Law Society of Scotland

Consultation Response

Preparing for our future UK trade policy

November 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society welcomes the opportunity to consider and respond to the Department for International Trade's paper: *Preparing for our future UK trade policy*.[1] The Society has the following comments to put forward for consideration.

An inclusive and transparent trade policy

We support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. We welcome the recognition of the importance of engaging with the devolved administrations and legislatures.

It is important to ensure that the whole of governance approach is extended to trade negotiations. As we have previously commented, Bernard Jenkin MP, the Chairman of Public Administration and Constitutional Affairs Committee stated in his note to the Cabinet Office on "Leaving the EU and the Machinery of Government", this is a "Whole of Government project". The Whole-of-Government concept is important to recognise in terms of the negotiations with the EU because of the breadth, depth and scope of EU Law as it applies throughout the UK. In this context "Whole of Government" should be interpreted as "Whole of Governance" to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government. [2]

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654714/Preparing_for_our_future_UK_trade_policy_Report_Web_Accessible.pdf

[2] This would require a revision of the October 2013 Memorandum of Understanding and Supplementary Agreements between the Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee. This revision would take into account of the extraordinary circumstances which apply because of the UK's exit from the EU and establish structures to

We would urge the Government to publish further information as to how it envisages trade negotiations will be handled with respect to powers of the Scottish Parliament and other devolved administrations where any proposed trade agreement will affect an area of devolved competence.

The policy should also encompass trade in the round, looking not just at the passage of goods and services in terms of entry to markets but also the other measures which support this trade. It is therefore to ensure that matters such as intellectual property protection, data flows and data protection and procurement are properly addressed.

TRADE IN SERVICES

Trade in services should be firmly embedded in the UK's approach to trade. This requires a particular focus on removing non-tariff barriers to entry into, or maintaining a position within, overseas markets. These can include for example, foreign ownership caps, joint venture obligations, restrictions on types of commercial presence, nationality or residency requirements, or complex regulation. Other non-tariff barriers are even less visible and can be created by practical rather than legal considerations, for example application processing times.

Trade in legal services

We believe free trade agreements (FTAs) ought to include commitments on trade in legal services.

The legal services sector facilitates trade across all other sectors as well as being an important contributor to the UK economy in its own right. This includes contract negotiations for the provision of goods or services and also extends to advice on matters such as intellectual property protection.

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help achieve the best outcome for the UK and its constituent nations. In particular Supplementary Agreement B which contains the "Concordat on Coordination of European Union Policy issues" with Sections B1 relating to Scotland, B2 to Wales, B3 to Northern Ireland and B4 providing a common annex needs revision. Relevant considerations are also contained in the Concordat on International Relations, Section D of the Memorandum of Understanding and its relevant Sections for Scotland, Wales and Northern Ireland and common annex. Revision of the Memorandum and the annex will enhance the UK response by full engagement with the devolved administrations. A common approach will ensure that the "Whole-of-Government" concept is respected. It is crucially important that communications between UK Ministers and the devolved administrations are as transparent as possible. Whitehall departments must be fully appraised of the considerations which are of importance to the devolved administrations and fully cooperative with the devolved administrations, the Scottish Parliament and the Welsh and Northern Ireland Assemblies.

Lawyers also play a key role in resolving disputes when problems arise. We support the ability of lawyers to provide advice on the law of any jurisdiction where they are authorised to practice in addition to international law. This ability should extend to advising on representing clients with respect to international arbitration.

Businesses of all types are increasingly international in focus and global in reach and lawyers must be able to provide their services accordingly, whether this is through expansion of their own offices or partnering with firms in other jurisdictions on an ongoing or case-by-case basis. Furthermore, trade agreements create legal rights and obligations and it is therefore imperative that individuals and business have access to legal advice to allow them to exercise those rights and meet the requirements of their obligations.

In practical terms, this must be supported by efficient business visa systems which allow lawyers to enter a country for the purposes of meeting their clients face-to-face.[3] This refers back to the concept of non-tariff barriers referred to above: if a lawyer has to wait a long time for a business visa to be authorised this could act as practical barrier to provision of legal services.

International data flows

Legal services, as with other professional services, increasingly rely on international data flows. We thereore support the objective of seeking digital trade packages to support those data flows. This issue was first addressed in the Trans-Pacific Partnership agreement[4] and we would encourage the UK to seek commitments in this area in its own trade agreements going forward.

At the same time we emphasise the importance of ensuring that such agreements not only facilitate flows of data between the UK and other countries but also contain safeguards to ensure that any data stored, processed, or used in those countries is effectively protected. The domestic legislation of the UK's trading partners must therefore guarantee the same level of protection as UK data protection rules but rules alone are insufficient without effective enforcement.

The UK should therefore seek to engage with international partners on these issues and to support the work of the ICO in relation to the duties set out in Article 50 of the General Data Protection Regulation[5] and as envisaged under Clause 118 of the Data Protection Bill.[6]

[3] Mode 4 of the GATS (also known as "fly-in-fly-out"

[4] http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/final_agreement-accord_finale.aspx?lang=eng

[5] http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

[6] https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/18066.pdf

WTO membership and the Trade in Services Agreement (TiSA)

We support the UK's continued participation in the WTO. However, the WTO has not made material progress on trade in services beyond the GATS Agreement, which entered into force over twenty years ago.

At the same time we note that 23 members of the WTO, including the EU, are currently taking part in negotiations for the proposed TiSA which would bring improvements in terms of trade in services. The parties recognise the critical importance of services in driving economic growth and are seeking to conclude an agreement which would go beyond the services commitments which the participating countries have signed up to in their respective WTO schedules. The ultimate aim would be for the agreement to be brought within the WTO system and allow further parties to become signatories to the agreement.

We understand that little progress has been made over the last 12 months but would encourage the UK Government to take formal steps to ensure participation in the project with a view to influencing the negotiations and rules that are ultimately put in place. We would welcome clarification as to the current status of the UK in relation to the TiSA.

In terms of substantive content, it is important to ensure that effective commitments on professional services, including legal services, are contained in the TiSA. It is also of paramount importance that the agreement recognises the increasingly digital nature of services provision and is sufficiently flexible to allow for innovative methods of services provision.

This is in addition to the issues outlined in the **Immediate Issues** section below.

Supporting developing countries to reduce poverty

Approach to unilateral trade preferences

We support the continuation of unilateral trade preferences for developing countries in order to facilitate the reduction of poverty in other parts of the world through trade. In doing so the UK should continue to focus on promotion of human rights and sustainable development, which are built into the Generalized System of Preferences as it currently operates. It may be difficult to determine exactly what the UK would wish to offer at this point: the Government should seek to engage with stakeholders on this issue.

We note that these preferences can help build strategic relationships for the future as well as offering immediate potential benefits for UK supply chains and consumers.

ENFORCEMENT OF RIGHTS AND TRADE DISPUTE RESOLUTION

Approach to trade remedies

We agree that the UK's trade remedies framework should encompass the principles of impartiality, proportionality, efficiency and transparency in addition to respect for the rule of law and interests of justice.

WTO dispute resolution

The WTO dispute settlement process allows cases to be brought by one member against another for infringement of the WTO rules. There is no mechanism for a case to be brought before the WTO Dispute Settlement Body by private actors and therefore if a business wishes the action of another member to be challenged, it must look to its Government to bring the case.

The system nonetheless offers many advantages and we do not consider that it would be practical for the UK to seek to widen its scope at this stage. The UK should, however, take a proactive approach to ensure that the mechanism is supported and use. We would welcome further information on the Governments' position on this point.

However, where a bilateral investment treaty (BIT), FTA, or other agreement between two or more parties covers investment disputes resolution mechanisms, the actions of a state may be challenged through the ISDS process provided for.

Investor state dispute settlement (ISDS)

At present two types of ISDS are provided for in the FTAs and BITs to which the UK is party through its membership of the EU: what might be termed "traditional" arbitration and resolution under the EU's new Investment Court System, introduced in the CETA agreement with Canada, Vietnam FTA, and other agreements currently being negotiated. In this context we also note the CJEU's ruling that inclusion of ISDS means that an FTA is regarded as a "mixed agreement" which therefore requires to be ratified by all member states.

The EU's stated long-term aim is to expand the Investment Court System to create a Multilateral Investment Court (MIC). In line with this, with support from Canada they have recently gained approval in UNCITRAL to investigate options for international investment dispute resolutions. The MIC will be one of the options put forward.

We would welcome information about the Government's position on ISDS in general and specifically regarding the creation of the MIC.

IMMEDIATE ISSUES

In addition to the strategic policy issues identified above there are a number of practical legal issues which need to be addressed more immediately.

EU withdrawal and the impact on existing trade agreements

Clarification is also needed as to whether the UK Government has taken steps to ensure we retain participation in FTAs, economic partnership agreements (EPAs), investment treaties and other plurilateral agreements, negotiated as part of the European Union. It would be helpful to know the Government's projected timescale in ascertaining whether continued participation is possible or whether certain agreements would need to be renegotiated.

We also note that the form of the UK's relationship with the EU following withdrawal may have an impact on the likelihood of trading partners to accede to "rolling over" existing agreements. UK access to or relations with the Internal Market [and any customs arrangements] are likely to be particularly important in this respect.

EU withdrawal and the UK's place in the WTO

The UK is already a member of the WTO in its own right, although at present it is represented through the EU the UK's trade with other WTO partners[7] is carried out on the basis of the commitments which the EU has signed up to.

As noted in the consultation paper, upon the UK's withdrawal from the EU we will return to participation on an individual UK basis and will need to agree its own schedules of commitments.

We have read with interest the joint letter from the UK and EU to the WTO[8] which provides helpful information regarding the attended approach of both parties. From this, we understand that the EU and the UK have brought a joint position to the WTO in which they state that both the UK and the EU would seek to maintain the current market access level available to other WTO members. The EU and the UK also committed to ensuring that the UK would remain subject to the rights and obligations of the Government Procurement Agreement (GPA) as it currently is as an EU member state. We welcome the commitment of the Government and the EU to ensuring that the '*future EU's (excluding the UK) and the UK's (outside the EU) quantitative commitments in the form of tariff-rate quotas be obtained through an apportionment of the EU's existing commitments, based on trade flows under each tariff-rate quota.*' We also welcome the

[7] Excluding those where there is an existing trade agreement

[8] Joint letter of the UK and the EU to the WTO, 11 October 2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/letter_from_eu_and_uk_permanent_representatives.pdf

willingness of both the UK and EU to follow an common approach on data and methodology and to engage in dialogue with other WTO members

However, the following questions remain to be addressed:

- How long does the Government anticipate these negotiations regarding the new UK schedules to take?
- If the UK withdraws from the EU before agreement is reached, would UK companies be able to continue trading with other WTO members and what rules would govern those transactions?

Answers to these questions are essential to businesses trading with other WTO countries, to allow them to plan for business operations in the run up to and following UK withdrawal.

TRADE WITH THE EU

We welcome the Government's commitment to securing an ambitious agreement in relation to trade in goods and services between the UK and remaining EU Member States upon withdrawal.

In conjunction with the general UK approach to trade, we are also considering the Government's partnership paper on *Future customs arrangements*.[9] The customs union and harmonised approach to product standards support the free movement of goods within the internal market. The absence of a customs agreement or a comprehensive free trade agreement which includes mechanisms for mutual recognition of standards may cause significant delays in customs and regulatory procedures when compared with the current arrangements, therefore adding costs for both importers and exporters. There would also be cost implications for importers and exporters of both goods and services providers in terms of understanding new regulatory requirements and customs processes and the potential impact on supply chains. There may also be implications to be considered in other areas such as the exhaustion of intellectual property rights or employment issues.

For these reasons it will be imperative for the UK and EU to agree transitional arrangements to ensure legal certainty and transparency for both businesses and regulators. As with all legal change, clarity is of key importance. In the interim, the transitional arrangement should seek so far as possible to maintain the status quo. This will allow business to maintain their operations (and solicitors and other professionals advisers to continue advising their clients) in line with the existing rules so that a new relationship can be agreed if this has not already been achieved by the date of formal UK withdrawal. In the longer term the current arrangements should run for long enough to allow people to familiarise themselves with whatever

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf

relationship will follow on from Withdrawal. This will be crucial even in the absence of any special trading agreement.

In practice many businesses will need time to seek legal advice to accommodate the changes brought about by withdrawal from the EU - be that internal advice from in-house teams or external advice from private practice. Lawyers themselves will need time to process the new rules to ensure they are best able to advise their clients. Businesses will then need to adjust their processes and contracts, and may also choose to restructure or move parts of their businesses, to ensure a smooth transition when the new relationship comes into effect.

The nature of these adjustments will depend on the form of any new relationship agreed with the EU in particular in relation to Internal Market participation. In the financial services sector, if the UK is regarded as standard third country then the arrangements or rearrangements will depend on whether the UK is granted equivalence.

Specific priorities for legal services in the context of EU Withdrawal

As set out in our Negotiation Priorities memorandum,[10] we believe that the UK Government should negotiate the continuity of the EU law concerning the transnational practice of law and legal professional privilege in the Withdrawal Agreement. We have drafted an article for the Withdrawal Agreement which can be found in the Appendix.

Free movement of lawyers

The regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another member state have been in force for a number of years. There are three key pieces of legislation that affect the legal profession:

- Lawyers' Services Directive of 1977 (77/249)
- Lawyers' Establishment Directive of 1998 (98/5)
- Recognition of Professional Qualifications Directive (2005/36)4

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession.

The Lawyers' Services Directive (temporary provision)

The Lawyers' Services Directive 1977 governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another member state

[10] https://www.lawscot.org.uk/media/9945/negotiation-priorites-for-leaving-the-eu-for-the-uk-government.pdf

- a ‘migrant’ lawyer - must do so under his or her home title. Migrating lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practices before the judicial authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

Permanent establishment under home title

The Establishment Directive 1998 entitles lawyers who are qualified in and a citizen of a member state to practice on a permanent basis under their home title in another EU/EEA member state, or Switzerland. The practice of law permitted under the Directive includes not only the lawyers’ home state law, community law and international law, but also the law of the member state in which they are practicing – the ‘host’ state. However, this entitlement requires that a lawyer wishing to practice on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers.
Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

Recognition of professional qualifications

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 Lawyers’ Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one member state and is in good standing with his or her home bar.

The member state where the lawyer is seeking to re-qualify may require the lawyer to either:

- complete an adaptation period (a period of supervised practice) not exceeding three years, or
- take an aptitude test to assess the ability of the applicant to practice as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host member state and it must take account of the fact that the applicant is a qualified professional in the member state of origin).

It is also worth bearing in mind that a number of our future lawyers take advantage of programmes to broaden their horizons during their studies, which rely on reciprocal arrangements with other EU universities. The ERASMUS programme, the best-known EU student exchange programme established in 1987, has a number of participants from Scottish law schools.

Legal professional privilege (LPP)

Agreement on legal services must also include recognition of legal professional privilege, both as an important end in its own right and to ensure that Scottish (and other UK) lawyers are on a par with those who are members of the local bar or law society in the EU/EEA and Switzerland.

LPP is conceptually a right of the client and is central to the rule of law and administration of justice. Its scope may vary slightly between jurisdictions but in general terms LPP protects confidential communications between companies or individuals and their legal advisers made for the purposes of, or legal advice in contemplation of, litigation. It is not possible to force such communications to be disclosed in legal proceedings or to regulators or other third parties. However, we note that restrictions may be set as to who qualifies as a legal adviser in this context.

Any business based in the trading partner country that obtains legal advice from a UK qualified lawyer on must have the same protections afforded by the LPP under EU law or Member States rules as if the advice was given by an EU/EEA lawyer.

The ability of UK qualified lawyers to provide advice on the basis that the privileged nature of those communications will be respected is also of key importance to the legal sector as a major contributor to the UK economy.

Securing legal privilege for communications between EU clients and UK qualified lawyers should be included within the legal services negotiating priorities of the UK Government in the in order to ensure that UK qualified lawyers can function fully when acting for EU or third country clients who engage them.

Resolving disputes between citizens and/or businesses: recognition and enforcement of judgments

Rights must be enforceable if they are to deliver full value to the rights-holder.

At present the UK is an attractive jurisdiction for dispute resolution as a result of its reputation for reliable, efficient courts and relatively generous and flexible rules on the discovery of evidence among other factors. This brings clear benefits for the UK legal services' industry, which in turn contributes to the economy as a whole. Instrumental to this degree of success in an EU context is the possibility for claimants to rely on the well-established rules provided by the Brussels I Regulation in respect to both the establishment of jurisdiction and the mutual recognition and enforcement of judgments within the EU.[11]

We are concerned about the negative consequences that might result if the benefits of participation in the Brussels I regime are lost. This could be of detriment to clients if UK judgments in will not automatically be enforced in the remaining EU countries. We therefore recommend that the UK Government seeks to

[11] See e.g. the studies conducted by Rodger: "Competition law litigation in the UK courts: a study of all cases, 2005-2008", (2009) GCLR 93; "Competition law litigation in the UK courts: a study of all cases, 2009-2012", (2013) GCLR 55

maintain arrangements to ensure certainty of jurisdiction and continued mutual recognition and enforcement of judgements with the remaining EU Member States, and indeed to pursue continued participation in the Lugano Convention to continue cooperation with the non-EU signatories.

As set out in our Negotiation Priorities memorandum we therefore consider that maintaining the structure of the Brussels Regulations, the EU Enforcement and Order of Payment, the Maintenance Regulation and Rome I & II on Applicable law are essential to litigants in both the UK and the EU. They assist in the resolution of disputes and are valuable to litigants in their personal and commercial capacities.

Resolving disputes between businesses and states

As we have noted previously, participation in the EU system, while setting the rules by which UK businesses are bound, also provides them with recourse to redress if they have a complaint about behaviour of other Member States in relation to eg state subsidies.

However, under the WTO trade rules, a case can only be taken against the EU by the UK itself and the grounds for doing so are much more limited. There are a number of disadvantages to this in terms of rights enforcement when assessed from the point of view of individual UK businesses. Firstly, the business must persuade the UK to bring the case; political/diplomatic factors could play into this decision. Secondly, the WTO processes are widely recognised as slow-moving.

Most importantly the WTO does not benefit from the enforcement powers which allow the European Commission to effectively oversee compliance with the EU's state aid rules. Subsidies that are found by the WTO dispute settlement mechanism to be in breach of WTO rules only need to be discontinued or the adverse effects caused by them removed; unlike the European Commission, the WTO cannot force repayment where a subsidy has been given. The WTO anti-subsidy legislation does not provide the same level of detailed guidance and there is much less case law, meaning a higher level of legal uncertainty for those businesses seeking redress. Furthermore, the WTO system does not provide for damages claims: the only remedy is discontinuation of the practice complained of or removal of adverse effects.

For the reasons outlined above, we consider that it may be helpful to re-examine the issue of access to justice in this context when the terms of any proposed agreement for trade with the EU post withdrawal are more visible.

Appendix: UK-EU withdrawal agreement draft article on legal services

1. The parties recognise that trans-European and transnational legal services that cover the laws of multiple jurisdictions play an essential role in facilitating trade and investment and in promoting economic growth and business confidence.

2. The parties shall regulate or seek to regulate UK and EU lawyers and transnational legal practices, subject to such amendment as may be necessary to reflect this Agreement, in such a manner as existing EU Law currently provides. Accordingly the parties agree that the following Directives continue to apply in the UK, notwithstanding that the UK is no longer a member State of the EU:-

(i) The Lawyers Services Directive of 1977 (77/249)

(ii) The Lawyers Establishment Directive of 1998 (98/5); and

(iii) Recognition of Professional Qualifications Directive (2005/36) in respect of lawyers' qualifications.

3. The parties also agree that:-

(a) foreign lawyers may practice foreign law on the basis of their right to practice that law in their home jurisdiction;

(b) foreign lawyers may prepare for and appear at commercial arbitration, conciliation and mediation proceedings;

(c) lawyers qualified in a UK jurisdiction may prepare for and appear in the Court of Justice of the European Union;

(d) provision of legal services through web based or telecommunications communications technology is permitted;

(e) foreign lawyers and domestic (host country) lawyers may work together in the delivery of full integrated transnational legal services; and

(f) "foreign lawyer" means in relation to the UK, a lawyer qualified in an EU member state and in relation to the EU, a lawyer qualified in the UK, as referred to in Article 1 of the Lawyers Establishment Directive of 1998 (98/5) and the term "Foreign Law", shall be construed accordingly.

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