



Law Society
of Scotland

Consultation Response

Trade in Services

January 2019



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 Trade Policy Working Group welcomes the opportunity to consider and respond to the International Trade Committee's inquiry into *UK trade in services*.¹ We have the following comments to put forward for consideration.

General comment

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.

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

Response to questions

Q1. What are the main barriers faced by UK services exporters?

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.

Legal services

The barriers to legal services providers vary between jurisdictions. Some jurisdictions are very open to foreign lawyers, allowing firms to establish, joint ventures with local lawyers, and an easy route to requalification. In others it can be far more difficult. The precise level of market access depends on the specific reservations by each country contained in the relevant part of the (prospective) trading partner's WTO² commitment schedules.

The types of barriers encountered in the context of legal services which might be encountered when trading on the basis of WTO rules alone include:

- limits on the ability to give advice which attracts legal professional privilege;
- limits on ability to open an office or partner with local lawyers
- limits on the ability to represent clients in European proceedings.³

At present, commitments in legal services made by the EU and its members under GATS are limited to the provision of legal advice in public international law and home country law only. This excludes legal advice and representation under EU and domestic law.

In terms of temporary movement of professionals, the GATS applies to limited categories of professionals as compared with most of the recently concluded FTAs and the internal market (for example, the GATS does not cover graduate trainees).

It is also important to note the interaction between provision of services and national immigration regimes which may severely impede the freedom to provide services (especially on a temporary basis).

² World Trade Organization

³ A fuller table is contained in the Bar Council's supplementary written evidence available here: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-future-trade-between-the-uk-and-the-eu-in-services/written/45009.pdf>

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.

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 domestic law.

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 overseas 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 third country clients who wish to access their legal services and advice.

Q2. To what extent, and in which sectors, do goods and services exports interact

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.

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 practise 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 terms of hybrid goods and services exports (ie export of goods with inbuilt services provision), we are not aware of examples where the services in question are legal services at present.

Data itself is an important issue to consider international trade increasingly relies on international data flows. We therefore support the objective of seeking digital trade packages to support those data flows.

Q3. To what extent should the UK seek to liberalise international trade in services through: preferential trade agreements; plurilateral agreements (e.g. the Trade in Services Agreement, TiSA); and/or through other mechanisms?

The UK should seek to liberalise international trade in services through all relevant channels. We support the inclusion of legal services commitments in free trade agreements to which the UK is party and have been engaging with the Department for International Trade and Ministry of Justice in this context.

In addition, 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 (General Agreement on Trade in Services), 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 in the last couple of years 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.

Q4. What approach(es) should the UK take to negotiating market-access commitments across different modes of supply, regulatory disciplines (including on transparency and sector-specific anti-competitive practices) and mutual recognition (e.g. of qualifications) in its international agreements covering trade in services?

It is vitally important that the Government consults sectors on prospective and ongoing FTA negotiations to ensure that sector-specific asks and intelligence can be communicated to the relevant teams. Mutual recognition of qualifications has proved beneficial in the context of the EU and is something that we would wish to explore with other international trading partners in future agreements. All of these should be given

effect against a background of ensuring the following general principles: respect for the rule of law; providing access to effective justice and enforcement of rights for individual citizens and businesses; and respect for fundamental rights.

Q5. What other policy tools should the UK Government use to facilitate international trade in services, including both imports and exports?

Trade policy is about much more than bilateral trade negotiations. Flowing from a structured stakeholder engagement mechanism should be government/industry collaboration on market access issues, which could be modelled to some extent on the EU Market Access Strategy. This brings together the Commission, industry, Member States and EU Delegations and Member State Embassies 'on the ground' to agree priorities and then deploy the market access toolkit to tackle commercially significant barriers in markets around the world. This will range from classic diplomacy to using mechanisms at global level (notably the WTO system but also, for example, OECD) and, ultimately, WTO dispute settlement. Business sectors are part of the team throughout the process.

We emphasise the importance of facilitating an integrated approach to trade promotion, both within and across economic sectors to maximise opportunities. Legal services can be promoted in their own right but it is also important to note that, along with accountants and consultancy firms, the sector is part of a suite of high-quality professional services offering. Hand in hand with financial services, these present an attractive and comprehensive support infrastructure for existing businesses and new investors. There are other examples where cross-promotion may prove more effective focusing on individual sectors.

We are concerned that promotion of legal services on the international stage often focuses exclusively or predominantly on English common law, the English courts and English law firms. However, Scotland has a strong market for professional services, including legal services, and arbitration and other forms of international dispute resolution are seen as a potential growth area. UK trade promotion initiatives should recognise that the Scottish legal industry, as with Scots law, offers many of the same advantages as England and Wales, while retaining distinct characteristics. For example, discussion of legal services should ensure that the reputation of the Scottish courts as impartial and independent, the offerings of the Scottish Arbitration Centre and the strengths of Scots law are harnessed alongside promotion of the high-quality legal services offered by the Scottish legal profession. The recent launch of Scottish Legal International, a profession-led initiative with the support of Scottish Development International and the Law Society of Scotland offers a collective mechanism to encourage greater awareness and expansion of the sector by marketing Scottish legal services as an essential component of successful international trade and investment.

Q6. What are the implications of negotiating trade in services agreements for domestic policy autonomy, including for devolved administrations and local government? How should these implications be considered in the development of UK 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.

We have consistently stressed the importance of ensuring that a 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.⁴

The devolved legislatures and administrations have not played a formal role in negotiating international trade treaties to date. 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

⁴ 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, 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.

provided from anywhere in the UK, demands a holistic approach. A more in-depth discussion of devolved participation can be found in our responses to the International Trade Committee's UK Trade Policy Transparency and Scrutiny inquiry⁵ and the Scottish Affairs Committee inquiry on Scotland and Brexit: Trade and Foreign Investment.⁶

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

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