TheCityUK

Review of the Balance of Competences between the United Kingdom and the European Union

Trade and Investment

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Executive Summary

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TheCityUK's response to the Government Review is appended. Further contributions will be made to future consultations, including the "Services" and "Capital" aspects of the Internal Market. Six themes arise from the current consultation and are worth highlighting:

1 Trade and investment policies and negotiations have tangible commercial value and are vital for business:

- They are core instruments for improving the EU's balance of advantage in global trade;
- They are vital links to global growth (90 % of which will come from outside EU over next 10-15 years);
- Policy success/failure is crucial to the EU's scope for engaging in the global economy on optimum terms.

2 UK financial and professional services stand to benefit from EU trade & investment policy:

- UK financial services exports account for more than half the surplus of all UK net exporting industries;
- The UK is unique in the EU in the scale of financial services in its international trade;
- 66% of the UK's trade surplus in financial services arises from extra-EU business;
- The UK attracts more FDI than any other EU member-state, and financial services attracts more FDI than any other sector;
- The EU as a whole is the world's largest net financial services exporter (with extra-EU exports of €59 billion).

3 The EU's Common Commercial Policy has been a success story for the UK:

- Trade partners want access to the entire EU Single Market: negotiating as a bloc gives the EU added power;
- The UK has successfully influenced EU trade policy's open markets objectives;
- The UK is no longer equipped to conduct its own trade negotiations, and would need to rebuild and re-skill resources before it could do so.

4 The UK's comparative and competitive advantage in financial and professional services is being enhanced though EU trade and investment policy objectives:

- The prospects are currently far better than through the UK's WTO membership alone;
- Multilateral agreements negotiated by the EU – including all the WTO Agreements – have secured gains for financial and professional services over two decades;
- A new generation of bilateral EU trade agreements is leading to new opportunities for UK financial and professional services in key Asian markets (e.g. South Korea, Singapore);
- Agreements under negotiation with the US, Canada and Japan will extend the gains.

5 Future policy will be successful, if it focuses on:

- A liberalising trade and investment policy, calibrated to enhancing jobs and growth;
- Capturing further market access and non-discrimination in new, high-growth markets;
- Working with the grain of "the new trade narrative" – the importance of global supply chains and value chains, and the role of financial and professional services within them;
- Maintaining policy "coherence" - domestically and world-wide - to align EU regulatory and trade policy practice to secure open market objectives seamlessly;
- Avoiding extraterritorial legal approaches that have the potential to damage relations with trading partners;
- Keeping Europe open to global opportunities and growth, given that 90% of global growth now takes place outside the EU.

6 Conclusion

- Maintenance of UK membership of the EU is a critical factor in the continued ability of the UK financial and professional services to generate foreign exchange earnings;
- Withdrawal from the EU would not only throw the UK's trade relations with the rest of the Single Market into doubt, but would also lead to the loss of trade and investment benefits in current EU trade agreements with third markets.

TheCityUK
6 August 2013

TheCityUK

Detailed Submission

TheCityUK

Review of the Balance of Competences between the United Kingdom and the European Union

Trade and Investment

Detailed Submission

This submission takes in turn the questions in the Call for Evidence. After offering some general comment on the issues it aims at responding to each question (to the extent relevant to TheCityUK and its member-businesses). It also aims to develop each question, where appropriate, to bring out further points that TheCityUK considers important.

This submission reflects the views of TheCityUK's Liberalisation of Trade in Services (LOTIS) Committee, whose membership covers all areas of UK financial and related professional services.[1]

Background

Trade and investment policies and negotiations have tangible commercial value - vital for business. They are core instruments for improving the EU's competitive advantages in global trade by gaining new markets, opportunities and access. Trade and investment policies have make-or-break qualities based on whether they are effective, are sustainable over the long term, prosper business and contribute to growth and wealth-creation. Misdirected policies on the other hand can stunt overseas market opportunities for business and impede competitiveness and domestic structural change. . As the Commission has regularly emphasised, well-applied trade policies are low-cost in terms of the benefits they bring - they provide an "important means of achieving much needed growth and creating jobs without drawing on public finances"[2].

Trade Policy (although not investment policy) has always been a European "common policy". That is to say, in EU terminology, it has been established under the Treaties (from the Treaty of Rome (1958) onward) as the Common Commercial Policy (CCP). Although the policy has evolved and some areas of competence have been extended, this means that the key concepts and features of the CCP in its present form, and most of how it is managed, have been in place since the UK's accession (and indeed since the EU's inception): for all practical purposes, the Community negotiates on behalf of the member-states; and the Commission is the negotiator. Where there have been changes, these have tended to be institutional (e.g. qualified majority voting, or the increased influence of the European Parliament) or changes in policy scope (e.g. the inclusion of services and investment as matters of EU competence).

Because it is coeval with the origins of the European Communities (EC) some sixty years ago, **the CCP dates back to a different era** when:

- the EC was smaller, more homogenous and more globally competitive than the EU is now;

[1] See www.thecityuk.com for a list of LOTIS Committee members

[2] "Trade: a key source of growth and jobs for the EU" Commission contribution to the European Council of 7-8 February 2013

- the EC's interest was much more in trade in goods than in services;
- it was more possible than nowadays to treat a country's merchandise exports as finished products largely or wholly originating in that country rather than "made in everywhere";
- the GATT (predecessor to the WTO) was concerned with trade in goods (excluding agriculture) not with services;
- trade negotiations mainly took the form of multilateral tariff "rounds";
- trade between advanced OECD countries took place against a background of fixed exchange rates;
- trade was less globalised (with less developed complex supply chains) and less in the hands of the recent breed of global companies;
- Asian "tigers" and other high-growth new economies (except for Japan) had yet to emerge;
- information technology (now accounting for significant flows of overseas business as virtual exchanges) was in its infancy; and
- the distinction between forms of trade confined to cross-border transfers and those requiring local direct investment overseas investment was far clearer than today (investment then being outside the CCP).

It also dates back to an era before the accumulation of huge global imbalances and other economic disequilibria, when trade policy was more easily isolated as a specialism and did not need to be as fully integrated as now into wider issues of economic governance at national, regional and global level.

These historic origins have led to certain **key questions affecting services** receiving attention from the EU's – and indeed other trade partners' - policymakers only relatively recently:

- Trade in Services: this was not trade policy subject-matter in the early days of the CCP, and is still subject to difficulties in formulating evidence-based policies that do not apply to goods (such as "servicification"[3], problems in measuring services trade flows, and compiling EU statistics);
- "Services Trade Restrictiveness": there is an increasing recognition of the importance of analysing the degree of restrictiveness of different countries' barriers to trade in services, so as to develop more reliable methodologies for comparing their effects and their implications both domestically and for trade partners;
- Complex supply chains in global trade: developments in this area affect both goods and services, and account for the existence of supply chains in which both are tightly interlinked;
- Trade in value added: Global value chains (GVCs) have become a dominant feature of today's global economy. As OECD research demonstrates[4], processes of international fragmentation - driven by technological progress, costs, access to resources and markets, and trade policy reforms - challenge conventional wisdom on recording gross flows of goods and services each and every time they cross borders, and therefore on how trade flows should be evaluated and interpreted.

This mix of questions – sometimes collectively called the "new trade narrative" - has a significant bearing on trade in services in general and in financial and professional services in particular. Unless

[3] See "Everybody is in Services – The Impact of Servicification in Manufacturing on Trade and Trade Policy" (Swedish National Board of Trade, November 2012)
[4] OECD-WTO Database on Trade in Value-Added (OECD and WTO websites)

and until the role of services trade (and restrictions on it) can be measured and evaluated, both as regards general trade flows and within complex supply chains and value chains, there is a risk of trading interests being misinterpreted, leading to misguided policy decisions being taken. **The right approach to these questions is integral to the exercise of EU competence for trade in services**.

The same historic origins have been reflected in the sorts of **competence issues** that have arisen. The long-standing and well-established nature of the CCP means that trade has tended to be a much less contentious area than many other fields of EU policy. This is not to say that there are no arguments over policy (e.g. open trade versus protectionism) or competence (e.g. allegations of "competence creep"). There have been cases in which competence was seen as divided (this applied to services throughout the GATT Uruguay Round, and to negotiations on financial services leading to the Fifth Protocol to the GATS (1998)), or as capable of accretion (in line with the AETR[5] principle that powers which, at the outset, have not been conferred exclusively upon the EU may become so progressively through the exercise of those powers by the Community), or as subject to change by ECJ ruling (this affected trade in services under certain GATS "Modes" in ECJ Case 1/94).

Competence questions about the CCP looks set to continue, particularly as regards the interpretation of negotiating outcomes. Given the wide range of matters covered in any EU trade agreement, and the volume, complexity and frequency of change of EC legislation, it is difficult, in any given case, to know whether a specific matter falls within the exclusive or mixed competence of the Community. Virtually no EU trade agreement can be taken as falling entirely within EU competence[6]

Taken together, all these factors need to be seen as a running theme in any examination of EU competence in trade and investment. **Do the policies and their institutional framework, originally devised so long ago, still meet the needs for which they were designed in the post-War era? Do they enable the EU to pursue trade policies optimally calibrated to the EU's present comparative and competitive advantage in the global economy?**

General Comment

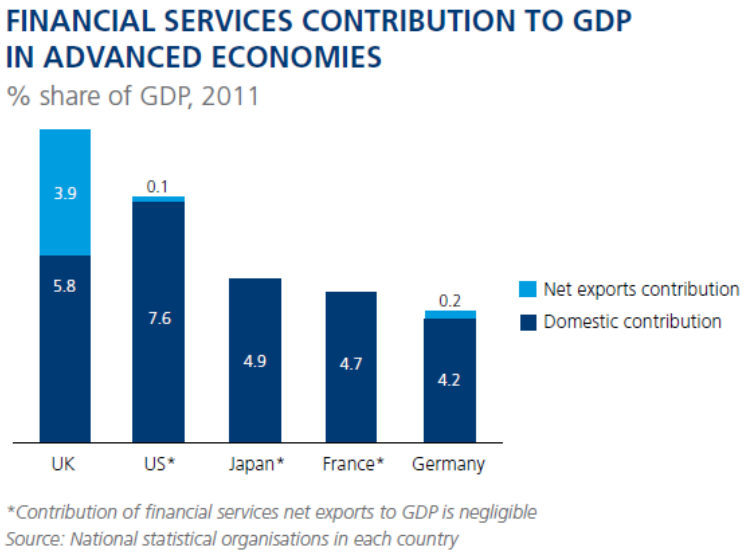
The huge importance of the EU's trade policy is reflected in its importance to TheCityUK's member businesses. Its success or failure is a factor in the EU's scope for engagement in the global economy on optimum terms. In a submission to the European Council in February 2013[7] the Commission noted that "90 % of global economic growth in the next 10-15 years is expected to be generated outside Europe" and said:

> "Trade has never been more important for the European Union's economy. In today's difficult economic circumstances, it has become an important means of achieving much needed growth and creating jobs without drawing on public finances. It is the conveyor belt that links Europe to the new global growth centres and is a unique source of productivity gains. The EU, which is benefitting much more from globalisation than is sometimes portrayed, is well positioned to benefit from this intensified international trade."

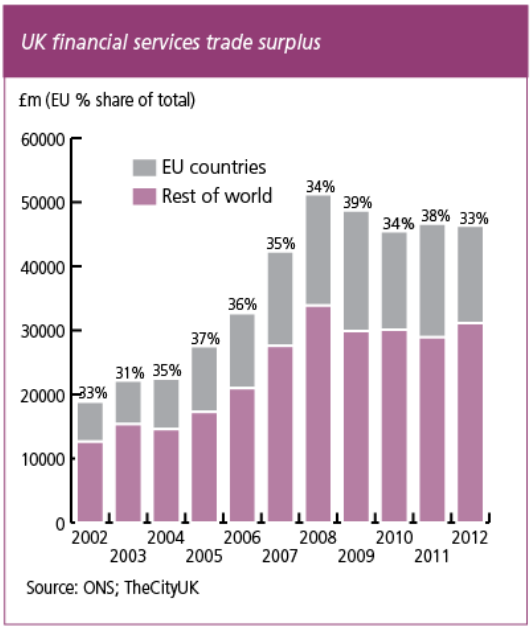
[5] The AETR (Accord Européen sur les Transports Routiers) AETR, Case 22/70 (31 March 1971)
[6] See Alastair Sutton "EC Competence in External Economic Relations" (White & Case, 2006)
[7] "Trade: a key source of growth and jobs for the EU" Commission contribution to the European Council of 7-8 February 2013

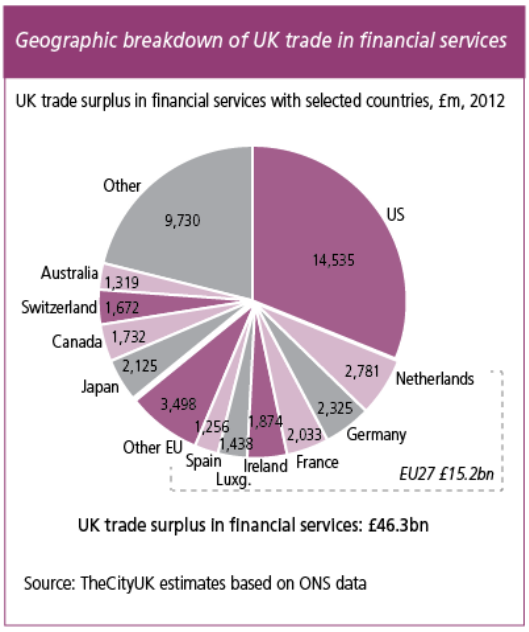
Studies support the Commission's contention that the EU is well positioned, at least for merchandise trade, and has held its share of global merchandise exports . But others point to the need for the EU's CCP to be re-orientated towards securing greater gains for EU services exports.

Within the EU – and indeed globally - the UK is unique in the role of financial services in its international trade. UK financial services exports account for more than half the surplus of all UK net exporting industries. The following chart offers a comparison with other major OECD economies:



Below these headline figures, the UK's more detailed position is as follows:





The EU as a whole is also the world's largest net exporter of financial services, with extra-EU exports of €59 billion,[8] and a world leader in stock of FDI. For all these reasons, it is essential that UK's comparative and competitive advantages in financial and professional services are reflected are fully

[8] "Key Facts about EU Financial and Professional Services" (TheCityUK, August 2013)

reflected in EU trade and investment policy objectives; and, in TheCityUK's view, no trade or investment agreement should be concluded without these interests being addressed fully and satisfactorily.

Against this background, **the EU needs to deploy trade and investment policies that are well calibrated to UK financial and professional services interests**. To be effective for these sectors, the policies will need to cater for traditional objectives in market access and national treatment. For services, they will also need to reflect the following:

- Clear political will to open the EU to international competition: without this, the power of the EU's trade and investment policy stance will inevitably be reduced;
- A coherent approach to investment and investment protection (both pre- and post-establishment). This is far more important for trade in services than for merchandise trade; but it also relates to merchandise trade particularly taking into account the need for satisfactory conditions for FDI affecting both goods and services business in complex supply chains;
- A clear approach to regulatory issues, including both prudential regulatory questions and "21st Century Issues" such as data-protection and data transfer (on which the EU's domestic stance needs to be consistent with concessions sought from trading partners);
- A clearer approach than hitherto to the question of EU legislation extending extraterritorially to EU foreign direct investments overseas (the present random approach can gratuitously disadvantage EU-owned operations in third countries).

Specific Questions

1. What are the advantages and disadvantages of the EU's competence over trade and investment, particularly in relation to international trade and investment negotiations?

When answering this question you may wish to consider:

- *the impact of acting as part of a bloc on the UK's global influence;*
- *the EU's capacity to deliver trade and investment policy effectively (e.g. its effectiveness in trade negotiations, including whether this varies across different regions);*
- *the resource implications of having competence at the EU level;*
- *the extent to which EU trade and investment policy offers benefits to the UK that go beyond those offered by WTO membership;*
- *the EU's priorities for trade and investment negotiations, for example in terms of negotiating partners and offensive and defensive interests (e.g. in market access), and the extent to which these align with UK priorities;*
- *the extent to which the UK's approach to trade policy is amplified or reduced by working through the EU (e.g. whether the UK, as a free trade advocate, succeeds in making EU trade and investment policy less protectionist);*
- *the extent to which EU trade policy has a trade facilitating or trade diverting effect for the UK.*

The EU's CCP has been a success story. As a highly advanced regional economic integration organisation (REIO), the EU combines a customs union with a common external tariff (CET) and common arrangements for imports from third countries. These features inexorably led the founding treaty-makers to favour a unified commercial policy, and a single negotiator representing all member-states, for negotiating terms of access to the customs union and changes in the CET – arrangements that are now institutionalised under the Treaty on the Functioning of the European

Union (TFEU)'s CCP provisions (within which investment generally now falls, following the Treaty of Lisbon). It is difficult to see how, for trade in goods, there could ever have been an alternative to this original approach. And it has worked to the member-states' advantage: given a unified Single Market, the EU as a whole carries the most negotiating weight, and can generally secure the best negotiating result, if it negotiates tough-mindedly *en bloc* from the strong position of being able to offer trading partners access to the entire EU market.

As regards services and investment, the arguments are generally similar, but with modifications. For services, the EU's Single Market is, overall, less harmonised than for goods. However, for financial services, a high degree of harmonisation is in operation (with provision for providers supervised in one member-state to "passport" to others), and access is valued, and sought, by third countries seeking new markets for their financial services. As for investment, the EU's position is still largely untried. It was agreed in the Treaty of Lisbon that investment would form part of the CCP. However, although a more coherent policy on investment is gradually being brought about (e.g. in mandates for negotiating on investment with the US (in the EU-US trade & Investment Partnership) and with China (in a free-standing EU-China Investment Agreement), the EU's investment policy has still to be completely worked out, and there is little experience, so far, of the EU's policy in practice; indeed member-states are still permitted, in certain instances, to negotiate their own bilateral investment treaties (BITs) or Investment Promotion and Protection Agreements (IPPAs) with third countries.

The impact of acting as part of a bloc on the UK's global influence

An assessment is not straightforward, not least because the counter-factual (pre-UK accession) is now so long ago. For financial services, however, the position is more defined. The UK's EU membership is integral to UK financial services. The forty years since UK accession have seen London's renewed pre-eminence as a global financial centre and huge progress in the development of the Single Market. Global financial services businesses now take for granted participation in the Single Market as a key factor in the continuing attractiveness of the UK as a destination for investment and as a base for undertaking financial services business, including euro business. As a result, the EU is the biggest individual market for UK exports of financial services. For the UK, acting as part of the EU bloc has twin impacts: first, through hosting the EU's financial centre, the UK is a global magnet for inward investment; secondly, through being the key channel for financial services trade with its EU hinterland (about 33% of the UK's total trade surplus in financial services (2012) came from trade with other member-states, compared with 31% from the US) the UK gains market influence and spokesmanship status as the pre-eminent EU member-state for financial services.

The EU's capacity to deliver trade and investment policy effectively (e.g. its effectiveness in trade negotiations, including whether this varies across different regions)

The EU's negotiating capacity and effectiveness varies (as with any entity conducting negotiations) depending on context and circumstances. It is not yet possible to make judgements on investment negotiations. But for services (the key concern for TheCityUK's members) various important factors can be in play, such as:

- <u>"Soft" versus "hard" power</u>: the EU's strength is in "soft" rather than "hard" power: unlike the US, the EU usually cannot deploy "hard power" (e.g. in the defence or wider geopolitical fields) to secure trade policy results. This may partially account for the apparent phenomenon that EU FTAs contain more non-enforceable provisions than their US counterparts, on regulatory issues

falling outside the WTO Agreements[9]. While "soft power" may make the EU appear a weaker negotiator, it can also demonstrate negotiating sensitivity and garner respect: the EU stance on the need to cater for the ultimate multilateralisation of the Trade in Services Agreement (TISA) is an example;

- Negotiating sensitivities: all trade negotiators have to cater for domestic sensitivities. But the EU may be exceptional – particularly on services - in the degree to which these are made explicit in advance in negotiating mandates. The debate over the "cultural exception" in the TTIP mandate was only the most recent example: there have been other instances where certain member-states' domestic policy conceptions of "public sector" services (e.g. educational services or social security provision) have tended to restrict the services fields in which the EU is ready to negotiate. This is not to say that such sensitivities are invalid; but they need to be carefully managed if the EU is not to forfeit the chance of securing negotiating gains for services sectors in which certain member-states may be highly competitive;

- Objective-setting: the EU has enjoyed some significant negotiating successes in cases where the US has already beaten a path: in the EU-South Korea and EU-Singapore FTA negotiations the EU objectives – for financial and professional services, at any rate - were very largely set in terms of securing "parity" with existing US FTAs; and it will be important for the EU to negotiate equally effectively under the "Global Europe" programme in cases where there is no pre-set "parity" objective.

That said, taking a longer view, there have been instances where the EU's capacity to deliver trade policy in services can be truly classed as visionary, as in the Community's tenacity in sustaining the GATS negotiations on financial series through to their final conclusion as the Fifth Protocol to the GATS (1998).

The resource implications of having competence at the EU level

For the EU's member-states taken together, there must be an overall economy of scale in trade policy being an EU competence: member-states do not have to conduct individual trade negotiations with third countries, do not need to maintain the skills and resources to do so, and can – and do - rely on the Commission as the principal framer of trade policy and source of expertise on the WTO Agreements as the basis of the global rules-based system. When the UK joined the Community, it was still a major player in international trade negotiations conducted in the GATT. UK trade officials had technical expertise matching that of any other GATT member. With the transfer of competence those special skills have inevitably eroded. The UK no longer needs to maintain, let alone duplicate, the range of trade policy skills required by the Commission. It would not be equipped to undertake and manage its own trade policy. There would need to be significant re-skilling and upgrading of capacity if the UK were, after four decades, to return to conducting trade negotiations.

That said, the EU framework creates its own demands on the resources of member-states and of their business sectors. For member-state governments, this reflects the need to decide on a negotiating mandate to guide the Commission; it also reflects the ongoing requirement to monitor (and ultimately approve) the progress and outcome of any EU negotiation. For business, it reflects the elongated line of communication between economic actors (in whose interest trade negotiations are undertaken) and the EU trade negotiators. For the UK, and for financial and professional services, these demands can be as follows:

[9] See Horn, Mavroidis and Sapir: "Beyond the WTO? An anatomy of EU and US preferential trade agreements" (Bruegel Blueprint 7, 2009)

- Government resources: for a member-state such as the UK, with (say) financial and professional services interests perhaps greater than those of any other member-state, substantial government resources are needed to gather evidence on the nature of UK interests in any particular negotiation, to ensure (e.g. via the EU Trade Policy Committee, the Committee of Permanent Representatives and the Council) that these interests are catered for by EU trade negotiators, and to keep domestic interests abreast of the progress of negotiations. The UK government might be able to economise slightly on these resources if there were an established EU system allowing cleared business representatives to have access to texts of proposals and negotiating documents (which, as in the United States[10], could be done while protecting the need for non-disclosure during negotiations);

- Private sector resources: these mirror government resources, particularly as regards the long line of communication between business interests and EU negotiators. Specific interests are co-ordinated at national sectoral level, national cross-sectoral level (e.g. TheCityUK's Liberalisation of Trade in Services (LOTIS) Committee, EU level (via EU "umbrella" organisations, notably the European Services Forum) and – sometimes – international level (e.g. the Global Services Coalition). The resultant system works reasonably well, but can suffer from poor co-ordination, lack of the right strategic alliances between businesses in different member-states or – contrariwise - lead to duplication of effort and "over-lobbying".[11]

All in all, there must be a saving in UK government resources. The private sector, on the other hand, faces a need for more, and better-deployed, resources if it is to track and influence a multiplicity of trade negotiations (often on a basis of incomplete knowledge). That said, the private sector would be likely to have to deploy such resources whatever the negotiating system: in today's globalised world, the need to follow and influence developments on a global scale is paramount. And, for financial services, both the government and the private sector need to recognise that the increasing interplay of trade and regulatory issues (typified in the current debate over the how far financial services will be covered in the "regulatory coherence" chapter of TTIP) means that enhanced levels of resources are required, irrespective of where competence lies.

The extent to which EU trade and investment policy offers benefits to the UK that go beyond those offered by WTO membership

The UK's WTO membership, by itself, means that the UK has equal legal standing with each of the WTO's other 158 members, with the same rights and obligations under the WTO rules-based system. It is difficult to compare the benefits of WTO membership with those of participation in the EU's CCP, as the CCP is only one of many attributes of EU membership, which brings with it all the other strengths and membership features of a customs union, a Single Market, and an REIO with a high degree of regulatory convergence, policed by the Commission and the ECJ. Taking trade policy alone, it has been suggested that although the EU and the US jointly accounted (2007) for no more than 40% of world GDP (at purchasing power parities) and world trade, they could be viewed as the "regulators of the world", on the basis of estimates that, together, they account for around 80% of the rules that regulate the functioning of world markets[12].

[10] For information on the system operated by the USTR, see: http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees

[11] For a detailed study, see Malcolm Levitt: 'Getting Brussels right: "Best practice" for City firms in handling EU institutions' (Centre for the Study of Financial Innovation, 2010)

[12] See A Sapir: "Europe and the Global Economy" in A Sapir (ed): "Fragmented Power: Europe and the Global Economy (Bruegel, Brussels, 2007)

For financial and professional services, it can be said that if the UK, with its special interest in these sectors, had to rely on its WTO membership alone to enforce its trade rights, it would lack the negotiating strength that it enjoys as one of the EU's 28 members. Assuming that the UK were not an EU member it would also have to conduct all its own trade negotiations, taking its place in the WTO pecking order to do so. As regards financial services, it could not be taken for granted that the WTO and the GATS would offer an automatic means for the UK to enforce a right to its current trading advantages for financial services within the Single Market: the "prudential carve-out" under the GATS Annex on Financial Services would allow EU regulators to take whatever prudential measures they deemed necessary to intervene in trade in financial services between the UK and the EU so as "to protect 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".

What is more, the WTO is only concerned to a limited degree with regulatory issues (to the extent that they affect market access and national treatment): WTO membership would not, by itself, provide a means of approaching regulatory disputes in the way that is offered in, for instance, a number of the EU's FTAs. True, the UK would be free, outside the EU, to negotiate its own FTAs which might contain similar provisions; but this would depend on substantial diplomatic effort with (probably) reduced negotiating weight.

All in all, the WTO is very important as guarantor of the global rules-based system, and as the world's most successful treaty-based dispute settlement forum. But it is not a substitute for EU membership, and the two cannot be compared on a like-with-like basis. What is more, the WTO has its own problems: it is no longer led (as it was during the GATT Uruguay Round) by the small "Quad" group of advanced countries (among which the UK was present as an EU member), nor has it succeeded in concluding the Doha Development Agenda. A critical test for the WTO will be whether the upcoming Bali Ministerial can reach accord on a Trade Facilitation Agreement – a matter of some interest to TheCityUK's members, as the resulting increase in global economic activity would carry benefits for the global financial and professional services sectors, in which the UK is a leader.

The EU's priorities for trade and investment negotiations, for example in terms of negotiating partners and offensive and defensive interests (e.g. in market access)

The extent to which these align with UK priorities; and the extent to which the UK's approach to trade policy is amplified or reduced by working through the EU (e.g. whether the UK, as a free trade advocate, succeeds in making EU trade and investment policy less protectionist)

TheCityUK will try to take these two aspects together, and relate them to financial and professional services. As the data cited earlier makes clear, the UK's unique level of interest in financial and professional services makes it something of an "outlier" in discussions of EU trade policy formation. That said, EU negotiators fully acknowledge that much of the EU's economic future will depend on trade opportunities in high value added services; and TheCityUK has not encountered difficulty – indeed, the reverse – in getting a hearing for its views among EU negotiators. It is with the European Parliament, rather than with EU negotiators, that TheCityUK and its members have had to deploy the case against protectionism and make clear the role of high value added services in the EU's economic future. The European Parliament's consideration of the EU-South Korea FTA in 2010 was a recent case in point: the EU automobile industry lobbied hard against the FTA, and EU financial and professional services had to make clear to MEPs the large potential benefits (far in excess of the threat to the car industry) offered by the FTA.

On balance, TheCityUK has no doubt that UK membership of the EU has brought considerable benefits in shaping a more liberal EU trade policy, which is to the advantage of UK financial and professional services and to London as an international financial centre. This reflects strong and

sustained efforts by the UK and certain other like-minded member-states to make the case for open markets: in turn, these efforts require the resources outlined in answer to Question 1.

The extent to which EU trade policy has a trade facilitating or trade diverting effect for the UK

For UK financial and professional services EU trade policy, when successful in opening third country markets, has a trade creating, not a trade-distorting, effect. For trade in goods (which is more directly affected by rules of origin) and agricultural products (where trade policy reflects the sector's much-criticised subsidy regime), there are separate debates to be had about trade-creation versus trade-distortion.

2. What are the advantages and disadvantages of having trade and investment promotion largely at the national level? How well has this delivered on UK objectives?

The CCP's existence emphatically does not mean that competition between the member-states for exports and investment is inhibited: this degree of healthy competition is as true of financial and professional services (where the UK has a unique level of interest) as of any other sector. In TheCityUK's view, it is therefore logical to keep trade and investment promotion relating to these services sectors at national level. This is particularly so given the plethora of strong UK institutions (both public and private sector) devoted to promoting this area of the UK economy. We know of no example of trade or investment promotion activity conducted at EU level that has been of benefit to our sector.

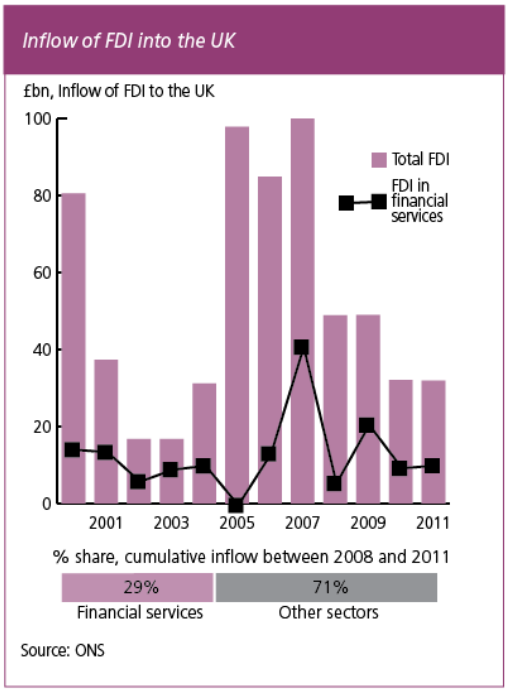
3. What are the advantages and disadvantages of the current division of competence over export and import controls and export credits?

On **Export and Import Controls** TheCityUK cannot offer a view based on detailed knowledge of the day-to-day operation of these controls: the controls very largely concern physical goods (often in a defence or security context) and TheCityUK's members have little direct experience of them. As regards export controls, even limited knowledge suggests that this is an area of detailed supervision which – as with much financial services supervision – needs to rely on member-states' authorities for deep knowledge of local market practice and practitioners, including knowledge of the service element (know-how and after-sales service) that goes with such exports (for import controls, see "trade defence" under Question 5).

As for **Export Credits**, these are currently co-ordinated through the machinery set up under the OECD Consensus (1976) and the OECD Arrangement (1978) on Guidelines for Officially Supported Export Credits, neither of which is comprehensive in scope. Within the EU there is coordination of EU member-states' Export Credit Agencies' policy statements and negotiation positions on long-term export credits, under Council Decisions 73/391/EEC and 76/641/EEC. In addition Regulation (EU) No. 1233/2011 requires member-states to follow the terms of the OECD Arrangement when providing export credit. The Berne Union (the International Union of Credit & Investment Insurers) has 49 members (mostly government-owned or controlled) and is linked to the Prague Club of new and maturing export credit insurers). The Union the Club combined have more than 70 member companies. TheCityUK has no reason to suggest any changes in existing arrangements.

4. What are the likely advantages and disadvantages of moving from national to EU competence in relation to investment protection?

For the reasons already referred to above, FDI is likely to be of growing importance to the EU and the global economy. The UK attracts more FDI than any other EU member-state, and financial services attracts more FDI than any other sector (see chart below). The EU's involvement in this policy area will therefore have significant implications for the UK, given the UK's interest in financial and professional services (where investment – both inward and outward - plays a significant role in service-delivery).



That said, the question of advantages and disadvantages for the UK is not easy to answer at this stage. Before the Lisbon Treaty, the UK national regime for IPPAs and BITs was largely orientated to the historic need to safeguard UK FDI in overseas markets against expropriation and to provide for compensation that would be adequate, effective and prompt. An updated investment protection policy – which EU member-states have yet to consider fully – will need to focus on a more rounded approach, covering not only pre- and post-establishment questions in third country markets but also the regime that the EU will be ready to apply to third country FDI into the EU market. Historically, third country FDI into the EU has come largely from OECD countries. But the rise of the BRICS (notably China and India as exporters of capital) means that EU will need to develop an investment regime that will take account of a wider spread of sources of incoming FDI. TheCityUK has noted that there are occasional references within the EU to greater use of controls on inward investment (including UK MPs' suggestions that the Enterprise Act should be invoked on occasion). TheCityUK and its members have consistently argued for an open EU market for FDI, not least as the basis for seeking equal openness and non-discrimination from trading partners.

As long as EU investment policy continues to be at a formative stage, one point of principle will remain important for safeguarding UK business interests: overseas investments by UK business should continue to enjoy the best protection available under whatever investment agreement offers the highest standard of cover, whether an EU investment agreement, on the one hand, or a UK bilateral BIT or IPPA, on the other.

5. How well are UK objectives met and interests taken into account through a) EU trade defence investigations, and b) the EU representing the UK in trade defence cases against the EU and more generally in trade disputes with other WTO members?

Up to now the EU's role in **Trade Defence** (as against trade dispute) activities has been almost wholly confined to investigations and measures affecting physical goods (anti-dumping measures, quotas and the like) whether imposed by the EU on imports from third countries or by third countries on EU exports. TheCityUK recognises that trade defence measures (of the kind involving physical goods) by the EU are sometimes justified. But TheCityUK notes that all such measures may be viewed as protectionist in intent (whether justifiably or not). TheCityUK's members have an overriding interest in global open markets, and consider that any such measures must be used sparingly if they are not to damage UK objectives and interests. TheCityUK also notes (from its members' interaction with their own clients in the goods economy) that all trade defence measures have two other types of effect in addition to their principal effect on foreign suppliers (whose exports are curtailed):

- Effects on intermediate consumers in the domestic market: these consumers include businesses (many of them clients of TheCityUK's member-businesses), which rely on the imports concerned and whose competitiveness is damaged by restrictions on their choice of industrial inputs;
- Effects on complex supply chains: similarly any trade measure affecting the supply of some intermediate good (and intermediate goods and materials are frequently involved) will have unpredictable (likely detrimental) effects on wider trade patterns and supply chains involving a range of goods and services, including financial and professional services.

It is not always clear whether these wider commercial effects are taken into account when the EU decides on a trade defence measure: it is essential that they are.

Over-use of trade defence measures would have wider anti-competitive effects on the EU's internal market. Like any other form of protectionist measure, they would, if over-used, have adverse effects on factor costs, affecting competition, productivity, innovation and market-openness generally. The UK cannot afford to allow this to happen in EU the internal market, which is the immediate hinterland for the UK's exporters. It will be important for UK policymakers to remain in a position to influence this aspect of the EU's external trade policy towards third countries.

Turning to **Trade Disputes** in the wider sense, some distinction should be made between the past and the future in considering how well UK objectives are met and UK interests taken into account through the EU representing the UK. In the past, trade disputes have been largely over trade in goods; and even since the General Agreement on Trade in Services (GATS, 1995) there have been few disputes (in the WTO or outside it) which have been centrally concerned with internationally tradable services. It follows that past experience relating to trade in goods (in which TheCityUK and its members have limited interest) is not necessarily a guide to the future. Suffice it to say that, in TheCityUK's observation, UK objectives and interests have generally benefited from the EU representing the UK in trade disputes over goods in the last forty years.

6. What future challenges/opportunities might we face on trade and investment policy and what impact might these have on the UK national interest?

When answering this question you may wish to consider the impact of:

- *the institutional changes introduced by the Treaty of Lisbon (e.g. the increased role for the European Parliament and the creation of the European External Action Service) on EU trade and investment policy;*
- *any further internal developments in the EU (e.g. potential further integration of the Eurozone) on trade and investment policy;*
- *the increasing ambition of EU trade policies, and the implications that this might have for the UK's offensive and defensive interests;*
- *any further developments in EU law, including for example any effect of the EU's exercise of internal competence on its external competence and vice-versa.*

International trade negotiations may be entering a new era when the focus is on bilateral trade and investment agreements between countries, or between regional blocs and third countries or other regional blocs, rather than on the negotiation of multilateral agreements under the WTO's auspices. There are various possible reasons for this, including increased linkages between trade policy and wider economic regulatory and structural policies. In other words, trade policy is less amenable than previously to being conducted in isolation, and as a result trade negotiators face tricky challenges in securing acquiescence to their proposals from other parts of their own governments. These factors, plus the need to deal in greater depth with regulatory "behind-the-border" issues, all tend to militate in favour of bilateral negotiations with significant markets, rather than broader, but shallower, multilateral negotiations.

Bilateral negotiations may be less challenging in the sense of only negotiating with one country. But they may also be more difficult because of sensitivities over non-tariff barriers to trade – both inside the EU and in the third country. As regards EU sensitivities, a key question is the extent to which EU member-states will permit trade agreements to drive internal economic structural change within their own countries. If member-states cannot or will not make structural changes in such areas as services, labour markets and the role of the public sector, the EU will be inhibited form pursuing agreements with trade partners regarded as too competitive for EU domestic interests to accept as rivals. This would be damaging for the UK, which has generally tended to take a more open-market view than many other EU member-states.

The institutional changes introduced by the Treaty of Lisbon (e.g. the increased role for the European Parliament and the creation of the European External Action Service) on EU trade and investment policy

The European Parliament has been the principal beneficiary of the Lisbon Treaty, which has greatly enhanced MEPs role in trade policy. The greater involvement of the Parliament in trade policy may open the risk of trade policy outcomes being subject to populist campaigns led by entities with little direct involvement. However, as noted above, the Parliament showed, in its consideration of the EU-South Korea FTA, that it was ready to take a balanced view. More generally, the role of the Parliament can be expected to become even more important for trade policy, the more so as trade policy becomes more integrated with other economic policies (environmental, regulatory, etc.) in which MEPs have wide-ranging interests. Larger resources (both public and private sector) will be needed to keep MEPs informed of the mix of interests affected by policy choices.

The creation of the European External Action Service does not yet seem to have had any visible effect on the conduct of EU trade and investment policy for financial and professional services.

Any further internal developments in the EU (e.g. potential further integration of the Eurozone) on trade and investment policy

The increasing ambition of EU trade policies, and the implications that this might have for the UK's offensive and defensive interests

Any further developments in EU law, including for example any effect of the EU's exercise of internal competence on its external competence and vice-versa

TheCityUK will try to take these three aspects together, and relate them to financial and professional services. Factors such as further integration of the Eurozone, or further developments in EU law (e.g. the development of EU financial services regulation into an EU common policy analogous to the CCP) could have effects on the EU's trade and investment policies, particularly as they apply to financial services. Both factors would probably come into play if the Single Market and its accompanying EU regulatory regime had to develop in ways that took greater account of the needs of the Euro area and the degree of economic and fiscal integration within it. The UK has sometimes tried to draw a distinction between the Single Market and the Euro, reflecting a concern to be in the one but not the other. But the Single Market and its legislative framework is integral to the Euro project (whatever its current problems). The benefits of the Euro project are unlikely to be fully achieved for its members and those whose economies depend on them without, ultimately, harnessing any further efficiencies that the Single Market makes possible. Members of the Euro area will therefore always have a particular interest in the functioning of the Single Market, including in financial services. If this led, ultimately, to some kind degree of deeper fiscal union within the Euro area, accompanied by the relevant legislation, this could, for instance, change the nature of the EU market offer that EU negotiators could make. EU trade negotiators would need to cater for this in the negotiating stance that they took vis-à-vis third country trading partners.

It is difficult to be more specific when the arguments are speculative. However, given that financial regulation will be a key component of any Eurozone development, significant Eurozone changes could have consequences for the EU's trade policy in relation to financial services.

7. Are there any general points you wish to make which are not captured above? We would welcome any specific examples and quantitative evidence where possible.

(1) Free Movement of Persons within the EU, and Temporary Presence under GATS Mode 4

Although the Call for Evidence on the Internal Market: Free Movement of Persons (Review, second semester) seeks views on free movement within the EU, the Call for Evidence on Trade and Investment does not seem to seek views on the analogous question of temporary presence under GATS Mode 4. For TheCityUK and its member-businesses **the twin fields of Free Movement of Persons and Temporary Presence under GATS Mode 4 raise closely related issues**: both within the EU Single Market and globally, UK financial and professional services providers are concerned to be able to establish in markets of their choice, freely recruit employees in the UK and elsewhere, and move their business personnel as business requires.

Within the EU, the principle of free movement of persons is of core importance in meeting this need. The internal market reflects the principle of be free movement of goods, capital, people and services. All four elements combine to ensure the internal market's effectiveness; and all four need to be maintained. For business, free movement of persons enables firms to provide services in another member state without employing people there as existing UK employees can travel and work in other member-states there freely when necessary. Secondly, free movement of persons within the EU enables businesses in the UK to fill key vacancies with staff from any member-state when there are skills shortages. The government Background Brief to the Call for Evidence on the Internal Market: Free Movement of Persons cites figures showing the extent to which the UK is dependent on labour from other European Economic Area (i.e. the EU plus Norway, Iceland,

Lichtenstein and also Switzerland) countries to fill professional posts as well as (more frequently highlighted) low-skilled and unskilled jobs. In answer to the questions in that Call for Evidence on whether the exercise of free movement rights in or from another member state has either positive or negative impacts on (a) UK Nationals and (b) the UK as a whole, it can be said:

a) Free movement enables UK individuals to work in the rest of the EU. For senior UK executives and professionals careers may be enhanced by working for a period elsewhere in the EU; free movement of persons facilitates this.

b) The UK as a whole gains a range of economic benefits from the free movement of people. The main economic benefits for financial and professional services are:

- Recruitment: UK-based businesses can recruit from a wider pool, enabling them to meet skills needs, provide flexibility during periods of growth, and gain employees with the language skills necessary for an international financial centre;

- Overseas deployment of staff: staff can be deployed in other EU markets without the need for work permits or visas, helping UK businesses to operate in or expand into other EU markets by enabling them to draw on existing UK staff;
- Education and training: UK professional training institutions represent a considerable UK business sector. Free movement of persons means they can recruit staff across the EU to help deal with critical skill shortages in specialist subjects, and work easily in partnership with other institutions (and businesses) in the EU.

Temporary presence under GATS Mode 4 provides the international trade policy analogue to meeting these core business requirements. In its Response to the Home Office Border Agency Consultation on Limits on Non–EU Economic Migration (2010) TheCityUK set out the reasons why negotiated arrangements on temporary presence under GATS Mode 4 were important to TheCityUK's member businesses. TheCityUK's submission was particularly concerned with the status of non-EU intra-corporate transfers (ICTs) under the Home Office's then proposals. But the arguments in the submission are applicable not only to ICTs but also to contractual service suppliers (CSSs) and independent professionals (IPs), and are indeed of general application in connection with the need for UK international financial and professional services providers to be able to establish in markets of their choice, and transfer employees and move business personnel as international business requires. In trade negotiations the EU has been vigorous in its attempts to secure commitments from trading partners under GATS Mode 4, with varying degrees of success: for TheCityUK's members this remains an important ongoing objective.

TheCityUK's submission of 16 September 2010, with its legal annex, is attached.

(2) Extraterritorial EU legislation bearing on extra-EU business

As noted above, **extraterritoriality is an issue related to trade and investment on which there needs to be greater EU policy coherence**. It arises from the increasing complexity of the globalised markets and the EU policy response in terms of draft EU financial and other regulations purporting to govern business activities outside the EU.

Attempts to impose domestic rules on activities in third markets used to be largely a characteristic of US, not EU, regulation. Before the global financial crisis, most EU regulation applied only within the Single Market. Recently, however, the Commission has been much more aggressive in proposing measures (some of them directly applicable Regulations) with significant extraterritorial impacts of three main kinds:

- Access to the EU Market: some measures affect the ability of firms outside the EU to conduct business within the Single Market. For example, as originally drafted, the Commission's Alternative Investments and Financial Instruments (AIFM) proposals would have imposed a complete ban on the sale of third country funds and products into the EU unless they satisfied a "strict equivalence test". Had these proposals not been amended in the Council, they would have had a significant protectionist effect which would have damaged the supply and choice of instruments within the EU and, if reciprocated elsewhere, would have been very harmful to EU export interests;

- Designation of "approved" overseas markets: increasingly, however, the Commission also makes proposals which not only affect access to the EU market but also prescribe the markets overseas in which EU financial institutions can operate, for instance by allowing overseas business only in markets subject to rules deemed "equivalent" to those within the EU. For example, Article 25 of the recent European Market Infrastructure Regulation (EMIR) means that EU entities can only buy and sell certain products in financial markets overseas which have been recognised by the European Securities and Markets Authority (ESMA) as meeting EU standards. Unsurprisingly, regulators in some Asian markets have already declined to seek EU "approval", potentially excluding EU entities from these markets (similar issues have arisen over EU data protection rules);

- Conduct in Overseas Markets: extraterritorial requirements can also apply directly to EU entities operating in third countries, regardless of host country rules. For instance, new requirements on remuneration by banks within the EU must also now be applied to their non-EU subsidiaries in markets such as Hong Kong or Singapore. In such markets, competitors are free to follow local requirements. The result is a significant distortion damaging EU firms' ability to locally on equal terms.

There has been a steady increase in EU financial regulatory proposals which seek either to restrict non-EU businesses' access to the Single Market or to impose unilateral restrictions on EU firms' subsidiaries in third markets. These can directly contradict the emphasis on open and non-discriminatory markets that has been the hallmark of the EU's liberalising stance in international trade negotiations. They impose damaging jurisdictional conflicts – plus the risk of reciprocal action by trading partners - on UK and other EU operators seeking to compete to compete in overseas markets.

There may be cases in which extraterritorial restrictions on trade and investment are genuinely justifiable on prudential grounds or to meet other defined market objectives. But present EU practice does not seem to reflect a coherent and coordinated policy approach to exercising EU competence in regulation, on the one hand, and in trade and investment, on the other. Any review of EU competence in trade and investment must therefore also consider the extent to which recent EU regulatory actions are introducing policy conflict and limiting gains available from successful trade and investment negotiations.

TheCityUK
6 August 2013

TheCityUK

Home Office Consultation on 'Limits on Non-EU Economic Migration' - TheCityUK Response

Home Office Public Consultation
"Limits on Non-EU Economic Migration" (June 2010)

Response from TheCityUK's
Liberalisation of Trade in Services (LOTIS) Committee

Summary

This Note sets out views on behalf of TheCityUK in response to the Home Office consultation "Limits on Non-EU Economic Migration" (June 2010). It gives the reasons why TheCityUK would be **against** including the Tier 2 (ICT) category within the proposed limit. It also explains why TheCityUK would **favour disregarding** this category when considering net migration flows, as irrelevant to wider migration issues. An **Annex** sets out legal issues.

Introductory

TheCityUK is a member-based body representing UK-based financial services businesses and related professions competing in global markets, both developed and emerging. It coordinates its work on trade policy with its members through its Liberalisation of Trade in Services (LOTIS) Committee.

This Note is specifically concerned with the question of intra-company transfers (ICTs), which are covered in Appendix C to the Home Office consultation document. It is an issue to which TheCityUK's LOTIS Committee has given regular attention, and submitted its views to the UK government and the European Commission during the negotiation of the WTO General Agreement on Trade in Services (GATS), the negotiation of the Fifth Protocol to the GATS (Financial Services) and the subsequent negotiation of EU bilateral agreements with third countries that include provisions on trade in services.

This Note is limited to the issue of ICTs and the question whether the Tier 2 (ICT) category should be covered by the proposed limit. But TheCityUK may make further representations on other aspects of the Home Office consultation, or on the related Migration Advisory Committee (MAC) consultation on the level of the first annual limit on economic migration. TheCityUK is aware that a number of its member-businesses and specialist member-associations will be responding to the Home Office consultation, and supports the case they make.

The Economic Importance of ICTs

The ability to move company personnel round the world through ICTs is integral to international trade in goods and services. When a good or service is exported to an overseas market there is frequently a need to transfer skilled personnel overseas to

deliver that export or offer professional advice and ongoing services relating to it. In the case of manufacturing industry and large public works contracts a UK contractor tendering for a contract will need, if the tender is successful, to be able to offer the relevant package of skills - often through ICT staff - on the spot. In the case of financial and related professional services (TheCityUK's central concern) these services are frequently delivered in third country markets through local establishments and offices, enabling the service-provider to cater - again, often via ICT staff - for international corporate clients' needs throughout the world. Similarly, foreign staff in overseas markets may be transferred across borders (e.g. to the home market, or some regional hub country) for training purposes or to gain fresh experience, in the long-term interests of the business.

ICTs are therefore a vital aspect of competing successfully in international business. They are particularly significant in the field of skilled services business, where the essence of service provision is the presence of staff in a series of markets to provide a seamless global service. ICTs are distinct from migration taken as a whole: the numbers tend to be small, the process is controlled by the businesses concerned, and there are few or no problems of "overstaying" or other difficulties that can be associated with migration for other reasons. The freedom to move staff through short-term ICT is an essential component of services business. For these reasons, TheCityUK suggests that ICT movements, being short-term in their nature, should be disregarded when considering net migration flows.

If a limit were placed on ICT personnel entering the UK there would be a damaging effect on UK trade in services. Apart from its restrictive effect on those UK business consumers wishing to benefit from overseas service-provision into the UK, the main effect would fall on UK providers of international services. They would be affected because other countries could be expected to follow the UK's example. And, as the UK and its competitors recover from the recession the demand for ICT personnel will increase: if this demand cannot be accommodated the UK's competitive position will suffer by comparison with that of competing countries with less restrictive rules.

It is in the UK national interest to avoid this happening. The services sector is now the primary contributor to economic scale, growth, employment and competitiveness in most advanced economies. European private-sector services businesses already contribute more than 55% of EU GDP and account for more than 50% of all EU employment (this rises to 77% for GDP and employment across all public and private sector services). The EU is also the largest exporter and importer of services, with more than 26% of total world trade in services (extra EU). Moreover, 65% of all outward foreign direct investment (FDI) by European businesses (extra-EU) and more than 90% of all FDI coming into the EU is invested into services sectors.

International Negotiations and Agreements

The UK has taken a long-standing interest in negotiations for liberalising trade in services. Such negotiations offer the opportunity to remove barriers to services business in overseas markets and to press for UK service-providers to be accorded "national treatment" (i.e. non-discriminatory treatment in the overseas markets in which they operate. For TheCityUK's members in financial and related professional services this is an essential objective. They have pressed for it in the WTO Doha Round of multilateral negotiations and EU negotiations for Free Trade Agreements (FTAs) with important markets.

All negotiations on services liberalisation tend to follow a common pattern, in which barriers to market-access and/or national treatment for any particular service are considered under four main headings or "Modes". The first two Modes[1] (covering two types of cross-border trade flows) can be largely ignored for the purposes of the Home Office consultation. But Modes 3 and 4 are closely related, and cover the removal of barriers to market access in two specific, often linked, instances:

- Mode 3 concerns "Commercial presence", i.e. the removal of barriers so as to permit a service business to cross the border to have a "commercial presence" abroad through which a service is provided (i.e. any type of business or professional establishment overseas, including incorporation, branch, representative office, joint venture, and so on, frequently staffed by a mix of UK-based and locally-employed personnel);

- Mode 4 concerns "Presence of natural persons", i.e. removal of barriers so as to permit natural persons – as individuals – to stay temporarily in an overseas market, for the purpose of supplying services, for example, as employees of service-suppliers.

Mode 4 (presence of natural persons) is the category within which ICTs fall. At both the technical and the substantive level, it forms an integral part of the way in which concessions facilitating trade in services in overseas markets are negotiated. It is an essential category for UK services businesses operating in international markets. International agreements covering Mode 4 allow UK-based multinationals (in whatever sector they operate) to import and export talent across the globe, enabling them to exploit their competitive advantage fully in freely deploying skills and expertise to provide goods and services to global clients.

Mode 4 is also integral to various multilateral or bilateral agreements that the EU has concluded (and so entered into commitments which are binding on the UK) or which are currently under negotiation. Mode 4 (including ICTs) is included, for instance, in the EU-Chile FTA (2003), the EU-Cariforum Economic Partnership Agreement (2008) and the EU-Korea FTA (concluded 2009 and awaiting EU ratification). It is understood to be one of the matters under negotiation in the current - and important - EU-India FTA negotiations. It also forms part of the public offer made by the EU (with the UK's support) in the WTO Doha Round of multilateral trade negotiations.

The binding nature of such international commitments is set out in the Annex to this Note. The consultation document recognises the binding character of the relevant multilateral and bilateral agreements: Appendix C, after listing numbers of non-EEA nationals admitted under the Tier 2 ICT category, goes on to say:

> "Secondly, the UK has obligations under international agreements concerned with trade which place an obligation upon it to admit intra–company transferees. The UK is party to the World Trade Organisation's General Agreement on Trade in Services (GATS) which requires it to provide access to managers and specialist staff who are nationals of a another party to the agreement, who are employed by a business established in the territory of that party, and who are posted to the UK branch of that business. Bilateral trade agreements concluded between the European Union and a number of other countries contain similar commitments.

[1] The first two Modes are (1) Cross-border - where the service supply takes place from the territory of one WTO member into that of another (or between parties to an FTA); and (2) Consumption abroad - services consumed by nationals of a WTO member in the territory of another where the service is supplied (or between parties to an FTA)

> "While these agreements do not prevent the UK applying Tier 2 criteria to such movements they do not provide for the imposition of a numerical limit upon them and the UK would be in breach of its obligations if it imposed such limits.
>
> "The weight to be attached to the latter consideration needs to take account of the UK's national interest as an exporter of services and inward investors overseas. The UK has a strong interest in ensuring that other countries provide equivalent access to the personnel of UK businesses who are posted to branches of those businesses overseas. The UK's ability to negotiate agreements guaranteeing such access would be undermined if it restricted such access domestically."

This passage - which could be misunderstood as suggesting that the government is contemplating breaching the UK's international obligations - clearly recognises the importance to the UK of access in other countries for personnel of UK businesses who need to be posted overseas. TheCityUK welcomes this recognition, and strongly supports the case for maintaining the full scope for negotiating better access for ICTs in future trade negotiations with third countries.

If the UK were to set aside its international obligations by imposing a limit on ICTs from trading partners with which there were agreements covering them, there would, in TheCityUK's judgement, be serious commercial consequences. There would, first, be grounds for a dispute between the trading partner(s) concerned and the EU, whether in the WTO framework or bilaterally. Secondly, even before dispute procedures began, there could be "tit-for-tat" administrative action affecting UK personnel (there have been instances of such action in, for example, "reciprocal" approaches to perceived UK visa restrictions). Thirdly, the UK, and its hitherto predictable approach to international trading relationships, would suffer reputational damage that would be hard to repair. This must be avoided.

Conclusion

TheCityUK well understands the pressures facing the government and the strong feeling that some form of increased control on immigration needs to be put in place. TheCityUK does not seek to gainsay that general view. But the UK commercial interest, and the international commitments into which the UK has entered or may enter, also need to be taken into account. It would be damaging to UK business if ICTs into the UK were subject to a limit that led, in its turn, to policies or measures in third countries to the detriment of some of the UK's most successfully and internationally competitive businesses. For these reasons, TheCityUK would be against including the Tier 2 (ICT) category within the proposed limit, and would propose that this category be disregarded when considering net migration flows.

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16 September 2010

TheCityUK

Home Office Consultation on 'Limits on Non-EU Economic Migration' - Intra-Company Transfers Legal Annex

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LEGAL OPINION TO THE CITY UK ON THE COMPATIBILITY WITH EU LAW OF PROPOSED ANNUAL LIMITS BY THE UK ON INTRA-CORPORATE TRANSFEREES FROM NON-EU COUNTRIES

The Secretary of State for the Home Department has called for responses to a consultation paper issued in June 2010 (the "**Consultation Paper**") on limits to non-EU economic migration into the United Kingdom.

The Consultation Paper deals with the treatment of Intra-Company Transfers ("**ICTs**") as part of a proposed numerical limit on individuals entering the UK under Tier 2 of the Government's points-based immigration scheme.

Specifically, in Question 8 of the Consultation, the Home Secretary asks, "***Do respondents agree that the Intra-Company Transfer route should be included within annual limits?***".

We have been asked by TheCityUK to provide a Legal Opinion on the legality under EU law of such annual limits.

1. TERMS OF REFERENCE

1.1 This opinion only pertains to legal issues surrounding the compatibility of annual limits of ICTs under EU law and does not address the legality of any other type of international agreement.

1.2 This opinion does not give any particular view of the economic, social or other benefits which ICTs may or may not contribute to the UK.

2. EU COMPETENCE FOR ENTERING INTO INTERNATIONAL AGREEMENTS

2.1 Article 3 of the Treaty on the Functioning of the European Union ("**TFEU**") provides that the Union shall have exclusive competence for a common commercial policy and furthermore, that the Union has competence to enter into such international agreements as necessary "to enable the Union to exercise its internal competence". For matters of exclusive Union competence only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts (Article 2(1) TFEU).

2.2 Article 207 TFEU provides that a "common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies" (emphasis added). To this end, the Union has competence to negotiate agreements with one or more third countries or international organisations under the procedure outlined in Article 218 TFEU.

2.3 Under the above competences granted to the Union by the Treaties, the EU has entered into free trade agreements on behalf of the Member States with a numerous third countries. A number of these agreements have provisions which mandate the liberalisation of the trade in services in line Article V of GATS, which deals with, among other things, the supply of services by a service provider of one party to the agreement through the presence of natural persons in the territory of the other party.

2.4 An example of the type of provisions in EU free trade agreements relating to ICTs can be found in the EU-Korea Free Trade Agreement (the "**EU-Korea FTA**"). Article 7.18 of the EU-Korea FTA provides for the access of "key personnel", which includes ICTs, from one party to the agreement to the territory of the other party to the agreement. Furthermore, Article 7.18(2) specifically prohibits the type of limits proposed in the Consultation Paper stating, "For every sector liberalised in accordance with Section C, the measures which a Party shall not maintain or adopt […] are defined as limitations on the total number of natural persons that an investor may transfer as key personnel or graduate trainees in a specific sector in the form of numerical quotas" (emphasis added).

3. BINDING NATURE OF INTERNATIONAL AGREEMENTS

3.1 Article 216(2) TFEU states that, "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States" (emphasis added).

3.2 The European Court of Justice has held consistently since Case 181/73, *R & V Haegeman v Belgian State*, that "the provisions of [an] agreement, from the coming into force thereof, form an integral part of [Union] law" (emphasis added). Therefore,

any agreement entered into by the Union under the common commercial policy will be binding on the United Kingdom not only as a matter of international law, but as a binding part of EU law.

3.3 Furthermore, Article 291 TFEU obliges Member States to "adopt all measures of national law necessary to implement legally binding Union acts." This is regardless of whether or not the binding Union act is the result of an international agreement. Therefore, a Member State is obliged by EU law to adopt all measures necessary to implement a free trade agreement entered into by the Union, including one that provides for the liberalisation of the provision of services in the EU through ICTs.

4. DUTY OF SINCERE COOPERATION

According to Article 4 of the Treaty on European Union (as amended by the Lisbon Treaty) Member States have a duty of "sincere cooperation" whereby they shall assist the Union in carrying out the tasks which flow from the Treaties. This, combined with the obligations under Article 291 TFEU to adopt all measures necessary to implement Union acts (see 3.3 above), means that Member States may not take any action which would effectively undermine an international agreement entered into by the Union. To do so would be a breach of EU law.

5. JUSTICE AND HOME AFFAIRS

5.1 The United Kingdom currently has an exemption whereby it shall not take part in the adoption measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union concerning justice and home affairs (the "**Opt-out**").

5.2 International agreements entered into by the Union in relation to the common commercial policy are provided for in Part Five of the Treaty on the Functioning of the European Union and, as such, are based on a an entirely different legal basis than justice and home affairs. Therefore, the UK would not be opted-out of any international agreements entered into by the Union in the context of the common commercial policy.

6. INFRINGEMENT PROCEEDINGS

6.1 Article 258 TFEU provides that if the European Commission (the "**Commission**") considers that a Member State has failed to fulfil its obligations under EU Law, it shall deliver a reasoned opinion on the matter. If the Member State involved does not comply with the opinion within the period laid down by the Commission, the Commission may bring the matter before the European Court of Justice (the "**ECJ**").

6.2 Under Article 260 TFEU, if the ECJ finds that a Member State has failed to fulfil an obligation under EU Law, the Member State shall be required to take the necessary measures to comply with the judgment of the ECJ. Furthermore, if the ECJ finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

6.3 Accordingly, a Member State would be exposed to infringement proceedings by the Commission, including being referred to the ECJ, for any failure to fulfil an obligation under EU, including in relation to the EU's common commercial policy.

7. CONCLUSION

7.1 The ability for the UK to act unilaterally by setting an annual limit of ICTs that may enter the United Kingdom is severely limited by EU law as a result of the Union having exercised its exclusive competence in the common commercial policy by entering into agreements with third countries under Part Five of the Treaty on the Functioning of the European Union. The negotiation of future Free Trade Agreements is also within the competence of the EU. Any such current or future agreements would be binding on and enforceable in the UK as a matter of EU law.

7.2 Furthermore, the UK would be under a positive obligation to facilitate the aims of any such agreement and not take any action which might undermine it. As international agreements concerning the provision of services through ICTs relates to the Union's common commercial policy, there would be no Opt-out for the UK as would be the case for matters regarding justice and home affairs.

7.3 As international agreements entered into by the EU form part of EU law which is binding upon Member States, any failure by the UK to meet its obligations under EU law to permit the provision of services in the UK through ICTs would expose the UK to potential infringement proceedings by the Commission with the possibility of being referred to the ECJ and pecuniary penalties.

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