



Law Society
of Scotland

Trade Bill

Law Society of Scotland briefing for second reading

January 2018



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.

In October 2017 the Department for International Trade published its paper on *Preparing for our future UK trade policy*¹ to which the Law Society responded.² The Society welcomes the opportunity to consider and respond to the Trade Bill³ and has the following comments to put forward for consideration.

General Remarks

We continue to support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. In our response we welcomed the recognition of the importance of engaging with the devolved administrations and legislatures. We also emphasised that it is important to ensure that a whole of governance approach is extended to trade negotiations.

In particular we consider that trade in services should be firmly embedded in the UK's approach to trade and that free trade agreements should include commitments to facilitate 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.

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

²https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf

³<https://services.parliament.uk/bills/2017-19/trade.html>

Comments on the draft bill

Scope of delegated Powers

We are concerned by the extensive scope of delegated ministerial powers under the Act, mirroring concerns previously identified in relation to the use of Henry VIII powers in the context of the European Union (Withdrawal) Bill.⁴ It is not clear why the Government considers such wide powers to be necessary.

Under clause 1(1), the Bill grants an appropriate authority the power to make regulations which it considers “appropriate” to implement GPA. We consider that if the intention is to ensure implementation of the 1994 GPA then the authorities should be required to make such provisions. In this specific context, it could be helpful to allow the relevant authority discretion, facilitated by the current wording, to make regulations which it considers appropriate to implement the GPA to ensure continued alignment with EU requirements.

Clause 2(1) provides that an appropriate authority may make such provision as the authority considers appropriate to implement a future agreement. We believe this power should be limited to making regulations which are considered “necessary” to implement the agreement.

We are concerned that clause 7(1) grants a very wide discretion to HMRC to require information. The scope of this provision should be more clearly defined to give greater certainty as to the extent of information and the anticipated frequency and method of data collection.

Similarly, clause 8(1) could involve disclosure of personal data relating to individuals or sensitive commercial information. Limitations should be enshrined in clause 8 to ensure that their rights are not affected. Similarly, any disclosure of information should be subject to the requirements of protecting legal professional privilege

Clarity of drafting

The principle of certainty is central to good law-making.

Under clause 2(2) an international trade agreement means a “free trade agreement”, however “free trade agreement” is not itself defined. Furthermore, clause 2(2)(b) refers to “an international agreement that mainly relates to trade, other than a free trade agreement”. However, “mainly” does not grant sufficient certainty in terms of interpretation. We note that the explanatory notes define international trade agreements as follows: “International trade agreements are agreements between two or more countries

⁴ See our response to the Government’s White Paper in May 2017 - <https://www.lawscot.org.uk/media/9969/grb-white-paper-response.pdf> at p4

aimed at reducing the barriers to trade in goods or services between them.” It would be helpful if clause 2(2) were amended accordingly.

We note also the reference in clause 8(5) to the Data Protection Act 1998. However, the General Data Protection Regulation comes into effect on 25 May 2018 and the Trade Bill will only take effect upon withdrawal. The Bill should be amended accordingly to reflect the Data Protection Bill,⁵ which subject to Parliamentary approval will become the Data Protection Act 2018, through which the GDPR is being incorporated into domestic UK law.

Issues of relevance in the context of devolution

At present, free trade agreements negotiated by the EU are classified as exclusive or mixed agreements, depending on whether the matters dealt with are within the exclusive competence of the EU or also apply to areas where competence is shared between the EU and Member States. For mixed agreements – including the recent EU-Singapore FTA and CETA – approval is required from national parliaments, which in the UK means approval by both Houses of Parliament.

International relations and regulation of international trade is reserved to the UK Government and Parliament.⁶ The Scottish Parliament and the Scottish Government (as with the other devolved legislative authorities) have no formal role in negotiations or approval of EU agreements. However, in our response to the consultation on *the Future of UK Trade Policy*, we highlighted the importance of extending a whole of governance approach to trade negotiations. We would urge further consideration of how trade negotiations will be handled where they intersect with the powers of the Scottish Parliament and other devolved legislative authorities where any proposed trade agreement will affect an area of devolved competence.

We note that clause 2(6)(a) would also affect devolved legislation. We also note the position of the Scottish Government set out in the Legislative Consent Memorandum⁷ which indicates that the “Scottish Government does not currently intend to lodge a legislative consent motion in relation to the Bill.”⁸ The allocation of responsibility and extent to which a UK or Scottish minister would have the relevant powers and duties should be dealt with explicitly in the legislation.

⁵ See <https://services.parliament.uk/bills/2017-19/dataprotection.html>

⁶ Scotland Act 1998, Schedule 5 at para 7

⁷ <http://www.parliament.scot/SPLCM-S05-12-2017.pdf>

⁸ See para 3 on page 1

Entry into force

It is important that regulations can be put in place in advance of the UK's withdrawal from the EU to ensure continuity in relation to the GPA and other international trade agreements.

However, currently the UK cannot conclude trade agreements independently of the EU, meaning regulations under clause 2 could not come into effect until exit day. At present it is unclear what the impact of a transitional period would be in this regard. As noted previously, we consider a transitional period is imperative to allow citizens and businesses in both the UK and EU to adjust to whatever relationship follows withdrawal.

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