



Law Society
of Scotland

Briefing

Submission to the Cabinet Office and Taskforce Europe on legal issues relating to negotiations for the future relationship with the EU

February 2020



Introduction

The Law Society of Scotland is the professional body for over 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.

General remarks

We support the aim of building a future relationship between the UK and the EU based on friendly cooperation for the benefit of citizens and businesses across both the UK and EU. To facilitate this, the negotiations should include provision for the cross-border practice of international law by building on the precedents set in:

- a) EU law, including the Withdrawal Agreement and Political Declaration; and
- b) FTAs between the EU and other third countries.

The advantages that the relative openness of the UK legal services market already provides in terms of international collaboration should form part of the narrative in highlighting the importance of ambitious commitments on legal services.

The rule of law and a functioning justice system remain of particular concern to individuals and businesses, lawyers and their clients in the UK and the EU; people should have access to advice to realise their rights and those rights must be enforceable if they are to deliver full value to the rights-holder.

The legal services sector facilitates trade and foreign direct investment across all other sectors as well as being an important contributor to the UK economy in its own right. This includes advice on matters such as contract negotiations for the provision of goods or services, commercial and financial instruments, intellectual property, real or heritable property, family and matrimonial matters, succession and advice on all the areas of law which individuals and businesses need.

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. This ability should extend to advising on representing clients with respect to, international law and international arbitration.

Background

As a member of the EU, the UK was a member of the Internal Market, which allows free movement of individuals, goods, services and capital across the EU, including the ability to establish branches and offices in other Member States. The jurisdiction-specific nature of legal services led to the creation of a dedicated framework for legal services.

The EU internal market for legal services is well developed with a high level of harmonisation ensuring smooth functioning of the market in legal services across national borders. The framework governing lawyers and legal services provision is set out in dedicated legislation:

- Lawyers' Services Directive of 1977 (77/249)
- Lawyers' Establishment Directive of 1998 (98/5)

These Directives enable lawyers to provide services and establish across the EU, thereby allowing a very high level of access to other Member State markets, while recognising the jurisdiction-specific nature of legal advice to ensure appropriate protection for recipients of those services. Lawyers qualified in the EEA States (Norway, Iceland and Liechtenstein) and in Switzerland also participate in the EU lawyers' regime.

Reciprocal market access, along with the supporting rights and obligations, will continue until the end of the transition period. If the negotiating period for the Future Relationship is not extended, the current arrangements will therefore cease on 31 December 2020.

Optimum Provision for the Future Relationship

The optimal outcome from the forthcoming EU-UK FTA (and any subsequent) negotiations would be to preserve the current system of rights and obligations to ensure that individuals, businesses and other organisations throughout the EU can obtain advice from the UK lawyer of their choice who can in turn cooperate and collaborate with EU colleagues and vice versa. This is in the best interests of both UK and EU clients as well as being of benefit to the legal profession in the UK and the EU. The crucial role that solicitors play in facilitating trade and investment lends an importance to substantive provisions on legal services that goes beyond the sector itself.

FTA priorities

If negotiations progress along more traditional FTA lines, the following areas fall to be considered to ensure effective provision of cross-border legal services on an uninterrupted basis:

- Market access commitments on legal services falling under Modes 1-4 of the GATS framework to remove barriers presented by reservations in the EU's existing GATS schedules;

- Removal of practical barriers such as ensuring availability of business visas (if required); and
- Other issues which affect services/business such as data flow provisions.

Market access

Mode 4 (fly in, fly out - in tandem with visa provisions) should be the first priority to allow solicitors to continue to interact with potential overseas clients face-to-face. Many smaller firms do not wish, and would not have the capacity, to set up formal offices but would still want to work for international clients. It is important from both perspectives that lawyers are able to travel to meet with clients in order to provide advice on issues relating to aspects of law in the relevant UK jurisdictions and/or international law. We note that this also brings a wider benefit to the UK economy in channeling foreign direct investment, of benefit to both lawyers themselves as well as UK businesses.

Modes 1 and 2 (cross-border supply and consumption abroad) are of general importance to UK and EU citizens and businesses in terms of obtaining the legal advice they need to create and enforce their rights, obtain access to justice and facilitate economic transactions. Clarity around market access ensures that access to this advice is not impeded.

Mode 3 (commercial presence) raises some more specific issues in terms of the barriers likely to be encountered. Many members of the Scottish profession now work for large international law firms that are likely to have offices across the globe. Smaller and mid-sized firms may operate through referral networks or seek to form joint ventures for particular projects to allow a comprehensive legal advice service on a particular project. It is important that such joint operations can go ahead as this benefits both UK lawyers and their international colleagues.

Availability of different forms of practice, particularly recognising limited liability, which is now standard practice in UK firms, is an important issue where foreign (ie UK) lawyers wish to establish a commercial presence. Both in terms of establishing a permanent office and setting up a joint venture, it is important to ensure that restrictions such as caps on shareholdings are avoided.

We also support calls to promote the introduction of Foreign Legal Consultation (FLC) status across the EU27 to facilitate the temporary provision of services and establishment of UK lawyers in the EU for the purposes of giving advice on home state law and public and private international law. This provision has precedent in the EU-Korea FTA. We would like to see inclusion of the continued ability of UK lawyers to provide advice on EU law.¹

¹ UK qualified lawyers who have been practising EU law will not lose their knowledge or ability simply as a result of UK withdrawal from the EU. Furthermore, the process of disentanglement of the UK from the EU will be long and not without disputes or issues to clarify which will call for legal advice on both sides of the channel and on both types of law. This will be especially important to those who cannot afford to pay for two lawyers.

Practical barriers

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. 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 business visitors to the UK.

Digital trade and data flows

International legal services provision goes hand in hand with the free flow of data across borders. Where this data relates to individuals with the EU, the data must be handled in accordance with the General Data Protection Regulation (GDPR). It is important to note that this is not confined to advice to private individuals but may also be an important consideration in the context of commercial transactions or ensuring regulatory compliance. Although it is possible for third countries to obtain an adequacy decision, this can be withdrawn at any time. We therefore favour a more robust arrangement agreed on a reciprocal basis, which would give greater certainty to businesses, while ensuring continued respect for the privacy and data protection rights of individual citizens.

Provisions on data flows should go beyond the B2C issues addressed in the GDPR and ensure the free flow of data on a B2B basis. Data localisation requirements could present a barrier to trade in this area and positive commitments to ensuring those flows are key to ensuring that businesses such as law firms can continue providing services to clients.

Inter-governmental relations

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:

- The Scottish legal sector contributes almost £1.7bn to the economy on an annual basis²

² [TheCityUK legal services report 2019](#)

- There are over 12,000 Scots-qualified solicitors practising in Scotland, the UK and internationally
- There are over 1,100 Scottish firms; and
- More than 26,000 people are employed within the Scottish legal sector.

As set out in our response to the consultation on the UK's future trade policy³ we believe that a whole of governance approach should be taken when considering trade negotiations. In the context of devolved competences, such as justice, 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.⁴

Civil judicial cooperation

Civil Judicial Cooperation (CJC) is key to maintaining the rule of law, promoting the interests of justice, upholding human rights and ensuring that commercial and personal matters can be properly dealt with in courts across the member states. It is of considerable importance to the protection of rights for individuals, consumers, workers, and businesses in the United Kingdom, the EU, and beyond.

The Withdrawal Agreement maintains the current regime for CJC as contained in Title VI (ongoing judicial cooperation in civil and commercial matters) until the end of the implementation period. At that point it is essential that the future relationship agreement or other supplementary arrangements make provision for continued CJC to the fullest extent possible. The Political Declaration envisages CJC only in the context of family and mobility and not for civil and commercial matters. In our view, it is vital for UK and EU citizens to have a mechanism for ensuring the protection and enforcement of their rights in all areas if we are to maintain the close cooperation envisaged by UK and EU negotiators.

We note that due to the policy of concluding a FTA by the end of the implementation period it will not be possible to include CJC in the FTA negotiations. We therefore encourage the Government to enter into and conclude as quickly as possible the negotiation of a separate agreement to provide wide and ambitious CJC between the UK and the EU.

Until such times as this can be achieved, we strongly support moves to apply for accession to the Lugano Convention (under Article 72) in order to protect the rights of citizens as far as possible, and to facilitate trade by maintaining recognition and enforcement of judgments in civil and commercial matters.

In any future agreement, we support the implementation of the provisions in paragraphs 55 and 56 of the Political Declaration, namely:

³ www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf

⁴ <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

55. *To support mobility, the Parties confirm their commitment to the effective application of the existing international family law instruments to which they are parties. The Union notes the United Kingdom's intention to accede to the 2007 Hague Maintenance Convention to which it is currently bound through its Union membership.*

56. *The Parties will explore options for judicial cooperation in matrimonial, parental responsibility and **other related matters**.*

When taking into account “other related matters” we would particularly like the Government to consider processes such as the *action civile*, that is to say, the civil determination of damages following a finding of guilt in a criminal case. This is a feature of numerous codified legal systems across the EU; and Council Regulation 44/2001 requires recognition across the EU for determinations of that nature.

We suggest that *action civile* determinations and other determinations with civil/criminal cross-over, such as civil actions arising from criminal prosecutions of domestic violence or assault as both a crime and an actionable civil wrong are the types of issues that would also be relevant here. The inclusion of such matters would enhance mobility provisions as they afford better protection for both UK and EU citizens.



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