consume the service. An example is a UK national being provided hotel or restaurant services while on holiday in Switzerland, or a client travelling from Paris to London to receive investment banking advice.
  - (C) Under mode 3 the service supplier of one WTO Member establishes a “commercial presence” in the territory of another WTO Member. An example would be a German bank establishing a branch in Paris.

- (D) Mode 4 is engaged where a natural person moves from one WTO Member to another WTO Member to provide the service. An example is an engineer who moves temporarily to another WTO Member to provide engineering services. Mode 4 is considered sensitive by many WTO Members because it interferes with a country's sole control over immigration<sup>3</sup>. However, the Annex to the GATS clarifies that the GATS does not apply to measures affecting natural persons seeking access to the employment market of a WTO Member, nor to measures related to residence, citizenship or employment on a permanent basis.

## Measures

- 2.5 It seems clear that “a very broad and flexible definition” of “measures” was chosen to achieve maximal scope of application<sup>4</sup>. However, purely private measures are thought to be excluded. To be subject to the disciplines of the GATS there must be some delegation or at least encouragement by the state through incentives or disincentives<sup>5</sup>. The term covers “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form” (Article XXVIII, GATS). The reference to administrative action and “or any other form” appears to capture inaction (such as a deliberate omission) as well as active measures that adversely affect trade.

## Affecting Trade in Services

- 2.6 Under Article XXVIII of the GATS “*measures by Members affecting trade in services*’ include measures in respect of:

1. *the purchase, payment or use of a service;*
2. *the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;*
3. *the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member”.*

The list is indicative and other measures which are not expressly singled out may be caught. However, for a measure to affect trade in services a link must be shown between the measure and the effect. The legal test covers “not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify conditions of competition between like domestic and imported products on the internal market”<sup>6</sup>.

- 2.7 In *US - Gambling*, the Appellate Body made clear the need to identify the legal source of the measure affecting trade and not its effects:

<sup>3</sup> N Munin, *A Legal Guide to GATS*, p. 10.

<sup>4</sup> *Ibid*, p. 59.

<sup>5</sup> *Ibid*, p. 61.

<sup>6</sup> *EC - Bananas III*, panel report, para 7.281.

“We note also that, if the ‘total prohibition’ were a measure, a complaining party could fulfil its obligation to identify the ‘specific measure at issue’, pursuant to Article 6.2 of the DSU, merely by explicitly mentioning the ‘prohibition’. Yet, without knowing the precise source of the ‘prohibition’, a responding party would not be in a position to prepare adequately its defence, particularly where, as here, it is alleged that numerous federal and state laws underlie the ‘total prohibition’”.<sup>7</sup>

## Most Favoured Nation

2.8 Most favoured nation treatment is one of the two non-discrimination provisions in the GATS and prevents a WTO Member from discriminating between services and service suppliers from different WTO Members. For example, a WTO Member cannot provide a concession to one WTO Member without automatically extending the concession to the whole WTO membership. Most favoured nation treatment applies equally to concessions granted to non-WTO Members<sup>8</sup>.

2.9 Article II of the GATS states:

- “1. *With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.*
2. *A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.*
3. *The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed”.*

2.10 The test for breach of Article II is the following:

- (i) Is the measure covered by GATS and is it affecting trade in services (see above)?
- (ii) Are the services and/or service supplier “like”?
- (iii) Does the WTO Member accord less favourable treatment than that required by Article II:1?

2.11 Article II:2 permits a WTO Member, on accession to the GATS, to submit a list of exemptions from most favoured nation treatment. This list cannot be supplemented later. The exemptions were originally intended “in principle” to apply for ten years after the entry

<sup>7</sup> Appellate Body report, para 125.

<sup>8</sup> *Ibid*, p. 105.

into force of the WTO Agreements, although WTO Members are in no rush to give up their exemptions and would seek to negotiate trade concessions in return for their abolition.

- 2.12 In *Argentina - Financial Services* the Appellate Body interpreted less favourable treatment as involving the modification of the conditions of competition to the detriment of like services and service suppliers of any other WTO Member. “Likeness” has been held to subsist where “the products or services and service suppliers, respectively, are in a competitive relationship with each other”<sup>9</sup>.

### Schedules of Specific Commitments

- 2.13 Article XX.1 of the GATS provides that “*Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement*”. It is therefore necessary for a WTO Member to schedule at least some commitments, although these may be minimal. Once scheduled, the WTO Member will enjoy all the benefits of the GATS including the obligation for other WTO Members to provide most favoured nation treatment (as discussed in paragraph 2.8).

- 2.14 The schedules are lists specifying to which service sectors and to which modes of supply a WTO Member chooses to apply the national treatment and market access requirements (as well as possible additional commitments). The schedules represent the services equivalent of bound tariffs under the GATT for goods: minimum commitments in respect of trade concessions. The GATS uses a positive list in which any concessions need to be positively listed to be binding.

- 2.15 When specifying their commitments, WTO Members are free to impose terms, limitations, conditions and qualifications. Article XX provides:

*“With respect to sectors where such commitments are undertaken, each Schedule shall specify:*

- a. terms, limitations and conditions on market access;*
- b. conditions and qualifications on national treatment;*
- c. undertakings relating to additional commitments;*
- d. where appropriate the time-frame for implementation of such commitments; and*
- e. the date of entry into force of such commitments”.*

- 2.16 Part 1 of the schedule is called “horizontal commitments” and specifies measures that apply across all scheduled services sectors. Examples include limits on foreign direct investment, land ownership and corporate structures. As such, it enables WTO Members to introduce restrictions for all services through a single entry<sup>10</sup>. Such measures may affect particular modes of supply.

<sup>9</sup> *Argentina - Financial Services*, Appellate Body report, para 9.29

<sup>10</sup> N Munin, *A Legal Guide to GATS*, p. 131.

- 2.17 Sector-specific commitments relate to specific service sectors and modes of supply. There are three types of commitments: market access, national treatment and additional commitments. Each are important in understanding WTO Members' schedules.

**The market access commitment** applies where the WTO Member specifies the terms and conditions subject to which it agrees to provide other WTO Members with market access to service sectors and modes of supply. Market access applies only to the six types of restrictions set out in Article XVI of the GATS<sup>11</sup> (see paragraph 2.24 below).

**The national treatment obligation** according to which the WTO Member specifies the conditions and qualifications which it applies to each service sector and mode of supply. Limitations on supply can cover cases of *de facto* as well as *de jure* discrimination<sup>12</sup>.

**Additional Commitments.** Article XVIII provides: "*Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule*".

- 2.18 There are four levels of commitment that may be undertaken by a WTO Member in the specific commitments part of the schedule of commitments:

**Full commitment - marked "none" in the Schedule of Commitments.** This means that a WTO Member does not limit market access or national treatment through measures inconsistent with either market access or national treatment in a specific service sector and mode of supply. However, any conditions set out in the horizontal part of the schedule will still apply.

**Commitments with limitations - marked "none, except" in the Schedule of Commitments.** If a WTO Member chooses to apply particular measures inconsistent with market access or national treatment it must specify these in the relevant column.

**No commitment - marked "unbound" in the Schedule of Commitments.** This means that the WTO Member is free to apply to the service sector and mode of supply any measure inconsistent with market access or national treatment. This should only be used where a commitment in respect of a mode of supply in a service sector has been made. Where no commitments are made as regards a particular sector, the service sector should not be scheduled.

**Lack of technical feasibility - marked "unbound\*" in the Schedule of Commitments.** Where it is technically impossible to supply a specific service sector through a particular mode of supply this should be marked with an \* asterisk<sup>13</sup>.

- 2.19 There are twelve service sectors, most of which are divided into sub-sectors. The list of service sectors is: business services, communication services, construction and related engineering

<sup>11</sup> N Munin, *A Legal Guide to GATS*, p. 132.

<sup>12</sup> *Ibid*, pp. 132-133.

<sup>13</sup> *Ibid*, p. 137.

services, distribution services, educational services, environmental services, financial services, health related and social services, tourism and travel related services, recreational, cultural and sporting services, transport services and other services not included elsewhere. WTO Members are able to schedule commitments in sectors or sub-sectors. Commitments may be made in respect of any or all of the four modes of supply (see paragraphs 2.3 and 2.4 above).

## National Treatment

2.20 National treatment complements most favoured nation treatment as one of the core disciplines under the GATS. Remember, however, from the preceding section that it is a qualified obligation in that WTO Members are able when preparing their schedules under Article XX to make it subject to exceptions and qualifications. It follows that, unlike Article III of the GATT, it does not apply immediately and unconditionally as its scope is determined by the commitments undertaken. Article XVII of the GATS provides:

- “1. *In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*
2. *A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.*
3. *Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member”.*

2.21 The scope of Article XVII is much narrower than the scope of the GATS. Firstly, it only applies to “*the sectors inscribed in [the country’s] Schedule, and subject to any conditions and qualifications set out therein*”. Secondly, it only applies to measures “*affecting the supply of services*”. As there is no specific definition of “measures” in Article XVII, the definition in Article XXVIII of the GATS (discussed in paragraph 2.5 above) applies.

2.22 In *Argentina - Financial Services* the Appellate Body rejected the decision of the panel to have regard to the regulatory aspects in considering whether a measure afforded less favourable treatment. The Appellate Body reiterated:

“the fact that a provision has a potentially broad scope of application is not unique to Article II:1 or Article XVII of the GATS. As Panama rightly points out, Article III:4 of the GATT 1994 also has an extensive scope of application, covering ‘all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use’ of the products at issue. The word ‘affecting’ in both Article III:4



of the GATT 1994 and Article I:1 of the GATS has been interpreted to mean that these provisions have a ‘broad scope of application’. The broad scope of Article III:4 of the GATT 1994 is also reflected in the fact that it covers measures affecting the ‘internal sale, offering for sale, purchase, transportation, distribution, or use’ of products, thereby including measures affecting not only products themselves but also producers or suppliers of goods. Nevertheless, the broad scope of Article III:4 of the GATT 1994 has not been perceived as a reason for requiring an analysis as to the ‘regulatory aspects’ relating to the products. Rather, pursuant to the legal standard for ‘treatment no less favourable’ under Article III:4 of the GATT 1994, the fact that a measure modifies the conditions of competition to the detriment of imported products is, in itself, sufficient for a finding that the measure confers ‘less favourable treatment’<sup>14</sup>.

## Likeness

2.23 The GATS jurisprudence is less developed in the area of likeness than is the case for the GATT. In *China - Electronic Payment Services* the panel focussed on the conditions of competition. This analysis was followed by the Appellate Body in *Argentina - Financial Services* where it was held that the same test applied to “likeness” under Article XVII and Article II (most favoured nation).

## Market Access

2.24 Market access is governed by Article XVI of the GATS. Article XVI:2 provides:

*“In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:*

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;*
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;*
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;*
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;*

<sup>14</sup> Appellate Body report, para 6.109.

- (e) *measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and*
- (f) *limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment”.*

2.25 The effect of Article XVI:1 is to turn the schedules of commitments into a source of rights for WTO Members. As the article refers to treatment no less favourable than that provided for *under the terms, limitations and conditions agreed and specified in its Schedule* it is clear that the limitations and conditions imposed in the relevant schedule cannot be disregarded or overridden. Article XVI applies to discriminatory and non-discriminatory measures. The reference to “*no less favourable treatment*” derives from the GATT where a competitive opportunities test is applied. Discrimination will be found, accordingly, if the competitive opportunities of the foreign supplier are adversely affected.

## Economic Integration Agreements

2.26 The GATS contains an exemption from most favoured nation commitments in respect of economic integration agreements. The requirements are set out in Article V of the GATS. Article V:1 provides:

*“This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:*

- (a) *has substantial sectoral coverage, and*
- (b) *provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:*
  - (i) *elimination of existing discriminatory measures, and/or*
  - (ii) *prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis”.*

2.27 It is clear that the GATS would not allow an economic integration agreement that was restricted to a single services sector (such as financial services). The UK would therefore be precluded under WTO rules from negotiating a preferential trade agreement with the EU that only applied to certain classes of services as opposed to services generally. Footnote 1 states that the requirement for substantial sectoral coverage “*is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet*

*this condition, agreements should not provide for the a priori exclusion of any mode of supply*". It follows that the number of sectors, volume of trade and modes of supply are all relevant to the question whether the economic integration agreement complies with Article V, although the degree of liberalisation of the individual modes of supply is unclear. For the position on mutual recognition agreements see paragraphs 2.35 to 2.39 below.

## Domestic Regulation

2.28 Domestic regulation is an important tool for serving public policies as well as protecting weaker parties such as consumers. At the same time it may serve as a significant barrier to international trade. It is governed by GATS Article VI. This provides:

- “1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.*
- 2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.*
  - (b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.*
- 3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.*
- 4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:*
  - (a) based on objective and transparent criteria, such as competence and the ability to supply the service;*
  - (b) not more burdensome than necessary to ensure the quality of the service;*

(c) *in the case of licensing procedures, not in themselves a restriction on the supply of the service.*

5. (a) *In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:*

(i) *does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and*

(ii) *could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.*

(b) *In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.*

6. *In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member ”.*

2.29 The purpose of Article VI is to make domestic decision-making, implementation and administration more transparent<sup>15</sup>. Article VI differs from national treatment and market access. Article VI:1 sets out the general goal in its call for the “*reasonable, objective and impartial*” administration of all measures of general application in which commitments have been given. It follows that Article VI cannot “bite” on sectors where no specific commitments have been made. However, where even minimal commitments have been undertaken in a sector, the article will apply to that sector<sup>16</sup>. In terms of scope, the article covers laws, regulations and general administrative acts but would seem to exclude individual or *ad hoc* measures that are not general<sup>17</sup>. It should also be stressed that Article VI is concerned with the administration and not the substance of domestic regulations<sup>18</sup>.

2.30 There is no case law on the interpretation of “reasonable, objective and impartial”. Reasonable could be interpreted as implying a standard of proportionality<sup>19</sup>. Impartial probably means even handed, providing for objectivity and neutrality<sup>20</sup>. Article VI:2 applies to all sectors whether or not a commitment has been undertaken in that sector. To rely on Article VI:2 a service supplier must show (A) an administrative decision, (B) an adverse effect on the service supplier and (C) a causal link between the decision and the adverse effect<sup>21</sup>. Article VI:2 requires that WTO Members have judicial, arbitral or administrative tribunals or procedures to review administrative

<sup>15</sup> *Ibid*, p. 271.

<sup>16</sup> *Ibid*, p. 273.

<sup>17</sup> *Ibid*, p. 272.

<sup>18</sup> *Ibid*, p. 273.

<sup>19</sup> *Ibid*, p. 275.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*, p. 277.

decisions. A failure to introduce such form of review may only be challenged by the WTO dispute settlement system. In practice, the United Kingdom is fully compliant with its system of courts and tribunals. The reference to “*appropriate remedies*” leaves discretion to WTO Members with the result that the remedies available may vary from WTO Member to WTO Member.

- 2.31 Article VI:3 addresses cases where authorisation is required. A service supplier is entitled to a decision within a reasonable period of time. It leads to transparency of decisions as well as information that may be used to challenge defects in the decision-making process<sup>22</sup>. Compliance with this provision presupposes a basis in national law on which to apply for authorisation<sup>23</sup>.
- 2.32 Article VI:4 empowers the Council for Trade in Services to develop disciplines to ensure that qualification requirements are (a) based on objective and transparent criteria, (b) not more burdensome than necessary and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. The words “*inter alia*” which precede the itemised list of requirements in Article VI:4 indicate that these are minimum standards. As Article VI:4 applies to sectors whether or not commitments have been made, there is the possibility of overlap with the rules on market access and national treatment. Only standards in the accountancy sector have so far been agreed.
- 2.33 Article VI:5 applies pending the adoption of standards under Article VI:4. WTO Members are prohibited in sectors where they have made commitments, from applying licensing and qualification requirements and technical standards that nullify or impair such specific commitments which do not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); or could not reasonably have been expected of that WTO Member at the time the specific commitments in those sectors were made. The article is designed to prevent WTO Members from taking back with one hand concessions which they have given with the other by making commitments.
- 2.34 Article VI:6 applies only where commitments have been made in respect of professional services and is limited to the procedure and not the substance<sup>24</sup>. The provision is intended to facilitate mode 4 through providing a mechanism for the qualifications of foreign nationals to be assessed. It is complementary to Article VII on recognition.

## Mutual Recognition

- 2.35 Article VII of the GATS provides for mutual recognition on a unilateral basis or a bilateral basis. Significantly, where mutual recognition is granted it must be capable of being extended on an MFN basis to other WTO Members who meet the relevant criteria. Article VII provides:

*“1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the*

<sup>22</sup> *Ibid*, p. 282.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*, p. 295.

*education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.*

2. *A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.*
3. *A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.”*

2.36 The core of the provision is Article VII:1 which would permit the United Kingdom to accord mutual recognition to EU standards on a unilateral or bilateral basis. The former is unlikely to be attractive as it would give EU financial services suppliers access to the UK market without a corresponding right on the part of UK service suppliers. Hence, the article makes provision for a mutual recognition agreement. Unlike an economic integration agreement, a mutual recognition agreement could be restricted to a single services sector or sub-sector. It is also an exception to the MFN principle as by according mutual recognition to EU standards the UK would, potentially, be discriminating against other WTO Members. Mutual recognition may be based on harmonisation, but need not be. In practice, it may be unlikely that the EU would agree to mutual recognition of UK standards unless they were based, at least, on internationally agreed prudential standards. In fact, the EU could go further and insist that the UK adhered to EU standards (even though the UK would have no say over their formulation) as a condition of entering into a mutual recognition agreement. This emphasises the discretionary nature of mutual recognition.

2.37 Since mutual recognition can cause diversion of trade to the parties to a mutual recognition agreement, Article VII:2 aims to balance the trade liberalising and trade distorting effects of such agreements. Basically, other WTO Members must be accorded an adequate opportunity to accede to the mutual recognition agreement or to negotiate similar agreements. Article VII:2 does not define an “adequate opportunity”, but based on the ordinary wording and objectives of the GATS it can be argued that it requires a general willingness to include other WTO Members in the recognition process<sup>25</sup>. The possibility of offering other WTO Members the opportunity to negotiate a similar agreement must be available on a non-discriminatory basis and the negotiations must be conducted in good faith<sup>26</sup>.

<sup>25</sup> R Wolfrum et al. *WTO Trade in Services*, Nijhoff, p. 201 (Krajewski).

<sup>26</sup> *Ibid.*

- 2.38 Article VII:3 imposes a positive non-discrimination obligation. A WTO Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorisation, licensing or certification of services suppliers, or a disguised restriction on trade in services. Article VII:3 would be violated if the EU recognised the standards operating in the United States without applying similar recognition to UK standards *provided that the standards were equivalent*.
- 2.39 There is a notification requirement in Article VII:4(c) on a WTO Member promptly to inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and to state whether the measures are based on an agreement or arrangement of the type referred to in Article VII:1.

## Exceptions

- 2.40 There are exceptions for public policy and public security in Article XIV of the GATS. Of more relevance in the financial services context is Article XIV(c) which provides an exception for measures “*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety*”. The scope of this provision was considered in *Argentina - Financial Services*. The case concerned various taxation measures, registration of branches of companies of non-cooperative tax jurisdictions and a prior authorisation requirement for the purchase of foreign exchange for repatriation. The panel held that the measures were justified on the basis that they discouraged harmful tax practices and enabled the authorities to ensure that Argentine residents were taxed on all their earnings. The requirements relating to the setting up of branches were justified by the need for the Argentine authorities to secure compliance with the Commercial Companies Law and the Resolution on Companies Incorporated Abroad, while the requirement for pre-authorisation for the purchase of foreign exchange was necessary to ensure compliance with the Law against Money Laundering.
- 2.41 The Appellate Body held that “[a] measure can be said ‘to secure compliance’ with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty. The more precisely a respondent is able to identify specific rules, obligations, or requirements contained in the GATS-consistent laws or regulations, the more likely it will be able to elucidate how and why the inconsistent measure secures compliance with such laws or regulations”<sup>27</sup>. Moreover, “[t]he second element entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations. In particular, this element entails an assessment of whether, in the light of all relevant factors in the ‘necessity’ analysis, this relationship is sufficiently proximate, such that the measure can be deemed to be ‘necessary’ to secure

<sup>27</sup> Appellate Body report, para 6.203.

compliance with such laws or regulations”<sup>28</sup>. In the Appellate Body’s view “these two elements as conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is ‘necessary to secure compliance with laws or regulations’ under Article XIV(c) of the GATS. We do not see the content of these two elements of the analysis as entirely separate. Nor do we see the structure of each analysis as one that must follow a rigid path. Rather, the analyses of these two elements may overlap in the sense that some considerations may be relevant to both elements of the Article XIV(c) defence”<sup>29</sup>. In addition, the measure must not be “*applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services*”.

## The Annex on Financial Services

2.42 The Annex on Financial Services is an integral part of the GATS and applies to financial services broadly defined<sup>30</sup>. However, in order to be a financial service it must be supplied by a financial services supplier. This is defined as “*any natural or juridical person of a Member wishing to supply or supplying financial services but the term “financial service supplier” does not include a public entity*”.

2.43 The most important provision in the Annex on Financial services is the “prudential carve-out” in paragraph 2(a). This reads:

*“Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement”.*

<sup>28</sup> Appellate Body report, para 6.204.

<sup>29</sup> Appellate Body report, para 6.205.

<sup>30</sup> A financial service is any service of a financial nature offered by a financial service supplier of a WTO Member. According to the GATS “Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities: *Insurance and insurance-related services* (i) Direct insurance (including co-insurance): (A) life (B) non-life (ii) Reinsurance and retrocession; (iii) Insurance intermediation, such as brokerage and agency; (iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services. *Banking and other financial services* (excluding insurance) (v) Acceptance of deposits and other repayable funds from the public; (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction; (vii) Financial leasing; (viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts; (ix) Guarantees and commitments; (x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following: (A) money market instruments (including cheques, bills, certificates of deposits); (B) foreign exchange; (C) derivative products including, but not limited to, futures and options; (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements; (E) transferable securities; (F) other negotiable instruments and financial assets, including bullion. (xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues; (xii) Money broking; (xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services; (xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments; (xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services; (xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy”.



- 2.44 In *Argentina - Financial Services* the Appellate Body considered for the first time the prudential carve out stating that “paragraph 2(a) contains three requirements that must be fulfilled for a measure to be justified under this provision. First, there is the threshold, or preliminary, question of what types of measures may potentially fall within the scope of paragraph 2(a). Second, a measure must have been taken “for prudential reasons”. Finally, under the second sentence of paragraph 2(a), the measure “shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement”. Only when a measure falls within the scope of paragraph 2(a) will there be a need to evaluate whether it was taken “for prudential reasons” and whether it fulfils the requirement in the second sentence of paragraph 2(a)”<sup>31</sup>.
- 2.45 The Appellate Body continued “The fact that paragraph 2(a) covers violations of obligations under “any other provisions of the Agreement” means that it could be invoked to justify inconsistencies with all of a WTO Member’s obligations under the GATS. These include, for example, a WTO Member’s most-favoured-nation treatment obligation under Article II, market access commitments under Article XVI, or national treatment obligation under Article XVII. This indicates that, for example, measures which are of the types listed in Article XVI:2, and which impose market access restrictions for prudential reasons, could potentially fall within the scope of paragraph 2(a). The type of measure taken by a WTO Member (such as market access restrictions) and the provision of the GATS contravened by such measure (such as Article XVI) are distinct, but related, concepts. For this reason, we do not agree with Panama that the permission granted by the introductory clause of paragraph 2(a) to depart from the obligations set out in “any provisions of” the GATS “has no implication on the type of measures that may be inconsistent with any provision of the GATS and also covered by the prudential exception”<sup>32</sup>.
- 2.46 Prudential measures that could fall within the prudential carve out include capital adequacy standards, requirements for the fitness and propriety of senior management and shareholder controllers, conduct of business rules, liquidity rules and requirements in respect of bank recovery and resolution. Standards set by the international standard setting bodies (e.g. the Basel Committee and IOSCO) might be taken as a benchmark for what constitutes prudential measures.
- 2.47 Paragraph 3(a) of the Annex on financial services makes provision for the mutual recognition of the prudential measures of any other country in determining how a WTO Member’s measures relating to financial services shall be applied. Such recognition may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the country concerned or may be accorded autonomously. This is a hortatory provision as it does not require the WTO Member mutually to recognise other states’ domestic regulation as equivalent. Paragraph 3(b) provides that a WTO Member that is party to such an agreement or arrangement shall afford adequate opportunity for other interested WTO Members to negotiate their accession to such agreements or arrangements or to negotiate comparable ones under circumstances in which there would be equivalent regulation,

<sup>31</sup> Appellate Body report, para 6.246.

<sup>32</sup> *Ibid*, para 6.255.

oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement.

- 2.48 Finally, paragraph 4 of the Annex requires panels for dispute settlement on prudential issues and other financial matters to have the necessary expertise relevant to the specific financial service under dispute. However, subject to that, the normal WTO dispute settlement procedure applies.

## The Understanding on Financial Services

- 2.49 The Understanding on Financial Services was elaborated by a group of developed, mostly OECD, countries that were dissatisfied with the quite limited degree of liberalisation of trade in financial services achieved by the Annex. The understanding is not a separate agreement but rather represents a “model schedule” that WTO Members may, if they so choose, adopt. It therefore has no legal force *per se* but becomes binding once its commitments are incorporated in the schedule of commitments of WTO Members that follow the Understanding on Financial Services. The EU and its Member States have adopted the approach set out in the Understanding on Financial Services.
- 2.50 Section A provides for a standstill provision. This is intended to fix the status quo of financial services regulation at a maximum below which a WTO Member may not lower its level of trade liberalisation. Under the standstill provision, any measure not in conformity with the Understanding’s alternative approach must pre-date the adoption of the Understanding in the relevant Member’s schedule. The effect is to grandfather existing measures that are contrary to the text of the Understanding.
- 2.51 Section B provides for market access and modifies the list of prohibited market access restrictions in Article XVI:2. Section B.3 provides for the liberalisation of cross-border trade under national treatment of certain insurance services (e.g. maritime shipping, commercial aviation and space launching and freight as well as goods in international transport). Under the Understanding, each adopting WTO Member shall permit its residents to purchase in the territory of any other WTO Member the insurance services set out in the Understanding and the banking services listed in paragraphs 5 (a)(v) to (xvi) of the Annex on Financial Services. This encompasses a very broad range of banking services including deposit-taking, lending, payment and money transmission services, securities, asset management, settlement and clearing and advisory services.
- 2.52 Each adopting WTO Member shall grant financial service suppliers of any other WTO Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence. Adopting WTO Members may, however, impose terms, conditions and procedures for authorisation of the commercial presence.
- 2.53 Each adopting WTO Member shall permit temporary entry into its territory of the following personnel of a financial service supplier of any other WTO Member that is establishing or has established a commercial presence in the territory of the adopting WTO Member: (i) senior

managerial personnel possessing proprietary information essential to the establishment, control and operation of the services of the financial service supplier; and (ii) specialists in the operation of the financial service supplier. Each adopting WTO Member shall permit, subject to the availability of qualified personnel in its territory, temporary entry into its territory of the following personnel associated with a commercial presence of a financial service supplier of any other WTO Member: (i) specialists in computer services, telecommunication services and accounts of the financial service supplier; and (ii) actuarial and legal specialists.

- 2.54 Each adopting WTO Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other WTO Member of: (a) non-discriminatory measures that prevent financial service suppliers from offering in the adopting WTO Member's territory, in the form determined by the adopting WTO Member, all the financial services permitted by the adopting WTO Member; (b) non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the adopting WTO Member; (c) measures of an adopting WTO Member, when such an adopting WTO Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other WTO Member concentrates its activities in the provision of securities services; and (d) other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other WTO Member to operate, compete or enter the adopting WTO Member's market; provided that any action taken under this paragraph would not unfairly discriminate against financial service suppliers of the adopting WTO Member taking such action.
- 2.55 Under terms and conditions that accord national treatment, each adopting WTO Member shall grant to financial service suppliers of any other WTO Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the adopting WTO Member's lender of last resort facilities. When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organisation or association, is required by an adopting WTO Member in order for financial service suppliers of any other WTO Member to supply financial services on an equal basis with financial service suppliers of the adopting WTO Member, or when the adopting WTO Member provides directly or indirectly such entities, privileges or advantages in supplying financial services, the adopting WTO Member shall ensure that such entities accord national treatment to financial service suppliers of any other WTO Member resident in the territory of the adopting WTO Member.

## EU Schedule of Commitments under the GATS

- 2.56 The EU schedule of commitments is established "in accordance with the provisions of the 'Understanding on Commitments in Financial Services'". These commitments are subject to the limitations on market access and national treatment in the "all sectors" section of the schedule and to the sub-sectors listed. Market access commitments in respect of modes 1 and 2 apply only to transactions listed in B.3 and B.4 (cross-border trade in certain insurance

and banking services). As a general rule and in a non-discriminatory manner, financial institutions incorporated in a Member State of the EU must adopt a specific legal form.

- 2.57 Unlike foreign subsidiaries, branches established directly in a Member State by a non-EU financial institution are not, with certain limited exceptions, subject to prudential regulations harmonised at EU level. Therefore, such branches may receive an authorisation to operate in the territory of a Member State under conditions equivalent to those applied to domestic financial institutions of that Member State, and may be required to satisfy a number of specific prudential requirements such as, in the case of banking and securities, separate capitalisation and other solvency requirements and reporting and publication of accounts requirements or, in the case of insurance, specific guarantee and deposit requirements, a separate capitalisation, and the localisation in the Member State concerned of the assets representing the technical reserves and at least one third of the solvency margin. Member States may apply the restrictions indicated in this schedule only with regard to the direct establishment from a third country of a commercial presence or to the provision of cross-border services from a third country; consequently, a Member State may not apply these restrictions, including those concerning establishment, to third-country subsidiaries established in other Member States of the EU, unless these restrictions can also be applied to companies or nationals of other Member States in conformity with EU law.
- 2.58 Several Member States have imposed restrictions on the provision of insurance and insurance-related services under modes 1 and 2. By way of example, under mode 1 (cross-border) Denmark requires compulsory air transport insurance to be underwritten by a firm established in the EU. In Germany if a foreign insurance company has established a branch, it may conclude insurance contracts in Germany relating to international transport only through the branch established in Germany. Italy imposes a requirement that insurance of risks relating to c.i.f. exports by residents may be underwritten only by insurance firms established in the EU. In respect of mode 2 (consumption abroad) Austria requires compulsory air insurance to be underwritten only by a subsidiary established in Austria or by a branch established in Austria. No persons or companies (including insurance companies) may for business purposes in Denmark assist in effecting direct insurance for persons resident in Denmark, for Danish ships or for property in Denmark, other than insurance companies licensed by Danish law or by Danish competent authorities. Many more examples could be given.
- 2.59 In terms of commercial presence, Austria states that the licence for a branch office of a foreign insurer will be refused if the insurer in the home country does not have a legal form corresponding or comparable to a joint stock company or a mutual insurance association. Finland has a requirement that the general agent of a foreign insurance company shall have his place of residence in Finland unless the company has its head office in the EEA. Spain requires a foreign insurer to have been authorised to operate the same classes of insurance in its country of origin for at least five years before establishing a branch or agency to provide such classes of insurance. In Greece the right of establishment does not cover the creation of representative offices or other permanent presence of an insurance company unless such offices are established as agencies, branches or head offices. In Finland the managing

director, at least one auditor and at least one half of the promoters and Members of the board of directors and supervisory board shall have their place of residence in the EEA unless an exemption is obtained. Foreign insurers cannot get a licence as a branch to carry on statutory social insurance (statutory pension insurance, statutory accident insurance). Sweden requires a founder of an insurance company to be a natural person resident in the EEA or a legal entity incorporated there. Other restrictions on market access and national treatment exist.

- 2.60 Presence of natural persons is unbound except as set out in the horizontal section and is subject to additional requirements in Greece. The horizontal section states that access is unbound except for measures concerning the entry into and temporary stay within a Member State of listed categories of natural persons without requiring compliance with an economic needs test except where indicated for a specific subsector. The Schedule states that all other requirements of EU and Member States' laws, regulations and requirements regarding entry, stay and work shall continue to apply. The service contract shall comply with the laws, regulations and requirements of the EU and the Member State where the service contract is executed.
- 2.61 In respect of banking and other financial services, Belgium requires establishment in Belgium for the provision of investment advisory services. Ireland generally requires authorisation (in Ireland or another Member State) for the provision of investment services and investment advice which requires that the entity be incorporated or be a partnership or a sole trader, in each case with a head/registered office in Ireland. Authorisation may not be required where a third country service provider has no commercial presence in Ireland and the service is not provided to private individuals. There are no limits on national treatment in respect of mode 2 (consumption abroad). However, several Member States place restrictions on market access. Greece requires establishment for the provision of custodial and depository services involving the administration of interest and principal payments due on securities issued in Greece. The UK requires sterling issues, including privately led issues, to be lead managed only by a firm established in the EEA.
- 2.62 Under mode 3 (commercial presence) all Member States require the establishment of a specialised management company to perform the activities of management of unit trusts and investment companies, and only firms having their registered office in the EU can act as depositories of the assets of investment funds. In Belgium any public bid to acquire Belgian securities made by or on behalf of a person, company or institution outside the jurisdiction of one of the EU Member States shall be submitted to the authorisation of the Minister of Finance. In Spain, financial institutions may engage in trading in securities listed on an official stock exchange or in the government securities market only through securities firms incorporated in Spain. In Finland at least one half of the founders, the members of the board of directors, the supervisory board and the delegates, the managing director, the holder of the procuracy and the person entitled to sign in the name of a bank shall have their place of residence in the EEA unless the Ministry of Finance grants an exemption. The broker on a derivative exchange shall have his place of residence in the EEA, although an exemption can be granted under conditions set by the Ministry of Finance.

- 2.63 In Ireland, to become a member of a stock exchange an entity must either be authorised in Ireland (which requires that it be incorporated or is a partnership with head/registered office in Ireland) or be authorised in another EU Member State. The provision of investment services requires either authorisation in Ireland, which normally requires that the entity be incorporated or be a partnership or sole trader, in each case with a head/registered office in Ireland or another EU Member State. The supervisory authority may also authorise branches of third country entities. In the UK inter-dealer brokers dealing in Government debt are required to be established in the EEA and separately capitalised. More examples could be given.
- 2.64 The presence of natural persons is unbound save as indicated in the horizontal section and is subject to specific conditions in Finland and Greece.
- 2.65 The EU has undertaken additional commitments under the GATS in respect of insurance and other financial services. In respect of insurance, Member States will make their best endeavours to consider within six months complete applications for licences to conduct direct insurance underwriting business, through the establishment in a Member State of a subsidiary in accordance with the legislation of that Member State, by an undertaking governed by the laws of a third country. In cases where such applications are refused, the Member State authority will make its best endeavours to notify the undertaking in question and give the reasons for the refusal of the application. In respect of other financial services in application of the relevant EC Directives, Member States will make their best endeavours to consider within 12 months complete applications for licences to conduct banking activities, through the establishment in a Member State of a subsidiary in accordance with the legislation of that Member State, by an undertaking governed by the laws of a third country. In cases where such applications are refused, the Member State will make its best endeavours to notify the undertaking in question and give the reasons for the refusal of the application. Member States will make their best endeavours to consider within 6 months complete applications for licences to conduct investment services in the securities field, as defined in the Investment Services Directive [now the Markets in Financial Instruments Directive or MiFID]), through the establishment in a Member State of a subsidiary in accordance with the legislation of that Member State, by an undertaking governed by the laws of a third country. In cases where such applications are refused, the Member State will make its best endeavours to notify the undertaking in question and give the reasons for the refusal of the application.
- 2.66 It will be seen that the degree of liberalisation effected by the GATS is considerably less than that available under the Single Market Directives. There is no right to establish a branch, and where a Member State allows a third country branch it will be subject to authorisation requirements. Mode 1 (cross-border) services is limited to certain kinds of large risk insurance and banking activities, but is subject to limitations on market access and national treatment in many Member States. Consumption abroad is not subject to restrictions on national treatment but is subject to national restrictions on market access in certain Member States. The presence of natural persons is heavily caveated and subject to national immigration laws.

2.67 The House of Lords European Union Committee, in its report on the impact of Brexit on financial services recommended that a key priority for the Government should be to ensure that there is an adequate transition period, avoiding a 'cliff edge' both at the moment of withdrawal following the Article 50 process and as the UK and the EU move towards a new relationship.

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