



Hogan
Lovells

Brexit: Understanding the Negotiations

Part of the *Navigating the Negotiations Webinar Series*

10 July 2017

Introduction and agenda

1. Future UK-EU relationship
2. Global trading system
3. Trade relations post-Brexit
 - a. UK-EU trade relations
 - b. UK trade policy
 - c. UK-US trade relations
 - d. Three Brexit models
4. Treatment of financial services in free trade agreements
5. How to advance business interests in trade negotiations
6. Our Brexit resources

Future UK-EU relationship



Future UK-EU relationship: EU position

- Future relationship will be discussed within the withdrawal negotiations once sufficient progress has been made in citizens' rights, financial settlement and borders
- Future UK-EU trade relationship will be governed by a separate (trade) agreement, not by the Withdrawal Agreement
- The boundaries of the future UK-EU relationship are set out in the EU Common Commercial Policy:
 - ✓ 4 freedoms of the Single Market are indivisible
 - ✓ No "cherry picking"; no sector-by-sector approach
 - ✓ EU sovereignty over its regulations, rules and standards



Future UK-EU relationship: UK position

- "Brexit means Brexit":
 - control over immigration from the EU
 - no CJEU "direct legal authority" in the UK
 - leave Single Market and Customs Union
 - do trade deals with the rest of the world
- BUT
 - "deep and special partnership" of "greater scope and ambition than any such agreement before"
- Process
 - "agree ... future partnership alongside ... withdrawal"
 - agreeing to disapply parts of the EU is unlike building up a trade deal from scratch: quicker and easier



10 DOWNING STREET
LONDON SW1A 2AA

THE PRIME MINISTER

29 March 2017

Dear President Tusk

On 23 June last year, the people of the United Kingdom voted to leave the European Union. As I have said before, that decision was no rejection of the values we share as fellow Europeans. Nor was it an attempt to do harm to the European Union or any of the remaining member states. On the contrary, the United Kingdom wants the European Union to succeed and prosper. Instead, the referendum was a vote to restore, as we see it, our national self-determination. We are leaving the European Union, but we are not leaving Europe – and we want to remain committed partners and allies to our friends across the continent.

Earlier this month, the United Kingdom Parliament confirmed the result of the referendum by voting with clear and convincing majorities in both of its Houses for the European Union (Notification of Withdrawal) Bill. The Bill was passed by Parliament on 13 March and it received Royal Assent from Her Majesty The Queen and became an Act of Parliament on 16 March.

Today, therefore, I am writing to give effect to the democratic decision of the people of the United Kingdom. I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union. In addition, in

Global trading system



Global trading system

- WTO – Governing rules for global trade
 - Broadly accepted set of international rules – 164 members
 - General Agreement on Tariffs and Trade – goods
 - General Agreement on Trade in Services – services
 - Understanding on Financial Services
 - WTO Agreements, e.g. Agriculture, Antidumping, Subsidies, Dispute Settlement, Standards
- GATT Article XXIV and GATS Article 5
 - Authorize FTAs and Customs Unions
 - Must eliminate "substantially all" tariffs and trade barriers



Trade relations post-Brexit



UK-EU trade relations post-Brexit: 'Preferential' scenarios

EEA



- Free movement of goods, services, people, capital (Single Market)
- No customs union
- No common trade policy
- Rules of origin determine eligibility for preferences

Customs Union

- Free movement of goods (services excluded)
- Rules of origin determine eligibility for preferences
- Common Customs Tariff to imports from third countries (e.g. EU cars enter Turkey duty free and vice versa)
- No independence in trade policy matters

FTA

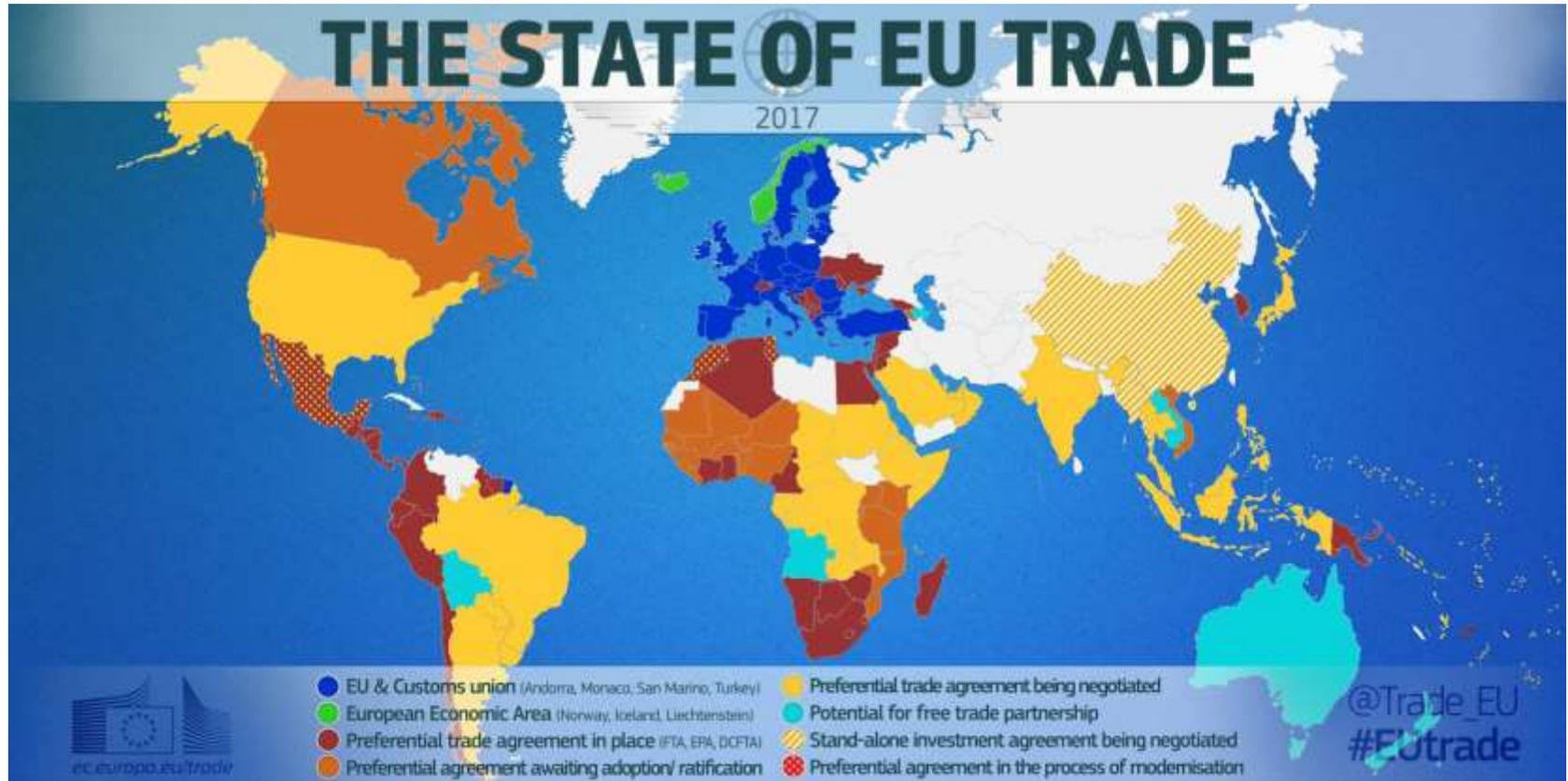
- Preferential market access for goods and services
- Level of access depends on negotiations (scope, exceptions, obligations, etc.)
- Rules of origin determine eligibility for preferences
- No common trade policy

EU rules of origin in practice



- **EU-Korea FTA**
 - Non-originating goods max 45% of the ex-works price
- **EU-Turkey Customs Union**
 - Non-originating goods max 40% of the ex-works price
- **EEA**
 - Non-originating goods max 40% of the ex-works price
- **EU-UK?**

EU Free Trade Agreements with third countries



The UK's trade policy post-Brexit



WORLD TRADE
ORGANIZATION

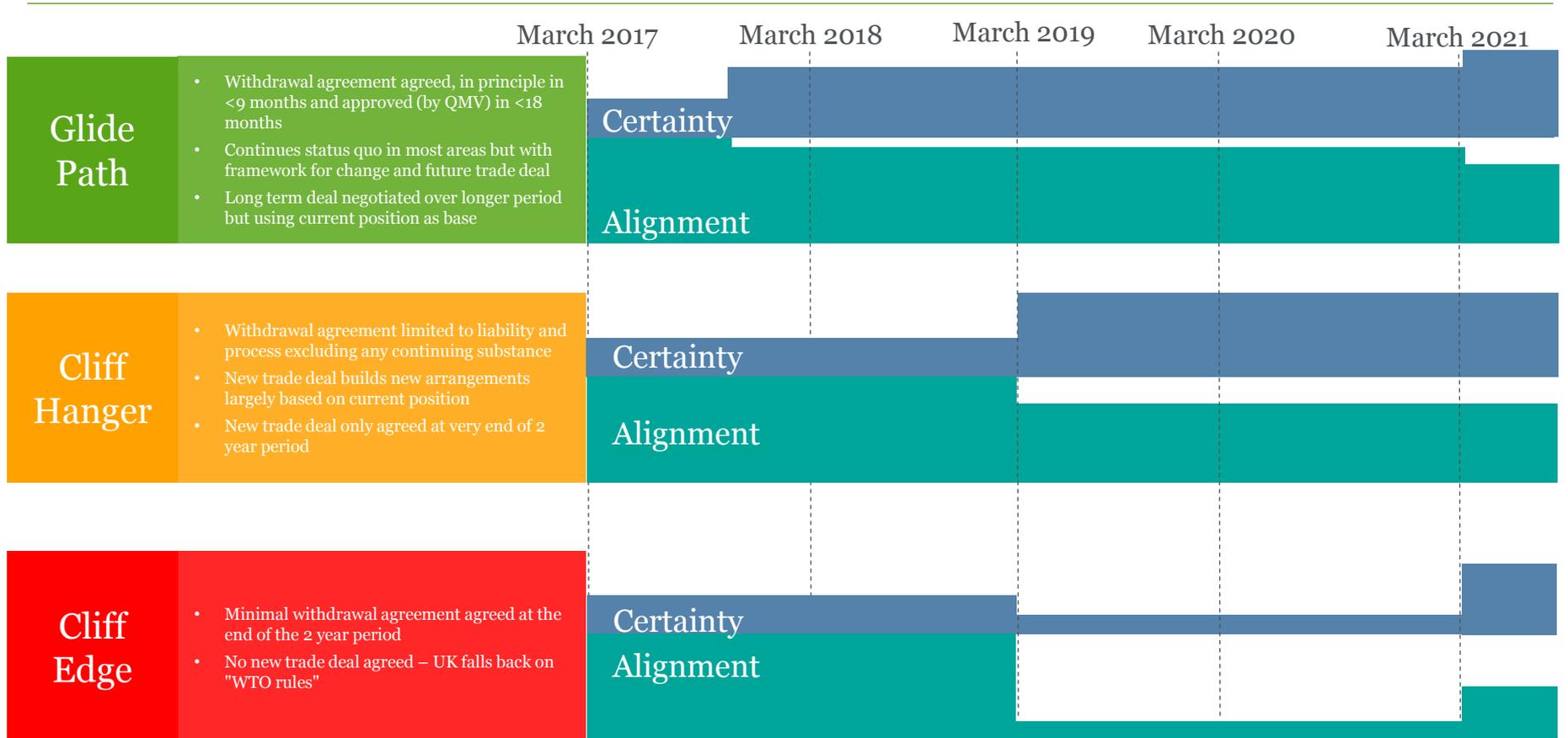
- Changes on UK's WTO schedules of commitments?
- UK legislation affecting trade subject to WTO Dispute Settlement
 - State to State (private parties do not have access)
 - Rules on compatibility of measure or legislation with WTO
 - Condemned party needs to amend
 - Compliance procedure long (e.g. Boeing – Airbus dispute: 2004 – ongoing)
- WTO trade liberalisation insignificant after the Uruguay Round
- WTO Members have resorted to bilateral/ plurilateral trade agreements providing for more liberalisation:
 - TiSA (services)
 - EGA (environmental goods)

The possible shape of UK-US trade relations

- UK bound by EU's Common Commercial Policy until Brexit
- Post-Brexit: Can negotiate and conclude FTAs (e.g. US, Japan, Canada, Korea, etc.)
- Trump Administration's Trade Policy
 - "America First" trade agenda
 - Focus on "Bilateral Trade Deals"
 - Will ignore WTO rulings if infringe U.S. sovereignty
 - Open to U.S.-UK FTA, but highly unpredictable ...
- U.S. FTAs require Congressional approval
 - President Trump's legislative agenda is currently stalled ...
 - TPA/Fast-track procedures must be renewed in 2018 and expire in 2021
- U.S.-UK FTA is within realm of possibility but also could involve challenges



Three Brexit models



Treatment of financial services in free trade agreements



US and EU FTAs – Treatment of financial services

- U.S. and EU FTAs both have detailed FTA chapters on financial services
- Current U.S. and EU FTAs are not a substitute for EU passport
- FTAs provide additional legal protections for financial services:
 - But more limited than general FTA obligations on services
 - Tailored to address specific concerns of U.S. and EU regulators
 - Incorporate limited investor-state arbitration – but exclude disputes involving National Treatment, MFN, Minimum Standard of Treatment, NCMs, and Performance Req'ts
 - Incorporate "prudential principle" – protects regulators' authority to override FTA
- Main difference
 - U.S. FTAs are "negative list"
 - EU FTAs are mixture of "positive list" (Korea, Singapore) and "negative list" (CETA)
- FTAs can always be tailored to address specific commercial goals/needs



Standard US and EU financial services obligations

Key obligations include:

- National Treatment and MFN – non-discrimination
 - NCMs – Exclusions for specific restrictive and/or discriminatory measures
- Market access – Ban on quotas and other quantitative restrictions
- Cross-border supply – Limited right to cross-border supply of financial services under GATS Mode 1
- Senior management – Right to appoint without regard to nationality
- Recognition - Other party's prudential measures are "equivalent"
- Transparency
- Prudential principle

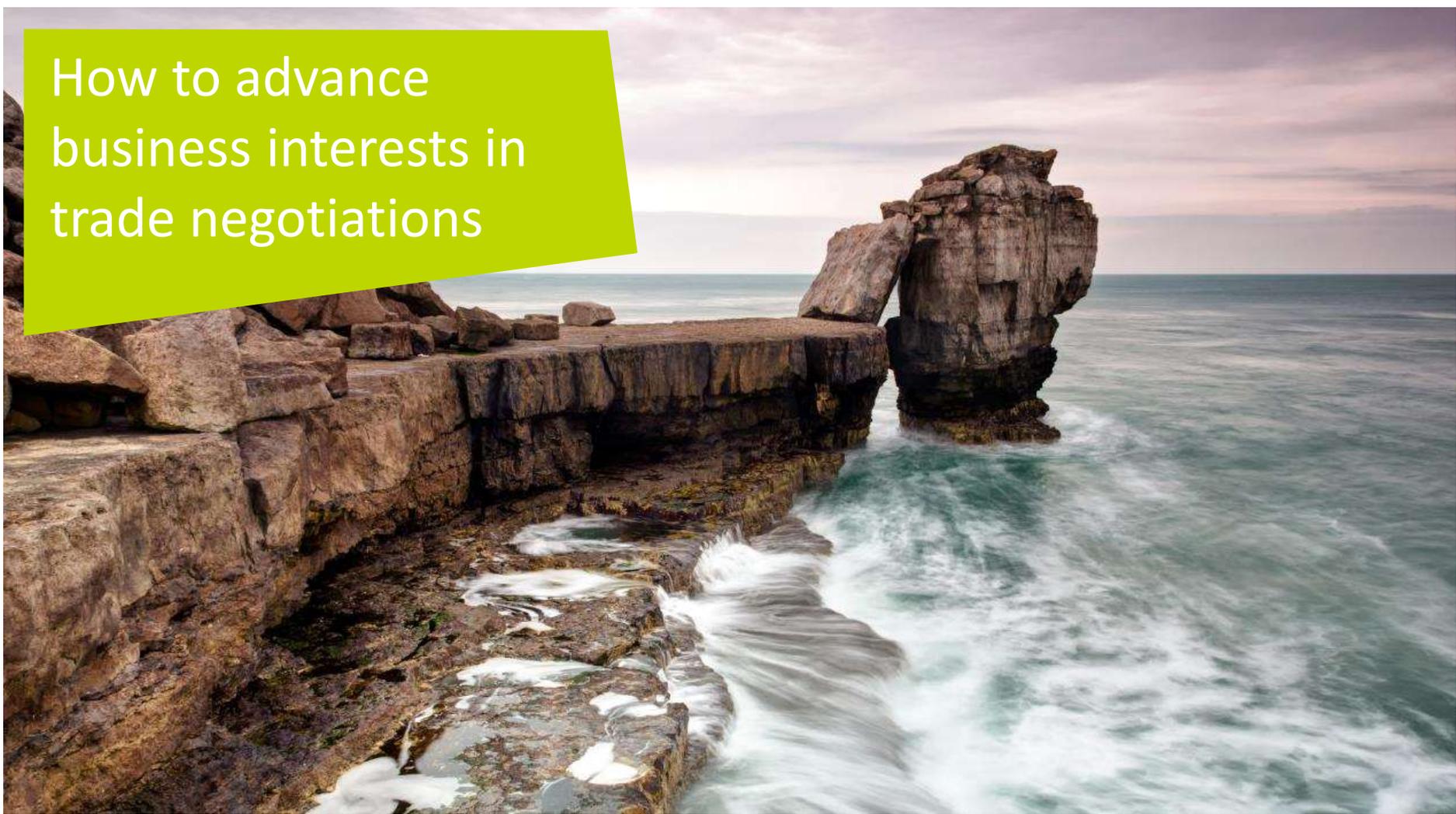
"Recognition" of Other FTA party's prudential measures

Potential solution to passport?

- Trade agreements can provide for "recognition" of foreign regulatory systems
 - Mutual recognition
 - "Equivalence" – despite technical differences, results in "equivalent level of protection"
 - "Harmonization" – adoption of common standards by FTA parties
 - Examples: sanitary phyto-sanitary measures, standards, technical regulations, services and financial services
- Application of recognition to financial services - complicated
 - Requires evaluation of:
 - Regulatory measures, criteria and standards
 - Enforcement practices and level of enforcement
 - Greater concerns regarding systemic risks, fraud, etc.
- Recognition can be revoked, e.g. US-EU Privacy "Safe Harbor"...



How to advance
business interests in
trade negotiations



How to advance business interests in trade negotiations

Trade negotiations – Specialized form of international diplomacy

- Characterized by vast number of stakeholders
- Almost always highly political
- FTAs often subject to legislative/parliamentary approval process
- Requires governments to engage in extensive stakeholder consultations
- Requires governments to sort out different and conflicting industry demands
- Preparations for major trade negotiations
 - Understand FTA process and dynamics
 - Develop clearly defined goals
 - Build industry consensus
 - Build political support for your goals
 - Work closely with your negotiators throughout
 - Industries often can shape FTAs to fit needs, but major FTA also can be long and uncertain process

How Hogan Lovells
can help



Our Brexit resources

For more resources on readying your business for Brexit:

- Visit our Brexit Hub at: www.hoganlovells.com/brexit
- Sign up for our Brexit Bulletin
- Contact us with any questions about Brexit at:
 - Brexit@hoganlovells.com or
 - via our Brexit Taskforce www.hoganlovellsbrexit.com/contacts



Follow us on Twitter: @HLBrexit

Join in the conversation #Brexiteffect



www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.