



Law Society
of Scotland

Consultation Response

UK Trade Policy Transparency and Scrutiny Inquiry

June 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.

The Society's Constitutional Law Committee and Trade Policy Working Group welcome the opportunity to consider and respond to the International Trade committee's inquiry into UK Trade Policy Transparency and Scrutiny.¹ The Society has the following comments to put forward for consideration.

General Remarks

UK withdrawal from the EU presents an opportunity to review and, in so far as considered appropriate, to reform the process for negotiating international trade treaties.

At present the EU is responsible for negotiating trade agreements. When the EU is negotiating a new trade agreement, the first formal step is agreement of a negotiating mandate in Council. The Council gives the mandate to the European Commission to negotiate on behalf of member states. The Commission engages with stakeholders, including the relevant government departments of the Member States – in the UK, most notably the Department for International Trade. Although the European Parliament does not participate in the negotiations as such, it is kept informed throughout the process and engages with the Commission, including by asking questions. Once an agreement has been reached, the European Parliament must give consent before the agreement can be concluded.

After the UK leaves the EU, the process would be that which currently applies to international treaties generally. This means that the treaty is negotiated by the UK Government of the day; Parliament first enters the process at the point of ratification. The Constitutional Reform and Governance Act 2010² makes

¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-trade-committee/inquiries/parliament-2017/uk-trade-policy-transparency-and-scrutiny-17-19/>

² See Part 2 -

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/144230/Constitutional Reform and Governance Act 2010.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/144230/Constitutional_Reform_and_Governance_Act_2010.pdf)

provision, among other things, for the process to be followed to effect ratification of treaties. The final treaty is laid before Parliament for a period of 21 sitting days³ and is ratified if the period expires without either House having resolved that the treaty should not be ratified.

Response to questions

1. Which documents pertaining to trade policy and negotiations should the Government make publicly available – and which should remain confidential?

We believe that greater transparency provides advantages in terms of democratic accountability and can facilitate more meaningful stakeholder engagement, while offering clarity, and (potential reassurance) to stakeholders, including civil society groups. Furthermore, trade agreements should be used to promote the rule of law, the interests of justice and human rights. Specific reference to the UN General Principles on Business and Human Rights would assist in embedding these considerations within the UK's international trading framework.

As a general principle therefore, trade policy and delivery would benefit from the highest practicable levels of transparency and consultation. This will ensure that trade policy is subject to appropriately wide scrutiny, and that opportunities are available to generate the broadest possible consensus about the conduct and content of UK trade policy. At the same time, publication and consultation exercises should be structured and managed in such fashion as to facilitate rather than impede the conduct of trade policy.

Similarly, we recognise that the nature of international negotiations requires a degree of confidentiality. There will be genuine need on occasion to ensure certain information remains confidential, including where commercially sensitive. In all circumstances, however, any decision to maintain documents as confidential should be subject to consideration of the public interest in each case.

This approach will make a virtue of necessity: trade policy and negotiations are likely to be a subject of increasing public concern in coming years, and transparency will be a critical element in building and sustaining public confidence in the UK's ability to design, pursue and implement trade policy. Rule of law issues, cultural issues etc are not highly confidential and should be regarded as open for debate as well as the detail of core trade issues once the broad negotiating position is settled. An approach to transparency that errs too restrictively on the side of maintaining confidentiality is also unlikely to be sustainable in the longer term as increasing numbers of stakeholders (both UK and international) become involved in these processes.

³ Beginning with the first sitting day after the date on which a Minister of the Crown has laid before Parliament a copy of the treaty

It bears noting additionally that FOI regimes are likely to come under continued pressure given anticipated demand for trade-related disclosures, and a proactive disclosure policy may help in alleviating some of these pressures.

Furthermore, we note that the European Commission has taken steps in recent years to increase transparency around trade relations. In particular, the negotiating mandate for each trade agreement is often now made public⁴ along with reports on the various negotiating rounds.

We support pursuing a similar approach in relation to UK trade negotiations. In terms of specific documents, this approach would be consistent with, for example, regular publication of trade policies, negotiating mandates and guidelines, periodic updates on progress on negotiations, and publication of draft agreements with commentary on agreed / to-be-agreed elements. Impact assessments evaluation prospective and proposed agreements in terms of the economy, equality, environment and the devolution settlement should also be made publicly available.

2. What level of access should Parliament and the devolved administrations and legislatures have to trade policy documents, including trade negotiation texts?

The devolved legislatures and administrations have not played a formal role in negotiating international trade treaties. However, since the EU first took over responsibility for trade negotiations, there have been constitutional developments within the UK with the creation of the devolved legislatures and administrations- including the Scottish Parliament - and subsequent further devolution of powers to them. Determining the UK's position across a raft of sectors encompassing products and services, which may be provided from anywhere in the UK, demands a holistic approach. As we have stated elsewhere, we believe it is important to ensure a "whole-of-government" approach in terms of the negotiations with the EU. The concept is also of particular relevance to other international agreements - including trade agreements - which may or will have an impact on domestic law. 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.⁵

⁴ The decision to publish the mandate is ultimately one for the Council and is assessed on a case by case basis <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf> but the text of the negotiating mandate has been published for a number of treaties under negotiation – see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>

⁵ 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 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,

UK withdrawal from the EU offers an opportunity to review the procedures in place for negotiation of international trade agreements and consider how these might best be modernised to take account of changes in the UK's political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in and engagement with trade negotiations in recent years.

In order to create a comprehensive and inclusive trade policy, conduct negotiations and implement trade agreements, it would be helpful were the UK government to engage with the devolved administrations and legislatures. In similar fashion, reflecting the evolving nature of Parliamentary engagement with treaty making under the Constitutional Reform and Governance Act 2010 and subsequently, trade policy and agreements may be subject to closer Parliamentary scrutiny than has traditionally been the case.

At a minimum, trade policy documents, including negotiation texts, should be made available to parliamentarians, both in Westminster and the devolved administrations and legislatures, to enhance transparency, facilitate scrutiny and strengthen democratic accountability. In an EU context, MEPs are able to consult such documents in so-called reading rooms, as was done in the case of EU-US TTIP negotiations. This approach balances the need for transparency on the one hand while ensuring confidentiality of negotiating texts (which are not themselves made public).

The following comments focus solely on devolved administration and legislative engagement in trade policy, negotiation, scrutiny and implementation.

Options for the involvement of the devolved administrations in this context might be:

- requiring the consent of the devolved administrations to any UK negotiated trade position;
- *normally* requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;
- having a procedural structure for the devolved administrations' involvement similar to that in the European Union Withdrawal Bill for "common frameworks" (ie formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process); and,
- as a minimum, and without requiring the consent of the devolved legislatures, allowing the devolved legislatures and administrations access to documents, policies etc and allowing them to have a scrutiny and comment role (as noted above).

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 apprised 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.

- With some of the above, consideration would need to be given to whether the rules should be set down in statute, convention, a memorandum of understanding etc. For instance, where terms such as “normally” are being used to describe what would be expected in the relationship between parties, such provision should probably best not be stated in statute, due to the lack of precision.⁶

In considering options for participation at different levels, the Canadian experience in negotiating CETA may be instructive⁷ and the structures and processes in place for German Länder co-ordination in respect of trade matters can also provide a further helpful example,⁸ albeit that these are both federal states. The current EU negotiating processes may be also instructive when considering how trade negotiations might operate in the UK following withdrawal from the EU. Although, the EU bodies do not have direct counterparts in the UK political framework, it is nonetheless possible to draw parallels which could inform the UK's approach. Again we note that at EU level there is a dialogue with Member States (a possible comparator for the devolved legislatures) as well as both the Council and the Parliament throughout the course of negotiations.

Perhaps most importantly, reflecting the drivers of provincial / territory participation in the CETA negotiations and the relationships between Westminster and devolved administrations and legislatures, for trade agreements to be implemented successfully, it will be advisable to ensure that devolved administrations participate in the design of trade policy and mandate, the conduct of negotiations, and review of draft agreements, to the fullest degree practicable.

More particularly, where the subject of negotiations relates to devolved matters, it should be expected that the UK Government would seek the involvement of devolved administrations in negotiations. Consideration should be given to whether the UK Government should be required to seek more than just the involvement of the devolved administrations in such negotiations but also seek their consent to the position of the UK Government during such negotiations where they relate to devolved matters.

This will be important where trade agreements impact upon on devolved matters and implementing

⁶ Section 2 of the Scotland Act 2016 should at best be seen as an exception peculiar to its context.

⁷ In Canada, trade falls under the federal prerogative but there is extensive information interaction between Ottawa and the provinces. For CETA there was close provincial participation in negotiations reflecting the extensive nature of the agreement and responsibility (but without international accountability) of provinces / territories for implementation. In practice, the provinces participated directly in negotiations on issue areas where they had interests and responsibilities, with effective "co-determination" of Canadian positions in these (supported by access to detailed information on negotiations overall, on ongoing basis). (See further <https://www.wcpp.org.uk/wp-content/uploads/2018/04/Sub-national-government-involvement-in-international-trade-negotiations-ENG.pdf> (at pages 7-9)

⁸ In Germany, where essential Länder interests are engaged by a trade deal, the Länder representatives are able to be involved in negotiations. Where a trade proposal relates to an area where Länder have sole legislative power, negotiating powers reside with the Länder.

legislation may be carried out by the devolved administrations or engage the legislative consent convention.

The process for granting legislative consent in a Scottish context is determined by a convention known as the “Sewel Convention”. This applies where the UK Parliament is seeking to pass legislation containing “relevant provisions” – ie where it would change the law on a “devolved matter”,⁹ or alter the “legislative competence of the Scottish Parliament” or the “executive competence” of the Scottish Ministers. The UK Parliament will normally only pass bills containing such relevant provisions if it has obtained consent from the Scottish Parliament first. The basic procedure is that a member of the Scottish Government lodges with the Clerk of the Scottish Parliament a legislative consent memorandum in respect of a “relevant Bill” that is before the UK Parliament. That memorandum is then referred to “the lead committee” relating to the subject matter and it then reports to the Parliament. After publication of the lead committee’s report on the memorandum, a legislative consent motion is lodged if the committee is recommending consent be given. The Parliament then takes the motion, in light of what has been said in that report.¹⁰

Accordingly, rather than seek to engage with devolved administrations on an ad hoc basis, to enable the smoothest possible design and operation of trade policy (and to minimise uncertainty for industry and trade partners), it would be advisable for formal structures to be established to facilitate trade-related confidence-building and good-faith collaboration across devolved and Westminster administrations eg to tie in with the “common frameworks” to be agreed as a result of repatriation of EU powers. Such structures may provide, for example, for devolved participation in the design of trade mandates and in the conduct of negotiations in respect of devolved areas, thereby ensuring devolved buy-in to trade agreement implementation and minimising risks to UK-wide implementation of trade agreements.

Lastly, insofar as trade negotiations relate to devolved areas, one option would be to make UK ratification of any agreements (or relevant sections thereof) provisional on devolved administration consent (which may in turn require devolved legislative consent). This is similar to the approach taken at EU level in relation to ratification of mixed agreements.¹¹ While this - and, indeed, devolved administration participation generally - might make negotiations more complex, it could also lead to more widely accepted consensus-based trade policy and ensure smooth implementation of agreements.

⁹ As determined by the Scotland Act 1998

¹⁰ See further <http://www.parliament.scot/parliamentarybusiness/26512.aspx>

¹¹ I.e free trade agreements where the competence is shared between EU and Member State because they contain investment provisions. Such mixed agreements need to be ratified by each EU Member State individually

3. How should the Government consult business and civil society groups on trade policy matters, including prospective and on-going trade negotiations?

We support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. This is important not only when establishing the blueprint for negotiations but should be an ongoing process throughout the course of negotiations.

Business and civil society groups, including professional bodies and trade associations can provide valuable information and intelligence regarding sector interests and in many cases foreign markets. This is bolstered by professionals and members of UK academia, with considerable expertise and experience in international commerce, trade law and related issues. Regular engagement with representatives from various sectors, alongside discussions with impartial and independent experts would help build and sustain public confidence in UK trade policy and its conduct.

One idea would be to create a specific independent advisory group to offer impartial advice on trade law matters. To enable members to be able to advise ministers effectively and robustly, it would be strongly preferable for such an advisory group to be placed on a statutory footing, with members selected for a multi-year tenure by a mechanism capable of reflecting consensus amongst key stakeholders. This could involve e.g. appointment by Secretary of State having consulted with devolved administrations and leading industry/practitioner groups across economic sectors). Members of this group would be bound by strict obligations of confidentiality, which would allow privileged access to otherwise confidential material and meetings. At the same time, ministers should be obliged to regularly convene, consult and share documents with this group. Last, to bolster public confidence, the advisory group should itself publish an annual report describing its activities.

In terms of effectively integrating specialist knowledge from outside government into policy-making processes (and indeed, the conduct of negotiations), it may be particularly instructive to examine the operation of the US system of USTR cleared advisors.

There would also need to be a mechanism for eliciting input from non-group members necessary to enable policy debates based on broad range of evidence. For example, as is the current practice in the EU, the government could organize consultation rounds for all stakeholders ahead of adopting negotiating mandates.

4. What role should Parliament and devolved administrations and legislatures have in drafting and/or approving the UK's negotiating mandate for trade negotiations?

As noted above, the first stage of the EU trade negotiation process is agreement of a negotiating mandate in Council. The Council gives the mandate to the European Commission to negotiate on behalf of member states. In the same way it would be possible for the UK Parliament to take on an enhanced role in establishing the mandate for negotiations to ensure that the scope of the prospective agreement and other key considerations have been subject to Parliamentary scrutiny before negotiations commence.

Similarly the role of the devolved legislatures merits particular consideration in the context of international trade negotiations. Such agreements will inevitably affect policy making in devolved areas and the ability of devolved legislatures to make effective use of their devolved competence. This will in particular be the case with regard to those areas of devolved competence 'coming back' from the EU: agriculture, (some) fisheries, and the environment.

As touched on above, the overall EU-UK deal will be a factor to be taken into consideration when the UK is seeking to conclude new trade agreements with other countries. It may be that by concluding trade agreements under the foreign affairs prerogative, the UK Government would impinge upon the powers which have previously been granted to the devolved legislatures. We note that the Sewel convention would not fall to be considered in this context as it only applies where the UK Parliament enacts legislation, although provisions for cooperation are set out in the Concordat on International Relations.¹² There may be an argument that a new framework providing for participation of the devolved legislatures in determining the negotiating mandate could be devised to take account of this situation.

See further response to question 2 above.

5. What procedures should be in place for the UK Parliament and devolved administrations/legislatures to scrutinise trade agreements as they are being negotiated?

Ensuring a level of access to trade agreements fulfils little purpose unless this is to be reinforced by effective scrutiny.

It would be helpful to formalise procedures for engagement with and participation of the devolved legislatures in scrutinising trade agreements throughout the negotiation process, in particular where there is the potential for impact on an area of devolved competence.

See further response to question 2 above.

6. What powers should Parliament and the devolved administrations and legislatures have over the ratification and implementing legislation of UK trade agreements?

See further response to question 2 above.

¹² See Part II, D1: Concordat on International Relations – Scotland from p44



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