



Law Society  
of Scotland



# Consultation response

## Consultation on trade negotiations with Japan

November 2019



## Introduction

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The Law Society of Scotland is the professional body for around 12,000 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.

Our Trade Policy Working Group and Intellectual Property Law Sub-Committee welcome the opportunity to respond to the Department for International Trade's call for input on a prospective free trade agreement between the United Kingdom and Japan.<sup>1</sup> We previously responded to the Government's consultation on Preparing for our future UK trade policy<sup>2</sup> and consultations on trade deals with other jurisdictions, including the possibility of the UK joining the CPTPP, of which we note that Japan is a member.<sup>3</sup> The Society has the following comments to put forward for consideration.

## Summary and 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

<sup>1</sup> <https://www.gov.uk/government/consultations/trade-with-japan>

<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)

<sup>3</sup> See <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/trade-policy-working-group/>

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 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>4</sup>

As set out in our response to the consultation on the UK's future trade policy,<sup>5</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>6</sup>

## UK approach to trade negotiations

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 this as to previous country-related consultations does not provide detail as to the logistical arrangements for trade deals.

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 the International Trade Committee's inquiry into the *Impact of UK-EU arrangements on wider UK trade policy*. Further commentary can be found in our response to that inquiry.<sup>7</sup>

<sup>4</sup> The number of practising Scottish solicitors is over 12,000.

<sup>5</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>6</sup> <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

<sup>7</sup> [https://www.lawscot.org.uk/media/361725/tra\\_lss-response\\_itc-uk-eu-agreements\\_jan-19.pdf](https://www.lawscot.org.uk/media/361725/tra_lss-response_itc-uk-eu-agreements_jan-19.pdf)

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:

*“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 the countries identified to date, although in general terms we support the negotiation of an agreement with Japan. We note that the European Commission provides impact assessments<sup>8</sup> before opening trade negotiations and continue to support this idea as 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 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 included

<sup>8</sup> <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/impact-assessments/>

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.

### **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>9</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.

<sup>9</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’

## Comments on Japan

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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

Japan is more restrictive than the UK in terms of legal services market access. However, international lawyers have been able to provide legal services in Japan since the 1980s (subject to certain restrictions), provided they clearly indicate the jurisdiction in which they are qualified and do not advise on the law of Japan, subject to certain restrictions. Lawyers from the EU (and other countries such as the US) can work in partnership with Japanese Bengoshi and offer legal services, although are prevented from opening subsequent branch offices (see proposed changes under domestic regulation below). UK law firms and lawyers from other EU countries operated in Japan well before the conclusion of the EU-Japan EPA. We note that the EPA specifically addresses legal services in terms of providing for a Mutual Recognition Agreement (MRA) and specific legal services reservations and it may be instructive to note those provisions. However, because of the nature of the reservations, it is not clear how much difference the agreement is likely to make to EU lawyers and firms.

### Japan reservations for legal services

With respect to Japan's reservations for existing measures, Japan entered two market access reservations pertinent to both cross-border supply and the establishment of legal services that are contingent upon certain qualifications (eg "Bengoshi" for natural persons or "Bengoshi-Hojin" for enterprises).<sup>10</sup> Moreover, Japan added another reservation of market access in relation to foreign lawyers on the basis of Law No. 66 of 1986.<sup>11</sup> Although EU lawyers can set up an office in Japan and provide advice on foreign law as a registered foreign lawyer - Gaikokuho-Jimu-Bengoshi – to do so they must stay in Japan for "not less than 180 days per year".<sup>12</sup>

As regards Japan's reservations of future measures pertinent to the provision of legal services as Bengoshi or Bengoshi-Hojin (ie Japanese-qualified lawyers), EU contractual services suppliers and independent

<sup>10</sup> See Annex 8-B I of the EU-Japan EPA, p 264-265, available here - [http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc\\_157232.pdf#page=11](http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157232.pdf#page=11)

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*, para 2 on p266

professionals are allowed to provide such legal services only as long as they are qualified under the laws and regulations of Japan.<sup>13</sup>

The EU-Japan EPA sets out a legal framework for conclusion of MRAs. It is also important to note that both the EU and Japan maintained specific reservations in relation to trade in legal services under the EPA.

This mutual recognition provision sets forth a two-tier track where, in a first stage, professional bodies from both sides engage in working out joint recommendations for an MRA and then, in a second stage, the EU Commission and Japanese government step in to evaluate these recommendations against a set of criteria, negotiate a final text and then formally adopt a MRA. Similar framework provisions are included in most of the EU's FTAs.<sup>14</sup>

The Committee referred to in this Article is the Committee on Trade in Services, Investment Liberalization and Electronic Commerce established under the EU-Japan EPA and tasked with facilitating the bilateral trade in services and investment between the two signatories.<sup>15</sup>

In addition to this preferential arrangement with respect to mutual recognition, the general criteria on mutual recognition stipulated in Article VII of the General Agreement on Trade in Services ("GATS") apply.<sup>16</sup> Those conditions seek to ensure: (i) transparency in notifying MRAs, (ii) affording adequate opportunity for other WTO Members to negotiate MRAs, and (iii) that MRAs are not being discriminatory or used as a disguised trade restriction.

Given that the reservations of both Japan and the EU in relation to the supply of legal services amount to relatively high regulatory trade barriers, the prospects of attaining an MRA for those services appears to have a low likelihood of success. If an MRA approach is adopted in the context of future negotiations with Japan, we would be keen to see higher levels of ambition to reduce reservations in order to increase the realistic chances of concluding an MRA.

<sup>13</sup> See Annex 8-B II of the EU–Japan EPA, pages 49-50, para. 1(c) available here - [http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc\\_157233.pdf#page=1](http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157233.pdf#page=1)

<sup>14</sup> See European Commission, *The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA)*, page 31 (available here - [https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc\\_157115.pdf](https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157115.pdf)).

<sup>15</sup> See Article 8.4 of the EU–Japan EPA.

<sup>16</sup> Article VII of the GATS is available here - [https://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm)

## Domestic regulatory barriers

We are aware of a number of domestic law and regulatory barriers to trade in legal services, although we are hopeful that these might be addressed through legislation currently before the Japanese Parliament.<sup>17</sup> If those do not pass, we consider these points should be raised in discussions around a future trade agreement.

One of the current domestic rules which poses a barrier to trade lies in the fact that the definition of domestic arbitration is currently very broad and can include wholly-owned subsidiaries of foreign owned companies. This could present a barrier to foreign lawyers representing clients in what would otherwise be recognised as an international arbitration. We therefore welcome the proposed change, which would allow a case to be treated as an international arbitration “if there is a specific connection to a foreign country”. We also welcome moves to establish provisions for international mediation.

Secondly, we note that foreign lawyers are required to have three years of post-qualification professional experience, two years of which must have been gained outside Japan, if they are to provide foreign law advice. The latter part of the restriction is of particular relevance to Japanese lawyers who might otherwise wish to dual qualify from within Japan but the rule as a whole presents a restriction to more junior foreign lawyers wishing to work in Japan under their home qualification. We understand that there is a Bill before the Japanese Parliament, which would reduce this requirement to one year outside Japan. We support this reduction but consider that the three-year rule should still be raised in any future trade discussions so that more junior UK solicitors can work in Japan.

Lastly, we note that there are issues around law firm structures. The third proposed change relates to an amendment which would provide for establishment of joint corporations to provide “full legal services” ie domestic law services alongside foreign law advice and to establish secondary offices, subject to certain requirements. Again, we welcome this change but if it is not implemented, consider that this issue should be revisited in the context of future agreements. We also note that Japan does not recognise limited liability structures: we consider that this issue should be addressed in trade negotiations as limited liability structures are allowed in the UK.

## Intellectual property

We note that Chapter 14 of the EU-Japan EPA contains commitments to various types of IP protection, including patents, trademarks and geographical indications. We consider that similar commitments should be included in any future UK agreement with Japan.

<sup>17</sup> For an English translation see here <http://www.japaneselawtranslation.go.jp/common/data/outline/191030.pdf>

## Geographical indications

We are pleased to note that the Government is in the process of establishing UK Geographical Indications Schemes.

### *Current EU rules*

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>18</sup> by offering 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.

<sup>18</sup> This note does not extend to wines, nor to the proposed "product of island farming" designation.

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>19</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.

### *Protection in Japan*

We note that "In Japan, GIs are regulated by the Ministry of Agriculture, Forestry, and Fisheries ("MAFF") through the Geographical Indication Act, enacted in June 2015"<sup>20</sup> and there is therefore a parallel in terms of the government department with responsibility for administering the scheme and differentiation from other forms of intellectual property.<sup>21</sup>

We are aware that protection of geographical indications in Japan, particularly enforcement, has previously posed problems. We are aware of concerns that registration of GIs in the Japanese system is seen as too demanding and time-consuming for foreign GI applicants (for example reaching an agreement on the terms and conditions for product specification) in view of the perceived benefit of the registration. The Japanese system is also quite new as it was introduced in October 2015. As with any IP protection in Japan, translation costs in providing documents may add significantly to the costs of obtaining rights.

We also note that there are particular problems with GIs for alcoholic products, such as Scotch whisky, as the Japanese *Act for Protection of Names of Designated Agricultural, Forestry and Fishery Products, and Foodstuffs* aka "the GI Act", which came into force in June 2015, does not extend to alcoholic beverages.<sup>22</sup>

<sup>19</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")

<sup>20</sup> [https://www.wipo.int/directory/en/contact.jsp?country\\_id=87](https://www.wipo.int/directory/en/contact.jsp?country_id=87)

<sup>21</sup> The application process is explained here - [http://www.maff.go.jp/e/policies/intel/gi\\_act/attach/pdf/index-4.pdf](http://www.maff.go.jp/e/policies/intel/gi_act/attach/pdf/index-4.pdf)

<sup>22</sup> Following on from this, a draft Notice on Establishing Indicating Standards Concerning Geographical Indications for Liquor was notified to the EU in 2016. At the notification stage, a number of issues were identified with this notice - in particular that the level of protection offered did not correlate to that under Article 22 of TRIPS (ie any means in the designation or presentation which misleads the public). We also understand that the GI Department of the Japanese National Tax Office previously advised the Cognac Producers' Association (BNIC) that so far as foreign alcoholic beverage GI's are concerned, protection is dependent on the creation of a multi-lateral system of notification as envisaged by Article 23.4 of TRIPS (which does not exist)

It seems therefore that the only way that foreign alcoholic beverages can be protected as GI's is under the terms of a free trade agreement (eg Mexico, Peru and Chile already benefit).

In the recent EU/Japan Economic Partnership Agreement a number of EU Wines and Spirits have been protected alongside general protections for other agricultural products. The EPA provides protection for 211 EU GIs (foodstuffs, beer, wines and spirits) which include Scotch Whisky and three UK food GIs (Scottish Farmed Salmon, West Country farmhouse Cheddar cheese and Stilton). There is to be enforcement of the rights by Japanese authorities to protect these GIs and to stop GI infringements on its territories, as well as enforcement on request by the EU. This means that those EU products currently enjoy the same level of protection in Japan as they do in the EU, although the protection will be lost when the UK leaves the EU. We welcome this mutual recognition approach but note that there are a considerable number of UK GIs, which are registered in the EU but were not included in the EPA. We would want to see continuing protection of existing UK GIs assured in any UK-Japan FTA. We anticipate that the latter should be achievable as we are not aware of any protected UK foods whose names are likely to be considered generic in Japan.

### **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, including the EU-Japan EPA,<sup>23</sup> 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.

As a matter of principle, we would be keen to see inclusion of provisions similar to those found in Chapter 11 of the EU-Japan EPA which contain commitments to maintaining competition law.

Under the current regime there is no enforcement mechanism if an alcoholic beverage GI is infringed as the only remedy in the Liquor Tax Act is that the Minister can issue instructions to comply with the law and it is not possible to obtain an injunction. Although some remedies are available under the Act Against Unjustifiable Premiums and Misleading Representations, we understand these are only available to particular consumer groups.

<sup>23</sup> See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>

## 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 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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