Law Society of Scotland

Written evidence

UK-US Trade Negotiations

October 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, together with other relevant subject-matter committees, welcome the opportunity to respond to the House of Lords EU International Agreements Sub-Committee Inquiry on *UK-US Trade Negotiations*.[1] We have the following comments to put forward for consideration.

Summary

The consultation spans many different issues and areas of law. Our comments below centre around the following themes:

- The fact that assessment of the benefits or detrimental impact of a trade agreement goes beyond purely economic considerations and should be seen as part of a sustainable recovery, in light of the ongoing coronavirus pandemic;
- The need for engagement and collaboration with the devolved nations to ensure a coordinated approach, while respecting the devolution settlements and the potential for varying policy priorities in the four UK nations;
- Ensuring that the UK's current high standards are maintained and government and regulators at all levels continue to be able to introduce and effectively enforce legislation and regulations in the interests of protecting UK consumers, workers, businesses, animal welfare and the environment;
- The related economic arguments for ensuring that UK businesses are not put at a competitive disadvantage if overseas companies are not held to similarly high standards, thereby allowing them to undercut UK farmers and manufacturers which face higher production costs;

[1] https://committees.parliament.uk/work/350/ukus-trade-negotiations/

- Maintaining and protecting the UK's intellectual property (IP) regime, which affords a balanced system recognising a range of stakeholder interests and the need to safeguard protections for goods recognised in our domestic geographical indications (GI) regime;
- The central role of data flows to the modern economy and the need to ensure that privacy rights are properly protected, not least to ensure that flows between the UK and the EU continue to be permitted;
- The importance of international legal services in the context of international trade, both in supporting trade in all other sectors and as a significant export sector and major domestic employer in its own right; and the need to improve market access for UK lawyers in the US as well as ensuring an accessible and efficient regime for business visas.

Consultation questions

1. How effectively does the Department for International Trade (DIT)'s strategic approach, published on 2 March 2020, 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 the USA 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.

Engagement with the devolved nations

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 and which states:

"*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*)"

and paragraph D1.5 which states:

"*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*."

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 be 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."[2]

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:

A. requiring the consent of the devolved administrations to any UK negotiated trade position;

[2] https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy

B. normally requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;

C. 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,

D. 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 may be important where agreements impact upon 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.

2. How reliable do you find the DIT’s assessment of the potential impacts of the proposed agreement with the US, either as set out in the strategic approach or elsewhere? How do you evaluate the economic analysis behind the DIT’s the impact assessment? The impact assessment suggests that the trade deal could increase GVA in Scotland, Wales, the North East, and the Midlands in particular. How do you evaluate this assertion?

See comment at 3 below.

3. How can the Government ensure that any outcome has a net positive result for the country, especially in the light of the impacts of COVID-19 locally, regionally, nationally and globally? What are

the costs and benefits of a UK-US trade deal to the various regions of the UK? We would be especially interested in detailed economic analyses on this point.

We note that the idea of a net positive result should not be a purely economic analysis. COVID-19 has reinforced the fact that factors such as promoting health including mental health, wellbeing, trust and equality are all vital aspects of society, although they are difficult to quantify in economic terms. For example, in the context of trade, issues such as standard-setting, regulation and intellectual property protection should be understood in terms of wider policy implications. It is important to ensure that the qualitative aspects of a net positive are taken into account, alongside important economic considerations.

4. To what extent do the ongoing negotiations with the EU on a future relationship conflict with negotiations with the US on a trade deal? What are the major trade-offs involved? And what effect could a UK-US trade deal have on the UK's future ability to negotiate deals with other countries, including China?

The prospect of the up-and-coming US elections clarifies that reaching a comprehensive FTA in a short period of time is overambitious. Indications from the US presidential candidate Joe Biden suggests that a UK-US FTA may not be a priority in the event that he is successful in the presidential election. We are also aware that many commentators have indicated that prospective negotiating partners, including the USA, will be keen to understand the UK's future relationship with the EU before concluding negotiations. Differences in regulatory approach in many areas could also create tensions between US and EU positions on particular topics. The importance of the EU trading relationship to the UK economy is therefore a relevant consideration in US negotiations.

5. The United States Congress will scrutinise the US Government's negotiations with the UK and any final deal. What do you think will be the key issues for Congress and legislators in the US? How will the influence of US legislators be felt in the course of these negotiations?

There are a few methods for the President to secure the authority to enter a treaty: Art II(2) of the US Constitution provides that the President 'shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.' The Senate can vote, not only on whether to accept or reject the treaty in its entirety but can also amend the treaty by making its agreement conditional upon its amendments being accepted by the President and the other contracting party. By taking this approach, there is no requirement to consult with the House of Representatives.

The President can also enter into 'executive agreements', which can be ratified without the consent of the Senate. These generally relate to foreign relations or military issues rather than those impacting on the rights and obligations of citizens and cannot be binding domestically without implementing legislation. The Trade Promotion Authority (TPA) is a legislative procedure, established in 1974, by which Congress defines US trade negotiating objectives and sets out an oversight and consultation process for use during trade negotiations. Under the TPA, Congress retains the authority to review and decide whether any proposed US trade agreement will be implemented.

Through the TPA, Congress sets out:

- guidance to the President on trade policy priorities and negotiating objectives;
- requirements for the Administration to notify and consult with Congress, other stakeholders and the public during the negotiations of trade agreements; and
- definitions of the terms, conditions and procedures under which it allows the Administration to enter into trade agreements and sets the procedures for consideration of bills to implement the agreements.

This approach does not require a two-thirds majority in the Senate. When the United States ratifies a treaty it immediately becomes law and a treaty provision that is sufficiently clear and precise to be applied as if it is a statute will be considered 'self-executing', equivalent to an Act of Congress. This can, however, create uncertainty about which treaty provisions are self-executing.

Climate change and environmental commitments and regulation

The Committee has already received evidence from several witnesses on these areas and would welcome additional views. The questions that follow are not intended to be prescriptive, and submissions relating to other relevant points are welcome.

6. What implications might an FTA with the US have for the UK's international commitments on environmental protection and climate change? How might the deal affect the UK's national objectives in these areas, such as the Government's commitment to reaching net-zero by 2050?

The UK is bound by a series of international commitments on environmental protection and climate change. Any trade deal with the US must align with these commitments and the ability of the UK Government and devolved administrations to achieve their targets under the net zero policy. This can be achieved by ensuring any treaty leaves scope for regulation to be justified on environmental protection grounds, even if it would otherwise constitute a non-tariff barrier to trade.

A deal with the US could provide an opportunity for the UK to engage in discussions on environmental protection and seek to persuade the US to do more on climate change to achieve a better global outcome. Environmental regulations, as with other regulation, may be viewed as a non-tariff barrier to trade, but trade rules and agreements recognise the importance of regulation so, to the extent any agreement sought to achieve an equalisation of regulation rather than simply conceding each party's right to regulate, that should focus on bringing standards elsewhere up to UK standards and not vice versa.

7. The UK objectives for negotiations with Japan include "ensur[ing] both parties meet their commitments on climate change", but this sort of objective is missing from the Department for International Trade's published documents about talks with the US. How should the UK Government prioritise climate change and environmental issues in talks with the US? What should be the key objectives?

See above at question 6. Other commentators will be better placed to advise on the specifics of this question but environmental considerations must be recognised as a necessary aspect of trade policy discussions. However, it is well recognised that differing environmental standards between trade partners can significantly disrupt any "level playing field", so that seeking observance with consistently high standards is an economic as well as an environmental issue.

8. The UK will host the UN climate conference, COP26, in 2021, having been delayed from November 2020. How should the UK's trade policy align with the UK's leadership on climate and environment in other fora, such as COP? In your view, is there already sufficient alignment between the Government's trade policy and its other goals, such as on achieving net-zero, or are changes needed? Or should the two spheres operate entirely separately?

We previously commented upon the interaction between trade and climate and environment[3] and are looking to explore this issue further in the run-up to COP26. As a general principle, we consider that all government policies must be aligned and work in concert to ensure that overarching objectives (such as net-zero) are pursued in a co-ordinated manner, rather than being championed in one area and frustrated by actions in another.

9. What is your assessment of how the Government is getting the message across to negotiating partners that it takes its multilateral and domestic commitments in this area seriously?

No comment.

10. What steps could the UK take to help ensure that the UK-US deal, taken as a whole, secures positive environmental impacts? How should this best be assessed?

Facilitating proper parliamentary scrutiny, both at Westminster and within the devolved Parliaments, as well as in-depth engagement with stakeholders such as environmental consultants, environmentally-responsible businesses, universities, scientists, lawyers, economists and relevant regulators could ensure that the UK-US deal as a whole secures positive environmental impacts.

11. We have heard from some witnesses concerns about how investor protections, in particular investor-state dispute settlement mechanisms, could affect domestic environmental regulation. What assessment do you make of this particular risk? Are there any studies or especially salient examples that you would give?

We note that the US has previously moved away from its preference for including the classic arbitration-based investor state disputes settlement (ISDS) provisions in FTAs and bilateral investment treaties. It is clear that both the Republicans and Democrats are largely opposed to ISDS, albeit coming to that conclusion from

[3] See the Law Society of Scotland's response to the House of Commons International Trade Committee inquiry on Trade and the Environment available here - https://www.lawscot.org.uk/media/367862/19-10-10-tra-env_itc-trade-and-environment.pdf

different ideological perspectives. Currently, it therefore seems unlikely that the US would be pushing for inclusion of such provisions in an agreement with the UK. Our comments below are therefore of general application and not framed in the specific context of an agreement with the US.

As we have commented previously, investment protection is one of the most high-profile areas of trade policy when examining the balance of, and possible conflict between, trade liberalisation and environmental protection (although, of course, investor protection can be considered in many other contexts). Investment protection provisions are designed to protect the "legitimate expectations" of investors from one party in the partner country and may give a level of protection and grant rights to those foreign investors which are not enjoyed by domestic investors or domestic companies. Investment protection clauses traditionally sit alongside ISDS clauses, which usually mandate arbitration between investors and the state they see as having infringed their rights under investment protection clauses.

A number of criticisms have been levelled at the current system. The first of these is the danger of "regulatory chill" if government actors are discouraged from regulating in a way that would enhance environmental protections (or other rights/protections) because they fear being sued by investors. While there is not conclusive evidence as to whether, or the extent to which, the threat of investment protection claims results in regulatory chill,[4] as a relevant factor in legal risk analysis, it must be recognised that there is at least a risk of this chilling effect if provisions enshrining the right to regulate are not sufficiently clear. However, we also note that more recent investment agreements and chapters specifically enshrine the right to regulate, with a view to reinforcing this as a fundamental principle, which investment agreements are not intended to override. This should help to reduce the risk of regulatory chill by highlighting regulatory autonomy, including in the field of environmental protection.

Ongoing investment reform generally is a key topic in international fora, most notably in the United Nations. Projects on this topic are currently running in both UNCTAD and UNCITRAL. More recently discussion has been growing around ways to tackle the perceptions of unfairness in granting rights to investors while imposing only obligations on states. The idea of balancing rights with obligations through giving states the ability to bring counterclaims or imposing requirements on investors are gaining traction. So, for example, it could be considered whether environmentally responsible business practices could form part of the necessary conditions which must be met before a foreign investor could issue a claim under an investment protection clause. However, the drafting of such provisions would need to be carefully worded to ensure the desired objective were met in terms of balancing state and investor rights and obligations.

[4] See Van Harten, Gus and Scott, Dayna Nadine, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada* (December 7, 2015). Osgoode Legal Studies Research Paper No. 26/2016. Available at SSRN: https://ssrn.com/abstract=2700238 or http://dx.doi.org/10.2139/ssrn.2700238 ; and Tienhaara, K. (2018). *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*. Transnational Environmental Law, 7(2), 229-250. doi:10.1017/S2047102517000309

Digital trade and intellectual property provisions

The Committee has already received evidence from several witnesses on these areas and would welcome additional views. The questions that follow are not intended to be prescriptive, and submissions relating to other relevant points are welcome.

We have heard concerns from witnesses about the risk that the UK's copyright and intellectual property rules might be changed in the light of any deal with the US.

12. How do the two countries' copyright and IP rules compare? What provisions on copyright and IP should the UK seek to agree with the US to support the UK's creative industries in particular? How high a priority should other areas be, such as securing an Artist's Resale Right provision?

Both the UK and US advocate the importance of copyright and other intellectual property rules. Strong protection is therefore afforded to those in creative industries, in line with international norms, on both sides of the Atlantic. Further cooperation is probably not necessary in this area.

There is a real risk that the US (favouring its own creative industries) would seek a trade deal which undermined the current strength of the audiovisual sector within UK Creative Industries. That strength is enhanced by UK original programming continuing to count towards European Works, and by the continuing strength and evolution of UK public service broadcasting which is the backbone of the UK audiovisual production and broadcasting sector. Any deal which restricted future change to the regulation and evolution of the UK public service broadcasting regime could be detrimental to UK creative industries.

From a UK perspective, we note that affording additional protection for particular products, which are currently protected by the EU's geographical indications (GI) system, would be beneficial. We have previously advocated for the creation of a domestic UK regime which replicates EU protections following withdrawal from the EU. The US domestic regime does not offer the robust protections to be found in the EU regime.[5] Even where the proprietor has not been obliged by the Registrar to disclaim exclusive use of the geographic element in a mark, its registration does not exclude the use of the geographic origin to signify goods that do not comply with other elements in the deposited Use Rules, such as sourcing of ingredients, recipes, etc.

[5] The US Trademark Act of 1946 (as amended) provides for Certification Trademarks (§ 4 (15 U.S.C. § 1054**)** . However at § 33 (15 U.S.C. § 1115). **Registration as evidence of right to exclusive use; defenses** provides that "...conclusive evidence of the right to use the registered mark shall be subject… to the following defenses or defects:…

> (4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, …or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin…" See further: https://www.uspto.gov/sites/default/files/documents/trademark_rules_statutes_2013-11-25.pdf

We note in this regard that the US negotiation position says that the US will seek to "Prevent the undermining of market access for U.S. products through the improper use of the UK's system for protecting or recognizing geographical indications, including any failure to ensure transparency and procedural fairness, or adequately protect generic terms for common use;…". US offensive interests may therefore seek to reduce the robust levels of protection which UK businesses and consumers are afforded by the existing regime.

It may also be of interest to note a distinction in the UK and US trade mark systems. In the USA, a mid-term declaration of use is required - and if such declaration is not filed (with evidence) the mark is removed from the register. This is very different from the UK, where unless a revocation action is raised by a third party, the trade mark right remains valid for the full 10 year term. In our view, the current UK approach should be maintained.

On intellectual property generally, we consider that the UK already offers a high standard of protection and the UK should not be required to alter its domestic regime as the result of any trade agreement.

Lastly, we note that a recent survey undertaken by CIPA identified some concern that a move to harmonise UK patent law with the US would move the UK away from the previous harmonisation with Europe under the European Patent Convention and this would affect the rights of UK based patent attorneys to act in front of the European Patent Office.[6] We are aware that the five main patent offices are considering further harmonisation through combined search initiatives, and that obtaining patents in multiple jurisdictions may become more streamlined. We consider that it is important for the UK to be at the table for these discussions to avoid "falling between" the US and EU approaches - particularly in relation to healthcare products where the regulatory regime may also impact the ability / desire of companies bringing product to market.

13. Witnesses have also raised concerns about the US' "safe harbour" rules that protect platforms like Google and Facebook from liability for content posted by others. What is your view of those protections and their consequences for copyright rights holders? What provisions should the Government be seeking to support copyright holders enforcing their rights?

The "Safe Harbour" protection for online platforms was considered a positive when the internet was in its infancy. It was the US equivalent to the EU's e-commerce directive article 14 – limiting the liability of online service providers for the content they carried. However, the growth of media giants means there is an imbalance in the ability of publishers, authors and composers to protect their works from widespread unlicensed dissemination. Technology advances and imbalance of power highlight the need for provisions ensuring take down processes can be activated, and that there is responsibility assumed for more stringent identification of harmful illegal content carried on those platforms.

14. The Court of Justice of the European Union has recently issued its judgment in the Schrems II case, invalidating the EU's adequacy decision for the US' Privacy Shield, which had facilitated

[6] NB – The European Patent Office is one of the two organs of the European Patent Organisation, created by the European Patent Convention. The Convention has signatories from across Europe is separate from the EU's incipient Unified Patent Court and Unitary Patent regime.

transatlantic data transfers. How might that judgment affect the possible provisions that the UK and US can agree? How might it affect the UK's parallel discussions with the EU?

The ruling of the Court of Justice of the European Union (CJEU) to strike down the adequacy of the Privacy Shield means that UK and EU companies can only transfer data to the US if other protections such as standard contractual clauses or binding corporate rules are in place, which are framed in such a way as to address the CJEU's concerns. Practice is still to develop in this area to understand when those protections will truly be deemed to be adequate as the court made it clear that the mere presence of SCCs or BCRs is not sufficient.

Thought is already being given to how the Privacy Shield can be replaced with something that would satisfy the CJEU's concerns and allow automatic approval of transfers to the US. Given that the updating of the Standard Contractual Clauses (SCCs) is still some way off, it may be prudent to wait and see what path the EU takes and then consider how best to proceed to ensure that the UK framework allows for onward transfer of the data of EU citizens to the US from the UK. We are aware that there is a risk for UK companies in that EU companies may be advised by their Supervisory Authority not to transfer personal data to the UK if there are concerns about levels of personal data protection in the UK. Any agreement with the US, which did not take account of the EU's concerns around security, could also jeopardise the UK's own adequacy status.

15. Would you support establishing a UK-US intellectual property working group? Who should be represented on that group, and what should its key focuses be?

We would support the introduction of a working group to facilitate collaboration. This should represent all relevant stakeholder interests, including those that use IP and IP advisors, such as solicitors specialising in this area. A working group could provide an opportunity for shared learning. It is also possible that changes could be incorporated which would not be detrimental to the UK /EU status but would render the UK system to be more attractive to US rights holders.

We have also received submissions about how intellectual property and exclusivity rights are applied to drug patents and 'biologic' medicines, such as some innovative cancer treatments. The US is seeking to secure extensions to the periods that protect such drugs and medicines.

16. What is your view of the effects of those longer periods, both in the US, where they currently apply, and for the UK if they were to be introduced following a trade deal?

One of the potential concerns around having longer periods of protection for drug patents is that this would give US Pharmaceutical companies extended market exclusivity in the UK. Our understanding of the rationale for the US system is that it reflects the length of time it can take to obtain a patent there (anecdotally up to 8 or 9 years), thus reducing the effective exclusivity period. This issue is already recognised in the UK through the current Supplementary Protection Certificate (SPC) framework. We note that the EU SPC regulations have periods of protection that last up to 15 years, which is in fact longer than the US extension system which offers periods up to 14 years. We note that significant investment is likely to be required to research and develop pharmaceuticals and complete clinical trials but as with other areas of intellectual property, the central concern

is balancing competition with incentivising and rewarding research and development to drive innovation. In our view, the UK framework, when taken as a whole, already strikes a sensible balance.

17. Are there any studies or salient examples of how these patent/exclusivity periods support or undermine innovative research and the ultimate health outcomes for patients?

No comment.

Regulation and standards setting

The Committee has already received evidence from several witnesses on these areas and would welcome additional views. The questions that follow are not intended to be prescriptive, and submissions relating to other relevant points are welcome.

18. Would the UK aligning more closely with the US' regulatory approach benefit either UK or the US business? How do you assess the respective benefits for US businesses of the UK's alignment either with an EU or a US approach to regulation? How might the UK use a UK-US deal to advocate for the adoption of international standards?

No comment.

19. We have heard from witnesses that the UK should not agree to mutual recognition of standards, for example because US standards are less consensus-based than those that apply in the UK. What is your view of how the US, at all levels, sets standards for, and regulates the safety of, products?

No comment.

20. Any agreement will bind the federal government in the US, but UK businesses may face a range of barriers at state-level, including variations in product standards. What steps could be taken in an FTA to help ease these barriers? What should the UK Government be pushing for in this area?

The states of the United States of America form a single nation but (in a number of respects) not a single market. The ability of the US Constitution's "Commerce clause" to lower intra-state trade barriers is a matter on which expert American legal advice will be required in order to answer this question. The issue illustrates that the UK's trade efforts should include engaging with US state governments in addition to the federal government.

Import of food and agricultural products

21. What opportunities do you see for UK businesses that import, or rely on the import of, food or agriculture products across sectors? How do you assess the Government's evaluation of any opportunities, in their published strategic approach or elsewhere?

No comment.

22. Trade deals are not solely about economic benefits. How might a trade deal on agri-food affect the UK in other ways? For example, could a deal that increased the number of agri-food imports from the US help in tackling food poverty, or increase efficiency or the adoption of innovations by producers based in the UK? What are the broader risks and opportunities in this area?

We support the assertion that trade deals are not solely about economic benefits. We are aware that numerous concerns have been raised in relation to US food standards and any trade agreement which threatened to reduce UK standards. These relate not only to the standard of food products and food processing mechanisms themselves, but also to the animal welfare standards which provide safeguards throughout the production process.

Similarly, environmental and land management regulations to ensure protection of soil, water etc and help to tackle climate change can help to ensure responsible food production. We note that farmers in Scotland have higher environmental and land management standards even than those in other parts of the UK and Europe. Scottish systems of agriculture are in general sustainable and in fact provide environmental benefits, rather than causing harm - for example hill farms are a haven of biodiversity due to the positive nature of low-impact sensitive grazing regimes. Grazed permanent pasture also serves to sequester carbon dioxide from the atmosphere.

Asymmetry in these regulatory areas could lead to an imbalance in production costs, which would put UK producers at a competitive disadvantage. In this case, the important issue of standards also correlates to an economic policy issue and negative impact on UK farmers and food producers. The UK is seen as a world leader with gold standard animal welfare provisions and is recognised for strong environmental protections, both important ends in their own right, which should not be compromised by any trade deal. Furthermore, the COVID-19 crisis demonstrates the importance of animal welfare and food standards as a critical issue of public health.

Other areas of negotiation: trade remedies, government procurement, SMEs and services

23. The UK has developed a new trade remedies framework based on the "key principles" of "transparency, efficiency, impartiality and proportionality". What impact might these negotiations and any deal with the US have on the UK's establishment of its own trade remedies regime? What are the possible risks or opportunities for the UK in negotiations with the US on these issues?

The new UK trade remedies framework, set out in the Taxation (Cross-border Trade) Act 2018 is intended to strike a balance between technical dependency and political accountability. The distinctive feature of the UK's

new regime is an Economic Interest Test which requires trade remedies to be in the UK economic interest, in contrast with the broader "EU interest" test used in the EU and the remedy-as-of-right approach where injury is shown as used in the USA. This approach may be regarded as giving more space to consideration of the impact on consumers.

The economic interest test is a technical question for the TRA in whether to proceed with a case, rather than a political question for a minister to determine.

In implementing this regime, the UK must observe its WTO obligations. As was noted by the TRA report, the trade defence "review process is designed to ensure any future measures fully reflect the UK market situation, thus demonstrating to the WTO membership, the UK's commitment to rules-based international trade." Put another way, WTO membership will require the UK not to discriminate and to apply trade defence measures on the basis of the specific UK situation. The UK will need to differentiate UK remedies from the EU-wide position in order to avoid discrimination prohibited by the WTO.

It is open to WTO members to agree free trade agreements with an element of differentiation without this becoming unlawful discrimination, and different treaties do apply different trade defence remedies. Therefore, a difficult question will be creating trade defence mechanisms that are broadly acceptable to all trading partners. We note that agreement on state aid is currently one of the key issues of difference between the EU and UK in negotiations for a future relationship. As the EU and USA have previously failed to agree an FTA, it seems likely that the same concerns from those negotiations would arise in relation to the UK if the UK has preferential access to both markets at once.

We note that the USMCA (formerly NAFTA) includes a panel mechanism to adjudicate trade defence disputes in which both relevant trading parties have a voice. Under that mechanism, the panel decides whether the domestic choice to impose trade defence measures was reasonable, objective, etc. The UK could consider whether this kind of mechanism might be helpful: in the current context it might be an attractive option in relation to the USA as it would be familiar to them.

24. Both countries' stated objectives include provisions relating to government procurement and areas that they intend to exclude from negotiations, including sub-federal programs and defence programs (US objectives), and key public services, such as the NHS (UK objectives). What are likely to be the key points of both agreement and contention in negotiations about government procurement? What are the possible risks or opportunities for the UK?

The stated US Objectives include:

> "*Exclude sub-federal coverage (state and local governments) from the commitments being negotiated. Keep in place domestic preferential purchasing programs such as:*
>
> • *Preference programs for small businesses, women and minority owned businesses (which includes Native Americans), service-disabled veterans, and distressed areas;*

- *"Buy America" requirements on Federal assistance to state and local projects, transportation services, food assistance, and farm support; and...*"

We note that the exclusions proposed by the US are therefore very wide and appear to substantially limit the ability to achieve real benefits for UK businesses within the agreement. In principle, it seems that the UK should therefore insist, at a minimum, on reciprocal exclusions at all levels of procurement, including procurement by the devolved governments. However, it is not clear how this could be balanced against the need to ensure open and fair processes with respect to overseas companies from other jurisdictions with which the UK has agreements.

25. Small and medium-sized enterprises could particularly benefit from opening US public procurement to UK business, but it is not clear that an SME chapter in a UK-US deal can secure those opportunities. What practical assistance should a deal give to UK SMEs? Are there any other steps that could be taken in a UK-US deal to help ensure that UK SMEs are treated in a non-discriminatory fashion?

Given the scope of the exclusions referred to in relation to 24 it is difficult to see how a procurement agreement could benefit any UK enterprises except the very largest companies, capable of entering into such contracts with eg US Federal Institutions which are not bound by the "Buy American" protection.

26. The UK is seeking "ambitious commitments" from the US regarding trade in services. What general or sector-specific rules, including on financial and aviation services, should the UK be seeking to support the UK's services exporters?

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. If a lawyer has to wait a long time for a business visa to be authorised this could act as a practical barrier to the 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, and 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.

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. 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.

27. The US has recently walked away from one strand of OECD-led talks about taxing digital services. What do you think the UK's approach should be to its recently introduced Digital Services Tax? How useful or necessary is such a tax for the UK?

No comment.

For further information, please contact:
Carolyn Thurston Smith
Policy Team
Law Society of Scotland
DD: 0131 476 8205
carolynthurstonsmith@lawscot.org.uk