Written evidence

UK-New Zealand Trade Negotiations

September 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.

Our Constitutional Law Committee and Trade Policy Working Group welcome the opportunity to respond to the House of Lords EU International Agreements Sub-Committee Inquiry on *UK-New Zealand Trade Negotiations*.[[1]](#footnote-2) We have the following comments to put forward for consideration.

Consultation questions

**1. Does the Department for International Trade (DIT)’s strategic approach, published on 17 June 2020, set out the right objectives for negotiations? How effectively does that strategic approach represent the interests of different groups and regions across the country, including the devolved nations, businesses, civil society, and individuals?**

We agree with the general principle that “an FTA with New Zealand needs to work for … UK consumers, producers and companies” and that it must “[uphold] our high environmental, labour, food safety and animal welfare standards.” We are not in a position to comment on the effectiveness of the strategic approach in representing all those groups outlined. However, the comments below relate to a number of these, in particular as they relate to legal services and constitutional issues concerning Scotland.

**4. The UK Government has expressed a strong interest in using a potential FTA with New Zealand as a key step to joining to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). How might a trade deal with New Zealand help the UK to join the CPTPP and what benefits would there be in joining? More broadly, what effect could a UK-New Zealand trade deal have on the UK’s future ability to negotiate deals with other countries?**

We are aware that New Zealand, along with other CPTPP members such as Japan, Canada and Australia, has indicated that it is generally supportive of the idea of the UK joining the CPTPP. The extent to which a deal with New Zealand might support that goal is a political one but in legal terms it is clearly possible in principle to be a member of the CPTPP and negotiate deals with other countries. However, concerns have been raised that the specific terms of the CPTPP might conflict with existing UK legislation and standards in areas such as food standards[[2]](#footnote-3) and data privacy. Over and above the importance of those considerations as a matter of domestic policy, if these kinds of standards were to be reduced, this could have a knock-on effect on the UK’s ability to negotiate deals with other countries. This has frequently been raised as a particular concern in relation to the UK’s future relationship with the EU as its nearest trading partner.[[3]](#footnote-4)

**5. How can the specific interests of the devolved nations of the UK be best protected as part of the negotiation of a UK-wide trade deal with New Zealand?**

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 in relation to the Withdrawal Agreement. 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 as well as involving meaningful engagement with stakeholders such as professional bodies, the universities and civic society groups.

*The Concordat on International Relations*

Cooperation between the UK Government and the Devolved Administrations is specifically recognised in paragraph D1.4 of the Concordat on International Relations which is part of the Memorandum of Understanding between the UK Government and Devolved Administrations[[4]](#footnote-5) and paragraph D1.5.[[5]](#footnote-6)

In addition to the Memorandum and Concordats there are a number of significant relations between officials which enable exchange on policy developments, evidence building, contacts and related matters on a practical and day to day basis.

UK withdrawal from the EU offers an opportunity to review the procedures in place for negotiation of international 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 treaty negotiations in recent years.

In order to create a comprehensive and inclusive international and trade policy, conduct negotiations and implement agreements, it would helpful were the UK government to engage with the devolved administrations and legislatures. We were therefore satisfied to note as was set out in the Trade White Paper: *Preparing for our future UK trade policy,* that the Government was committed:

“*To continue to respect the role of Parliament, and the importance of the business and the wider stakeholder community in preparing for and giving effect to an independent UK trade policy,*

*To seek the input of the devolved administrations to ensure they influence the UK’s future trade policy, recognising the role they will have in developing and delivering it*.”[[6]](#footnote-7)

We note, however, that this White Paper was withdrawn on 19 March 2020. **It would be useful for the Government to confirm its current position.**

In our response to the International Trade Committee’s UK Trade Policy Transparency and Scrutiny inquiry some months ago, we set out a range of options for involvement of the devolved administrations as follows:

1. requiring the consent of the devolved administrations to any UK negotiated trade position;
2. normally requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;
3. having a procedural structure for the devolved administrations’ involvement similar to that in the European Union Withdrawal Act 2018 for “common frameworks” (i.e. formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process); and,
4. 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).

With some of the above, consideration would need to be given to whether the rules should be set down in statute, convention or a memorandum of understanding.

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 formulating negotiating positions and ongoing engagement as those negotiations progress. 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 agreements impact upon on devolved matters and implementing legislation may be carried out by the devolved administrations or engage the legislative consent convention.

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 confidence-building and good-faith collaboration across the UK Government and devolved administrations. Such structures may provide, for example, for devolved participation in the design of negotiation mandates and the conduct of negotiations in respect of devolved areas, thereby ensuring devolved buy-in to agreement, implementation and minimising risks to UK-wide implementation of trade agreements. We hope that any future statement on Intergovernmental Relations will include such formal structures

**10. What concessions will New Zealand be seeking regarding indicators of geographical origins on food and drinks, and how do you think the UK Government should respond? What are the likely effects on producers of new arrangements on indicators of geographical origins, in particular small- and medium-sized businesses?**

In previous papers we have highlighted the importance of GIs in protecting producers in particular regions, or who manufacture products with a traditional character,[[7]](#footnote-8) 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. There are a number of Scottish products, which we are aware offer these benefits both domestically and in boosting exports overseas and figure prominently in Scotland’s trade reputation, such as Scotch Whisky and Scottish Salmon. There are similar products of local/regional importance which enjoy a strong reputation and accompanying protection throughout the UK.

*Position in New Zealand*

New Zealand recognises trademarks, patents, designs, plant variety rights and copyright.[[8]](#footnote-9) It also recognises geographical indications but these are far more limited than those in the EU as they are reserved to wines and spirits and do not, at present, extend to other products. Protection is achieved through the Geographical Indications (Wines and Spirits) Act 2006 and the Geographical Indications (Wine and Spirits) Regulations 2016. The system went live last year and appears to work well. However, protection is more limited than the EU - for example, it does not prevent a GI being used on other products eg “Scotch Whisky Flavouring” – so specific sectors may identify specific concerns.

**12. The UK Government has expressed interest in increasing opportunities for the UK professional services industry by supporting Mutual Recognition of Professional Qualifications and facilitating the temporary movement of business people between the UK and New Zealand. What provisions do you think the UK should seek to agree with New Zealand on the movement of people in professional services and what impacts might there be for UK workers and businesses? What provisions will New Zealand be seeking?**

We support the inclusion of provisions in a UK-Australia trade agreement to strengthen access for legal service providers and to improve temporary access for UK professionals such as solicitors. 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.[[9]](#footnote-10) 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.

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

**Position in New Zealand**

The legal market in New Zealand allows legal services to be provided by a range of people. However, only those qualified in New Zealand who hold a current practising certificate are allowed to carry out legal work in the reserved areas. These are set out in the Lawyers and Conveyancers Act 2006. Legal advice on, for example commercial law and contract and regulatory compliance are not within the reserved areas so lawyers from overseas are free to provide advice in those areas, subject to eg visa requirements. There are also specific exceptions to the reserved areas.

Overseas lawyers work in New Zealand in both private practice and as in-house lawyers in corporations and other organisation. A Scottish solicitor would be able to refer to herself as a solicitor, as long as the fact that she was a Scottish solicitor, rather than a New Zealand lawyers, was made clear. *[[10]](#footnote-11)*

*Admission as a New Zealand lawyer*

Admission as a New Zealand lawyer is open to lawyers qualified in other jurisdictions. Overseas lawyers must have their qualifications and experience assessed by the New Zealand Council of Legal Education. They may then be exempt from the requirement to complete the Professional Legal studies Course but would have to complete the qualifications prescribed by NZCLE.[[11]](#footnote-12)

**14. How might negotiated digital trade provisions serve as enablers for businesses in the UK? What provisions would bring the most benefit and so should be the highest priority in this area?**

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.

**For further information, please contact:**

Carolyn Thurston Smith

Policy Team

Law Society of Scotland

DD: 0131 476 8205

carolynthurstonsmith@lawscot.org.uk

1. [htt https://committees.parliament.uk/call-for-evidence/204/uknew-zealand-trade-negotiations/](https://committees.parliament.uk/work/458/ukaustralia-trade-negotiations/) [↑](#footnote-ref-2)
2. See eg <https://www.sustainweb.org/brexit/uk_cptpp_response_to_department_for_international_trade/> [↑](#footnote-ref-3)
3. See eg <https://www.techuk.org/insights/consultation-responses/item/14258-uk-potentially-seeking-accession-to-cptpp> [↑](#footnote-ref-4)
4. “*The UK Government recognises that the devolved administrations will have an interest in international policy making in relation to devolved matters and also in obligations touching on devolved matters that the UK may agree as a result of concluding international agreements (including UN Conventions*)” [↑](#footnote-ref-5)
5. “*The parties to this Concordat recognise that the conduct of international relations is likely to have implications for the devolved responsibilities of Scottish Ministers and that the exercise of these responsibilities is likely to have implications for international relations. This Concordat therefore reflects a mutual determination to ensure that there is close co-operation in these areas between the United Kingdom Government and the Scottish Ministers with the objective of promoting the overseas interests of the United Kingdom and all its constituent parts*.” [↑](#footnote-ref-6)
6. <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy> [↑](#footnote-ref-7)
7. This note does not extend to wines, nor to the proposed “product of island farming” designation. [↑](#footnote-ref-8)
8. <https://www.iponz.govt.nz/about-ip/overview/> [↑](#footnote-ref-9)
9. 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’ [↑](#footnote-ref-10)
10. <https://www.lawsociety.org.nz/practice-resources/practice-briefings/Overseas-lawyers-working-in-New-Zealand.pdf> [↑](#footnote-ref-11)
11. <https://www.lawsociety.org.nz/for-lawyers/joining-the-legal-profession/admission> [↑](#footnote-ref-12)