



Law Society  
of Scotland

# Consultation Response

Consultation on trade negotiations with the United States

October 2018



## Introduction

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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 Trade Policy Working Group welcomes the opportunity to consider and respond to the Department for International Trade's consultation on trade negotiations with the United States.<sup>1</sup> We previously responded to the Government's consultation on Preparing for our future UK trade policy.<sup>2</sup> The Society has the following comments to put forward for consideration.

## General Remarks

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Trade agreements can be used to effect a wide range of changes in the relationship between states and regions. In many such agreements provisions are a means to promote or reinforce the application of the rule of law. Trade negotiations should take into consideration the need to ensure minimum standards or norms and respect for the rule of law and the interests of justice and access to justice.

Other aspects of the legal framework play a similarly important role in facilitating trade. The foundation of negotiations should be a long-term vision for trade, incorporating issues such as regulatory cooperation in order to ensure effective markets and protect consumers. This extends, for example, to continuing protection of intellectual property rights, promotion of competition and facilitating flows of data.

In the context of trade in legal services, we emphasise the importance of recognising that Scotland is a distinct jurisdiction with its own law, court system and separately regulated legal profession. This should be

<sup>1</sup><https://consultations.trade.gov.uk/policy/consultation-on-trade-negotiations-with-the-us/>

<sup>2</sup> [https://www.lawscot.org.uk/media/359078/lss-response-to-dit\\_preparing-for-future-uk-trade-policy\\_november-2017.pdf](https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf)

taken into account in pursuing trade agreements including negotiations with the EU. It may be helpful to highlight a few statistics which relate specifically to the Scottish legal services sector:

- Scottish solicitors contribute £1.5bn to the economy on an annual basis;
- There are almost 1,200 Scottish firms; and
- More than 24,000 people are employed within the Scottish legal profession.<sup>3</sup>

As set out in our response to the consultation on the UK's future trade policy,<sup>4</sup> we believe that a whole of governance approach should be taken when considering trade negotiations. In the context of devolved competences this is particularly relevant where international agreements would bind domestic legislatures to effect changes to domestic law. We considered this further in our response to the International Trade Committee's inquiry into UK Trade Policy Transparency and Scrutiny.<sup>5</sup>

## UK approach to trade negotiations

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There are a number of general structural issues which need to be addressed and which provide necessary context to stakeholders seeking to engage with proposed or potential UK trade negotiations in the most constructive way possible. Stakeholder engagement on an ongoing basis will be necessary to ensure that any agreement reached is fit for purpose. We note that the background papers to the current consultations do not provide detail as to the logistical arrangements for trade deals. Some issues on which further information would be welcomed are set out below.

At the outset it is important to note that the UK's relationship with the EU will have a bearing on relationships with other trading partners going forward. This will be relevant, not only in terms of what may be legally and practically achievable but could also inform negotiating priorities. We note that the International Trade Committee of the House of Commons is currently conducting an inquiry into the *Impact of UK-EU arrangements on wider UK trade policy*. We will set out our comments on this topic in greater detail in our response to that inquiry.

There may also be some issues to be resolved around common frameworks, which will allow more effective engagement with the devolved administrations throughout the course of trade negotiations and implementation. In October 2017 the JMC(EN) agreed that common frameworks should be established where necessary. The communique stated:

<sup>3</sup> The number of practising Scottish solicitors is over 11,000.

<sup>4</sup> [https://www.lawscot.org.uk/media/359078/lss-response-to-dit\\_preparing-for-future-uk-trade-policy\\_november-2017.pdf](https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf)

<sup>5</sup> <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

*“The following principles apply to common frameworks in areas where EU law currently intersects with devolved competence. There will also be close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities. Discussions will be either multilateral or bilateral between the UK Government and the devolved administrations. It will be the aim of all parties to agree where there is a need for common frameworks and the content of them. The principles referred to included that common frameworks will be established where they are necessary in order to (amongst other things):*

- *enable the functioning of the UK internal market, while acknowledging policy divergence;*
- *ensure compliance with international obligations; and*
- *ensure the UK can negotiate, enter into and implement new trade agreements and international treaties”.*

In terms of the UK’s approach to trade, we consider it is important to take a strategic approach, not only to priorities to be pursued in specific negotiations but as a precursor to this in identifying partners within whom to pursue bilateral or regional trade agreements. We note that no background rationale has been given regarding the choice to explore negotiations with Australia, New Zealand and the USA in the first instance. We note that the European Commission provides impact assessments<sup>6</sup> before opening trade negotiations: this could be helpful in a UK context.

Beyond this, additional logistical information is essential to facilitate constructive dialogue in relation to the proposed negotiation and give a clearer picture of the anticipated architecture of UK agreements. Many countries, including Australia, New Zealand and the USA, operate on the basis of model trade agreements. This is helpful in setting broad expectations which inform negotiations with prospective partners as well as creating a framework within which domestic stakeholders can input into negotiations. We consider that this can also provide benefits to businesses involved in cross border provision of goods and services in terms of understanding arrangements ultimately concluded.

With this in mind, we consider that it would be helpful to create a model for new agreements which is consistent with the structure of existing agreements, so far as is practicable to achieve the UK’s desired outcomes. The model FTA could also address issues such as the UK’s preferred approach to resolution of disputes between the contracting parties. It could also indicate whether the UK would seek to include investor protection provisions and its proposed approach to investor state dispute settlement (ISDS). Even if this is not included in a model agreement *per se*, further information on these issues is needed.

Furthermore, there is a growing conversation around the desirability of incorporating review clauses into trade agreements. This could allow modernisation of agreements to ensure they remain relevant and effective in facilitating effective and inclusive trading relationships. Consideration might usefully be given to whether these should be included as a feature of UK agreements.

<sup>6</sup> <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/impact-assessments/>

## Issues to be considered in the context of trade negotiations with the United States

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As with any other trade agreement, the benefits to the UK or otherwise will depend on the precise terms of any agreement reached.

### 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.

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.<sup>7</sup> 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. Additionally, clients may sometimes wish to travel to the UK to instruct or receive legal services, requiring an efficient business visa system for visitors to the UK.

Lawyers also play a key role in resolving disputes when problems arise. This ability should extend to advising on representing clients with respect to, international law and international arbitration.

### *Legal services and the United States*

Scottish law firms provide services to clients based in the USA. This includes cross-border provision of services, for example in relation to funds or oil and gas, for clients looking to invest here. This highlights the important role which lawyers play in facilitating foreign direct investment in addition to international trade in goods and services.

Scottish firms also participate in international alliances, allowing closer working relationships with partner firms in other jurisdictions, including those in US states. In addition, with the rise of global law firms, Scottish solicitors increasingly work for law firms of US, or partial US origin with colleagues on both sides of the Atlantic.

<sup>7</sup> Such temporary provision of services is also known as “fly-in-fly-out” and forms part of the commitments under Mode 4 of the GATS and other trade agreements under the heading ‘Movement of natural persons’

A number of Scottish solicitors also work in the USA in a number of jurisdictions including New York, Texas and California.

The USA is a federal state with separate jurisdictions operating their own qualification and regulatory frameworks. Lawyers qualified in one state are not automatically able to move to other US jurisdictions to provide advice (ie there is no internal market for legal services along the lines operated within the EU), although there is a distinction between federal and state level advice.

In terms of overseas lawyers, some jurisdictions allow foreign lawyers to practise as Foreign Legal Consultants (FLC) and give advice on the law of the jurisdiction in which they are qualified.<sup>8</sup> However, while the state system itself may be relatively straightforward, anecdotally there can be transparency issues around the steps to be negotiated and the process for registering as an FLC can be a reasonably lengthy one.

It is also possible to requalify: as with qualification this is different from state to state. Both New York and California operate relatively liberal systems but this is not universal.

### *Immigration*

One of the practical issues which UK lawyers and law firms need to negotiate when seeking to provide legal services in the USA is the US immigration system. We are aware that a number of visa categories are available to UK citizens. These include intracompany transfer visas for managers and executives or employees with specialised knowledge (L-1 visas), which can also be used for candidates going to the US to open a new office. UK citizens are also eligible for E-2 treaty investor visas and E-1 treaty trader visas. More junior lawyers or staff may also benefit from internship and training options under categories J and H. Other visas may be of relevance to individual lawyers in particular circumstances. In practical terms, the key considerations will be ease of application, timescales for processing, and the ultimate decision to approve or deny the visa applied for.

### **Intellectual property – geographical indications**

We are pleased to note the Government's current consultation on establishing UK Geographical Indications Schemes.

The EU has created a set of rules which safeguard the authenticity of regional and traditional products. These benefit producers in particular regions, or who manufacture products with a traditional character,<sup>9</sup> by offering

<sup>8</sup> [https://uk.practicallaw.thomsonreuters.com/2-633-6340?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-633-6340?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

<sup>9</sup> This note does not extend to wines, nor to the proposed "product of island farming" designation.

specific protection to those products through the right to use a particular designation of origin, geographic indicator or guarantee of traditional speciality. This protection ensures that the reputation and quality of the product is maintained as producers are not subject to pressures from competitors who can cut corners to produce a cheaper version of the product or damage its reputation. It can therefore offer a way of preserving traditional industries, often made up of smaller/family-run businesses and sustaining employment vital to regional economies. By preserving the integrity of products and manufacturing processes, the measures offer consumers a guarantee of quality and the knowledge that they are supporting the preservation of cultural heritage, which can also promote investment and encourage tourism.

- a) Protected Designations of Origin (PDO): produced, processed *and* prepared in a specific geographical area, using the recognised know-how of local producers and ingredients from the region concerned
- b) Protected Geographic Indications (PGI): quality or reputation is linked to the place or region where it is produced, processed or prepared, although the ingredients used need not necessarily come from that geographical area
- c) Geographical Indications of Origin for Spirit Drinks (GI's): having a given quality, reputation or other characteristic that is essentially attributable to geographic origin.
- d) Traditional Speciality Guaranteed (TSG): having a traditional character, either in the composition or means of production, without a specific link to a particular geographical area

Specific examples from regions of Scotland include: Orkney Lamb PDO, Native Shetland Wool PDO, Ayrshire New Potatoes PGI (applied for), Orkney Scottish Island Cheddar PGI, and Stornoway Black Pudding PGI and the Spirit Drink GI Scotch Whisky. All the above and about 70 other producer registrations from across the UK exist or have been applied for in the EU register, which contains about 1,300 plus registrations in total.

The strength of the protection lies in the absolute reservation for producers in a particular area. It extends beyond direct usage to cover evocation.<sup>10</sup> The rights are usually enforced through civil actions.

The current EU rules are contained in Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. Spirit Drink GI's are covered by Regulation (EU) No. 110/2008.

<sup>10</sup> See for example the recent decision of the Court of Justice of the European Union regarding Scotch Whisky: *Scotch Whisky Association v Michael Klotz* C-44/17 ("Glen Buchenbach")

### *Position in the United States*

In the USA, products with a geographical origin, such as Florida oranges and Idaho potatoes, are typically protected by way of geographical indications as a subset of trademarks.<sup>11</sup> These are marks which are owned by a body that can verify that the goods on which they appear meet certain properties. These properties can of course include the requirement that they originate from a particular place. Most of these are registered but the US also recognised “common law trade marks”, which are not registered but where a particular expectation attaches nonetheless - for example in relation to Cognac as brandy originating in the Cognac region of France – and the product is protected accordingly.

We are aware that there has been some resistance to Geographical Indications particularly from the US dairy industry, which uses names protected in the EU to describe products that have been manufactured in the US for many years, and therefore argues that the protections are anti-competitive.

### **Creation of functioning markets and open competition**

In addition to the specific legislation which applies to the legal services industry outlined above, there are other aspects which, in a general sense, enhance the ability of lawyers to serve their clients in relation to trade between the UK and EU countries and advantage those citizens and businesses in their own right.

These include provisions relating to harmonisation of product standards and other aspects of consumer protection, competition law and procurement rules that regulate the functioning of and fair access to business opportunities within the Internal Market and EU-wide protections in terms of intellectual property

More recent EU trade deals have included provisions relating to state aid and competition law. There may be aspects of both state aid and competition of particular relevance in a Scottish context and we have stressed elsewhere the importance of ensuring that the particularities of Scottish or more localised markets and the communities to which they correspond, are observed.

### **Rules of Origin**

The Rules of Origin (ROO) system under FTAs imposes a further practical and administrative burden where goods are crossing borders into a customs union. The rules are intended to avoid goods from one trading party where this is no or a less favourable FTA with the destination party being routed through intermediary countries to take advantage of lower tariffs under an FTA between the intermediary and final destination. It is essential that rules of origin are clear, particularly in the context of logistics and

<sup>11</sup> [https://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi\\_system.pdf](https://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf)

international value chains. These should be framed in such a way as to ensure that the anticipated outcome is achieved, thereby avoiding unnecessary disruption or confusion and increased costs.

### **Data flows**

International trade increasingly relies on international data flows. We therefore support the objective of seeking digital trade packages to support those data flows.

In context of trade beyond the EU, we once more 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 the Data Protection Act 2018.

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