HOUSE OF COMMONS

International Trade Committee

Oral evidence: Trade in services, HC 1776

Wednesday 26 June 2019

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Watch the meeting

Members present: Angus Brendan MacNeil (Chair); Julia Lopez; Faisal Rashid; Owen Smith; Gareth Thomas; Matt Western.

Questions 225 - 306

Witnesses

I: Professor Johanna Jacobsson, International and European Law, IE University; Mickaël Laurans, Head of International, the Law Society of England and Wales; and Françoise Guei, Expert, Multilateral Trade issues, African, Caribbean and Pacific Group of States Secretariat.

II: Ruth Bergan, Coordinator, Trade Justice Movement; Professor Markus Krajewski, Chair in Public Law and Public International Law, University of Erlangen-Nuremberg; Dr Kamala Dawar, Senior Lecturer in Commercial Law, University of Sussex; and Kate Ling, Senior European Policy Manager, NHS Confederation.

Written evidence from witnesses:

– Mickaël Laurans, written submission from the Law Society of England and Wales (TIS0009)

– Ruth Bergan, written submission from the Trade Justice Movement (TIS0013)

Examination of witnesses

Professor Johanna Jacobsson, International and European Law, IE University; Mickaël Laurans, Head of International, the Law Society of England and Wales; and Françoise Guei, Expert, Multilateral Trade issues, African, Caribbean and Pacific Group of States Secretariat.

Q225 **Chair:** Good morning and thank you, panel, for coming to our inquiry into the UK trade in services, focusing on the movement of people and delivery of services mainly. We have two panels this morning and we hope to finish this first panel by 11.00 am. I am not sure if you can see a clock anywhere, but we all have to be mindful of time in these sessions. Thank you, first, for coming in. Can I ask you to introduce yourselves with name, rank and serial number as you choose, starting from my right?

Mickaël Laurans: Good morning. My name is Mickaël Laurans. I am the Head of International at the Law Society of England and Wales, the professional body for solicitors.

Professor Jacobsson: My name is Johanna Jacobsson. I am an assistant professor at IE University in Madrid, Spain.

Françoise Guei: Good morning. My name is Françoise Guei. I am an expert in the African, Caribbean and Pacific Secretariat Group in Brussels.

Q226 **Chair:** Thank you very much. Just to kick it off—and this is something that concerns me not just for the Committee but certainly for my constituency work as well—what is the difference between the movement of natural persons to deliver services, the so-called "mode 4", and migration for work? On the importance of having migrants I think there is a debate in the Chamber today. Can you differentiate between mode 4 and people coming to work on fishing boats, in hotels, the NHS or whatever?

Mickaël Laurans: I am quite happy to start. Obviously, I will focus on the legal services sector if you do not mind, being a representative of solicitors.

Mode 4 is crucial for legal services. Lawyers need to have the ability to fly in and fly out of other countries to provide legal services. Law firms also need to be able to transfer employees or partners from country to country, so ICT, intra-corporate transferees, and so on. They need to be able to send people to open up offices. That is the link between mode 3, commercial presence, and mode 4, movement of natural persons.

There is a distinction with business migration. People are not necessarily wanting permanent residence or permanent establishment in a country but they want to have the ability to move from jurisdiction to jurisdiction either on a temporary or more long-term basis.

Q227 **Chair:** Thank you. Professor Jacobsson, can you shed any light on the difference between migration for work and mode 4?

Professor Jacobsson: Absolutely, yes. First of all, I have to say that the exact scope of mode 4 is very unclear. It is one of the most discussed modes of the GATS in terms of its vagueness. It is not clear what exactly mode 4 covers and there are different views on that depending also on who you ask. As an academic, in my own research I have come to the conclusion that if you look at the text of the GATS and also at the WTO members' GATS commitments, they tend to see mode 4 as something that takes place outside the labour market of the host country.

What does this mean in practice? It means that most countries, most WTO members, have liberalised mode 4 in such a way that they allow the access of service professionals, people who come to the country to provide a specific service, without accessing the labour market of that country.

Now, this does not mean that a country could not liberalise access to the labour market, it is just that maybe the GATS was not written with that possibility in view. When you look at the commitments you also see this understanding.

There are some WTO members that have provided more access. It is not just about service contracts; they have liberalised a certain access to the labour market as well. Here, maybe the most famous example would be the United States, which has included in its GATS commitments a specific quota for very highly skilled professionals who can access the labour market.

If you ask, "What does this mean, accessing the labour market?" in my view it means that the person has an employee status in the country and is in an employment relationship with a local or domestic employer, whereas in the GATS type of movement, mode 4, the employment relationship is between the employee and the service supplier, who is established in another country.

Q228 **Chair:** Thank you. Françoise Guei, do you have anything to add to that?

Françoise Guei: First I would like to say, because I represent the African, Caribbean and Pacific Group, that they are a group of developing countries and the group is very diverse. You have less developed countries and you have middle economies. It is very important to give the perspective of developing countries.

Q229 **Chair:** With that in mind, how important is it to facilitate the temporary movement of people to provide services?

Françoise Guei: In terms of the interpretation from developing countries, mode 4 is temporary. This is not permanent.

Q230 **Chair:** How long is "temporary"? I know that in the fishing industry they talk about "temporary" as 10 months of the year.

Françoise Guei: Temporary? For sure it is within 12 months or two years. It really depends on the nature of the service supplied. For us, the distinction between migration and mode 4 is that mode 4 insists on the character and the temporary nature. This is very important. This is totally different because in the concept of migration you migrate because you want to stay in the country. Within mode 4, you are going to provide services, supply them, and you are supposed to come back. From the perspective of developing countries this is very important also in terms of remittances to develop their own countries. That is why it is very important to not try to mix migration and mode 4.

Q231 **Chair:** I met some friends I had been in school with yesterday, flying through Heathrow heading to Angola in west Africa to work in the oil industry. You would classify those as mode 4 workers?

Françoise Guei: Sorry?

Chair: Would you classify those people coming from Scotland through Heathrow to work in Angola as mode 4 workers?

Françoise Guei: Yes, but it depends because—

Chair: For two months, three months.

Françoise Guei: —the relation should be within a contract, a specific contract, a bona fide contract. It is very important the relation is within a contract where this is clear, where you have the duration and you have the kinds of services you need to supply. I think we could say that mode 4 at least gives this minimum guarantee.

Q232 **Chair:** Just a final point from me for the moment: how important are mode 4 services to UK trade in respect of the import and export of services? Do we have a view on the importance to the UK?

Mickaël Laurans: I can again provide a perspective on legal services. The legal services sector in the UK exports about £4 billion a year to the rest of the world. Mode 4 is critical to that, both going outside of the UK and coming into the UK. Why? Because we want to have the ability for UK lawyers in general to fly in and fly out to other destinations to provide advice on the various UK laws—English and Welsh law, Scottish law and so on—but we also want to have the ability of people, business owners and so on, to come to the UK for their legal advice, for their disputes and so on. This is to some extent mode 2 but we need to have people coming to the UK for these purposes as well.

Q233 **Chair:** Is the Home Office a difficulty, a hindrance or a help in this situation? How do you find the Home Office? Clearly, they would be very involved in that apart from the professionals who are coming into the UK.

Mickaël Laurans: In terms of the legal services market, we are a fairly open market. We have 200 foreign law firms that have been able to establish in London with foreign lawyers being able to travel to the UK on a temporary basis and for some of them to establish on a more permanent basis.

Q234 **Chair:** Any difficulties with the Home Office?

Mickaël Laurans: There are some anecdotes about business visitors being unable to find a visa to come to a dispute, an arbitration or a litigation in the UK and obviously that is potentially of concern. We want people to be able to come and hear disputes in the UK as well.

Q235 **Matt Western:** Let me turn now to commitments and barriers to mode 4. Can you give an idea of what mode 4 commitments are usually undertaken by WTO members?

Professor Jacobsson: If you look at the WTO members' commitments, you can see that there are basically four categories of people that the commitments typically cover. These people are, first of all, intra-company transferees, people who move typically between multinationals. This is a category that is most intimately related to mode 3, investment. Then you have business visitors. This is the most liberalised category because it is usually something that can be carried out under a typical business visa. These are people who come to maybe establish or start a business or do negotiations, people who only stay for a few days or a few weeks. That is another category.

Then you have two more categories that are more politically sensitive and where you tend to find many fewer commitments than in the first two categories. The first of these more sensitive categories is independent professionals such as lawyers, accountants and other typically very highly skilled professionals, and then the fourth category is contractual service suppliers, which is, if possible, even more sensitive. This is basically the kind of category where, if you were to liberalise this kind of movement of people, you would maybe allow the access of low-skilled workers or technical workers who could carry out service contracts as employees of somebody else, not as independent professionals but as, for example, construction workers or IT engineers who would enter under a service contract. This is what Ms Guei was already referring to. This is hugely important for developing countries who want to have better access for their labour-abundant economies.

Then you have to look into the commitments themselves to understand to what extent the various members of the WTO have opened up access to these people.

Q236 **Matt Western:** Ms Guei, do you have any comments you want to add?

Françoise Guei: I would like first to insist on the fact that with mode 4, at present the commitments are mainly focused on highly skilled labour. This is the main target. Most of the commitments are focused on specialists, those with high education. The issues of low-skilled and semi-skilled labour are not really tackled under the commitments.

It is true that under mode 4 there is at minimum the categories you mentioned—ICT, business visitors, contractual services suppliers—but I think it is very important also to look at the applied regime because in the applied regime you could see that you also have graduate trainees as a new category. It is true that, as it is for the time being, mode 4 is very restricted to highly skilled labour.

Q237 **Matt Western:** Can we just open this up to look at why it is that countries tend to include only limited categories of professionals in these commitments? Is it self-protection because there is a specialist need for those services? Is that right, Mr Laurans?

Mickaël Laurans: I cannot possibly comment for the sectors and so on, but a specific point I want to make on that is that mode 4 commitments are necessary and good. We need to have mobility for independent professionals, intra-corporate transferees and so on, but they are only one part of the picture. Apologies if we come to that in later questions, but the non-tariff barriers and behind-the-border barriers can make a difference as well in terms of various regulated sectors and professions.

We may well have commitments to help lawyers travel to another jurisdiction but there may be a regulatory framework that prevents them from giving legal advice or working in conjunction with local lawyers and so on. We need to bear in mind these two pictures, mode 4 commitments but also the regulatory framework in the country of destination as well.

Q238 **Matt Western:** Professor Jacobsson?

Professor Jacobsson: Mode 4 is very sensitive because even if it arguably takes place outside the local labour markets there is an obvious connection to immigration and you see, for example, in the UK, as in any country, you would have close co-ordination with the Home Office or the Department of Immigration to try to understand how these people fit into the domestic immigration scheme. What kind of visas should they have access to? Maybe they need a work permit. Sometimes they do need a work permit if they stay for a longer period than the visa allows.

This is also something where you have a huge pressure from the domestic industry, who are, of course, also afraid of foreign migrants, even if temporary, taking local jobs. This is something that has been specifically topical in the contractual service supply category and maybe also with independent professionals. I can imagine that some UK lawyers are maybe not too enthusiastic about foreign lawyers coming in and picking up UK lawyers' jobs, even if the legal sector is, of course, a bit specific. There are obvious sensitivities there.

It is also important to keep in mind that this is a trade instrument. Once you give a commitment in an international trade agreement, whether it is the GATS or—nowadays, what is much more relevant—a free trade agreement or preferential trade agreement, you lock it in. You cannot take it back. This is why I personally think that countries are not very willing to enter into mode 4 commitments. If they want to have, for example, a skilled labour force from a specific origin, they can conclude a bilateral migration treaty that is then more attuned to the purposes of that specific country of origin, whereas if you give labour-type commitments as part of a trade agreement they are not flexible. You cannot go back anymore. This is one of the reasons why the mode 4 commitments are very shallow at the moment and I do not see that changing too much, unfortunately.

Q239 **Chair:** There could be a cynical view that some of these agreements are drawn up by lawyers who are looking after their own self-interest and their own freedom of movement across the planet. There is a nod there, is there? Is there a possibility that this could be happening, the professionals who are drawing up these agreements, the lawyerly class, are looking after their own self-interest and effectively allowing free movement across the planet?

Professor Jacobsson: Of course. In the WTO, the only professional sector so far that has been liberalised or where there actually are common rules on domestic regulations is the accounting sector, where you obviously have some very powerful multinational accounting companies pushing for this. Of course, the legal sector, the accounting sector and the auditing sector are pushing very strongly for more liberalised global movement. It would be great to have this push from other sectors as well.

In my opinion it is positive, of course with the required checks and balances, because, as was already mentioned by Mr Laurans here, basically global business depends on the movement of highly skilled people, as well as people in other skill categories. It is impossible to conduct global business nowadays without having a degree of movement provided for professionals.

Mickaël Laurans: If I could just comment, regardless of how many lawyers were involved in drafting these agreements I would not underestimate the difficulties that regulated professions such as legal services, accounting services and so on still meet in their daily business doing cross-border work. There are fundamental difficulties in some jurisdictions and it is an issue for the sector and for other regulated sectors.

Chair: Yes. Sadly, the voices of Filipino and Guyanese fishermen are not as strong at the WTO and indeed the Home Office, and we cannot get lawyers to work on fishing boats, so some boats remain tied up. I have got that off my chest.

Q240 **Faisal Rashid:** We also see mode 4 provisions are present in many EU free trade agreements. How are these commitments implemented? How do they actually work in practice?

Professor Jacobsson: That is a great question and it makes a lot of work for academics and policymakers and everybody, I imagine. The thing that I imagine has come up before in this Committee is that the EU services agreements are quite special. They are very different to the EU's trade in goods agreements.

In the area of services, what you notice when you look into the EU agreements is that there is no common commercial policy in services, I might even say, because when you look into the actual commitments you see that there is no one EU commitment. There are separate commitments for EU member states because the EU's internal market in services has not been completely finalised. This shows up in the EU's external services commitments. If you open up even the latest EU free trade agreement's scale of commitments you will see that there might be a commitment from the UK, one from France, one from Germany, one from Finland and so on because there is no complete harmonisation.

This is even more so when we enter the sphere of immigration because, again, even if mode 4 is not, strictly speaking, immigration, because you have visas and you have work permits you have to look into the national immigration laws of each EU member state. There are no harmonised EU laws in this area. They are partly harmonised but not completely. You would need to see how each separate EU member state implements this.

Those countries that are in the Schengen, of course, have the Schengen visa and there is a certain degree of uniformity, but if you are, for example, a contractual service supplier who provides a service for a longer period than the Schengen visa allows, then you have to apply for a national work permit. This is in the competence of the member states. Then there is a huge variety of rules and there is no one harmonised EU scheme for this. This is a huge problem for mode 4 service entrants because basically when you want to provide a service in one of the EU member states you have to look up each EU member state's rules and you cannot trust to have a liberalised EU-wide market for this.

Q241 **Faisal Rashid:** That is quite interesting to know that there are different commitments for different countries. How does this work, then, if the EU has a free trade agreement, for example, with any African countries? Mode 4 is in the agreement. How does the Home Office work in terms of supplying the visas? How difficult is it? Is it very easy? How does it work?

Professor Jacobsson: In my view, the UK has one of the best schemes for this because what the UK has put in place is a specific GATS visa. I am not a UK lawyer, I am not based here and I do not know how the system works very specifically, but what I notice is that the UK has a specific visa that is basically there for people to enter under the GATS or under other international trade agreements. I do not know how, in practice, the Home Office has implemented this and if the visa category is indeed open for all mode 4 entrants under each trade agreement that the UK is party to, but at least if you go to the Home Office website you can see that this visa is there and it is supposed to cover entrance under international trade agreements.

In my view, this is ideal. I do not know how you see that but I think it makes things much easier. For example, if you look at the immigration service website of my home country, Finland, and you have to try to understand, "Okay, if I am a fisherman from Uganda and I want to come and provide a contractual service in Finland in the fishing season, what exactly is the visa or work permit I have to apply for?" it is hugely complex because there are the normal national visas and work permits or Schengen visa and national work permits and you would then have to understand under which you would need to apply.

Q242 **Chair:** Presumably, it is in Finnish?

Professor Jacobsson: It is available in English, of course.

Chair: The Ugandan maybe has a chance, if he can go through one of the—

Professor Jacobsson: Maybe, but they might have to hire a lawyer, maybe one of the international lawyers.

Q243 **Faisal Rashid:** Who determines the length of the visa required? Of course it depends on the nature of the services being provided, but in the case of solicitors and arbitration, that can take ages. Is there any limitation, for example, that the service can be provided for a certain length and then the visa has to be transferred to something else?

Professor Jacobsson: There are limitations. Usually, the mode 4 commitments of WTO members, including the European Union, are strictly limited in time, as Madame Guei was already saying. Basically, for example, for contractual service suppliers, I think most WTO members have a maximum period of 12 months. I believe that is also the case in the EU. Sometimes they can be extended but you would have to see under each agreement for each country what exactly they have given. This depends on the agreement.

Mickaël Laurans: If I may, I wanted to emphasise the point that Professor Jacobsson made on the EU trade commitment and the fact that each member state can put limitations for their own country in terms of market access, national treatment, overall objective and so on. Mode 4 commitments are important. In relation to the Canadian-EU agreement, CETA, some interesting mode 4 commitments were made by the EU and by some member states. The practical impact of this is to be looked at on a member state by member state level. We do have 27 regimes, so to speak. I have heard from sharing a platform with Canadian immigration lawyers that CETA has made a huge difference in terms of business migration to France, for example, but not necessarily in relation to other member states.

In relation to what you said about immigration and so on, there may be limits on visas. It would depend again on the country and what they want to put in. There may be other considerations that you need to take into account as a business as well. Tax rules, for example, are important. There are some countries where after 60 days, 90 days or 180 days, you become liable for global income, so you may not want to send people to these jurisdictions or you may need to keep track of how many days you send people to the jurisdiction not to attract further liabilities.

Françoise Guei: If I may add something, we have the experience of the EU-CARIFORUM EPA, which was signed in 2008, and we have a chapter on the movement of natural persons. Under this chapter you have six categories of person that have been defined. You have key personnel, graduate trainees, business services sellers, contractual services suppliers, independent professionals and short-term visitors for business purposes. With these six categories the EU and CARIFORUM have, they can put limitations if they wish.

The experience has shown that the main problem for the CARIFORUM countries with the EU visa regime is a very important restriction. There is a big problem regarding the EU visa regime because even up until now there is a waiver for some visas for some countries but only for unpaid activity. For the time being, the provision is not really operational.

I would like also to comment on the EU FTA. What is very interesting, for instance, with the EU-Canada agreement, is that you have some categories like investors. You have also the category of short-term visitor for business purposes, which are not recognised by the UK. Within the EU, some members could recognise a number of categories and some others not. For the UK, for instance, they do not recognise the investors category.

I would also like to bring the perspective of least developing countries. Some years ago they carried out a study on the UK market in terms of services and the perception was that EU regimes, in terms of visas, are very complex. For them this is the main barrier because visa regimes are sometimes not very predictable. It is always changing. You have differentiation between visas for specific nationalities and specific citizens. It is a bit difficult for them. Even in terms of fees, sometimes it is very expensive. You have some requirements also that are not very clear. The perception from developing countries is that in terms of improvement of the UK visa regime, it could be simplified sometimes.

Q244 **Julia Lopez:** There are several commitments on mode 4 in the South Korea-EU FTA, which has just recently been rolled over for a two-year continuation period with the UK. Could you outline what those commitments are in that FTA and also let us know whether you think there is scope for changes and improvements to those commitments if the UK and South Korea were to agree their own FTA in future?

Professor Jacobsson: As far as I remember, the EU-South Korea FTA has commitments on business visitors and intra-company transferees, but I believe that there is a clause that says that the parties will come back to discuss contractual service suppliers' entry and the entry of independent professionals once the GATS negotiations have been concluded. They obviously have not been concluded and are not going anywhere at the moment so this is kind of hanging in the air.

I would imagine that if and when the UK and South Korea enter into deeper negotiations to understand what exactly will be covered by the trade agreement with them, that is probably something where South Korea will ask for commitments from the UK.

Mickaël Laurans: On South Korea I do not have many comments to make on mode 4. I would just say that we welcome the news of the continuity FTA and the agreement in principle. The EU-Korea FTA has been the only FTA providing liberalisation of the legal services sector and access for UK and EU law firms into Korea and it was key for the sector to get that continuity agreement. That will enable five UK law firms to remain in Seoul regardless of what happens with Brexit.

Q245 **Julia Lopez:** Are there not similar commitments in CETA then on legal services?

Mickaël Laurans: No. That is the point I would like to emphasise. You are looking at non-tariff barriers. You are looking at the domestic regulatory framework for legal services in all the different jurisdictions. No, there are no specific commitments, sadly, which increase the openness of the market in Canada. The only EU FTA that achieved something on the legal services sector was Korea. For us it was key to get that continuity FTA, so we welcome the news. Obviously, should a new negotiation happen post-Brexit between the UK and Korea to widen that agreement, we would have contributions to make on the legal services sector and probably on mode 4, having spoken to our members about it.

Q246 **Owen Smith:** You have partly touched on this. I was going to ask initially about visas and how our visa system is viewed from other parts of the world, and I think, Françoise, you have particularly answered that. There seemed to be a slight difference in your view inasmuch as you were saying, Françoise, that from a developing country's perspective our system is looked at as quite expensive and complicated and yet, Professor Jacobsson, you were saying that in comparison to the Finnish system it looks relatively more simple. Is that just a difference between the two perspectives, the developed world and the developing world?

Professor Jacobsson: I do not disagree. The only thing I am saying is that it is legally clear, which is different from that being practical or accessible for people, especially from developing countries. One of the key problems in mode 4 is that we have the legal commitments but they do not play out very well in practice because it is completely unclear how the domestic immigration scheme reflects these international commitments. When you have the actual service supplier then trying to understand how to access the country under the international agreement, that is when it gets complex. Even in the case of the UK, where you have this clear GATS visa, what are the documents you need to submit?

There is a lot of discretionary power. Whenever you have an official authority making a decision on a visa or even a work permit, there is a big degree of discretion. You might have an international commitment but ultimately it is up to a state official to decide whether a person will get the visa or not. You can always put forward some sort of public security argument and ultimately refuse the visa, or if you have developing country service suppliers who cannot necessarily show all the documentation that the host country is asking for, you might have then an entry barrier that makes this international commitment completely empty.

Q247 **Owen Smith:** In that case, a simple question: are there examples of other countries elsewhere in the world that we should look to that have better systems for visas, in particular for people seeking to enter those countries to provide services?

Françoise Guei: At the time when they launched a study, they looked at the UK market and the French market. In terms of regulation it is still difficult because visas are within the discretion of the host country. It is very difficult to have a certain way to change things. For instance, LDCs have requested waivers on some specific provisions, maybe in terms of removing excessive visa fees or requirements. I know that in the UK system for some categories of visa you have to sit a language exam, but this does not apply to Swiss citizens because there is a special agreement. You have sometimes within the regime some imbalance or discrimination between two nationalities.

It would be good to have some kind of harmonisation because when we talk to developing country SMEs or even, for instance, when in Brussels we want to hire consultants from a developing country, it is very difficult to go through the visa regime. For instance, in the UK you have to introduce your application three months before. On very short notice, it is not possible for LDCs or developing countries to come for a meeting. You have some rules that could be adjusted for specific situations.

Q248 **Owen Smith:** That is useful. Would anybody else like to add anything to that?

Mickaël Laurans: I do not have any specific example of another immigration regime to look at. I just wanted to say in terms of the UK regime that we are an open legal services market. We have 200 foreign law firms who have lawyers from all over the world and we welcome them because it makes a successful international legal centre in the UK.

I am not an immigration lawyer myself. Obviously, your immigration law committee is inputting into the debate on the immigration White Paper and so on. As I have mentioned before, there is anecdotal evidence of foreign lawyers sometimes not getting the visa that they need in time. I receive some of these complaints or questions directly into my email inbox. There is anecdotal evidence of people not necessarily getting the visa they need to come for an arbitration or a court case in the UK.

Q249 **Owen Smith:** If I could just ask a question about one of the issues of the day, do you take a view, Mr Laurans, about what a no-deal Brexit scenario will mean for provision of legal services?

Mickaël Laurans: We have a very specific context. Many people would say that the single market in services is not advanced or not advanced enough. That is not true for legal services. We have two sectoral directives, two lawyers directives, which enable EU lawyers to do pretty much everything they want in other EU and EFTA member states: fly in, fly out, establishment, work with local lawyers, set up a branch office and so on. We really have the most advanced single market in legal services. When you compare it to the US, a New York lawyer has a lot more difficulty going to California to meet a client than an Estonian lawyer going to Portugal, for example.

For us, Brexit in general will create a number of challenges in terms of market access, whether it is mode 4 or the provision of legal services in general. Whether it is no deal or whether it is an FTA framework, we are likely to face—because I include the EFTA as well—31 different national regimes. Bearing in mind the mode 4 commitments and the regulatory framework, some countries will not be accessible at all to UK lawyers. You cannot establish as a—

Q250 **Owen Smith:** Are you able to quantify that at all? How many markets exactly would not be available to us?

Mickaël Laurans: A couple of examples. Non-EU lawyers cannot establish in Greece or France. Greece, obviously, is a major shipping centre. France at the moment have 51 Anglo-American law firms based there. Non-EU lawyers cannot establish there at the moment. The French Government are thinking of changing that but at the moment they cannot.

There are concerns about fly-in, fly-out abilities in some jurisdictions. Some jurisdictions are telling us that we would not be permitted to do so. Then there are concerns around the ability to work with local lawyers. Maybe you can be there as a UK lawyer but you cannot be in partnership with a local lawyer or there would be some equity-capping restriction in terms of the structure you can have.

In terms of market access, it is a challenge because we have had the lawyers directives.

Q251 **Matt Western:** Can I just come back to one point? If I heard you correctly, you said that it is more difficult for a New York lawyer to work in California than it is for an Estonian lawyer to work in Portugal. That is presumably because of interstate arrangements or restrictions. It is not about professional qualifications, is it? It is just simply about access to doing business?

Mickaël Laurans: It is about the regulatory framework in every US state. California is a state that is quite protectionist in relation to not only foreign lawyers—though there is a foreign legal consultant status there—but lawyers from other US states. It is more difficult to requalify in California if you are based in New York, for example, and it is more difficult to fly in and fly out. There is progress in the US as well. They are looking at these issues, but I think it is still more difficult for US lawyers to move to different US states than for lawyers in the EU.

Q252 **Matt Western:** Therefore, with UK legal firms trading in the US—and we have heard from others on this subject—it is in terms of the access to the market and the need then to have different representation in different states. It is not a homogenous market in the way that the EU is.

Mickaël Laurans: That is correct. It is not homogenous. In a very practical way, they are looking at the key states for their legal practice. They want to be in New York, Washington DC, California, Chicago, Florida and Texas. These are the key states but the rules will be different in all these key states. I think 31 US states have a foreign legal consultant scheme status for foreign lawyers to work there, but that means that 19 do not. The conditions are different from state to state. It is difficult for the person based in New York to service clients based in Texas, California or elsewhere, which is not the case at the moment in the EU.

Professor Jacobsson: If I can just add to that, you were comparing the US to the EU market and you said the EU market is homogenous. The EU market is homogenous for EU service suppliers, for EU lawyers, but it is not a homogenous market for third-country lawyers who then face these different national schemes.

Q253 **Matt Western:** So, a US law firm could come into Paris, say, and set up and access Estonia or Portugal?

Professor Jacobsson: Then you have to look into the GATS commitments of the European Union to see what are the French commitments, what are the Estonian commitments, and since the EU and the US do not have a free trade agreement you really have to look at the GATS commitments under the specific sector, which is the legal services sector. It is also important to keep in mind that we have to look not only in the horizontal commitments for these different categories of persons but whenever we are talking about a specific service sector, whether it is legal services or any other, then you have to go to those sector-specific commitments and see what exactly each member state has promised. Then you have really significant diversity between the member states of the European Union.[1]

Françoise Guei: There is also a very important point, which is recognition of qualification. Within mode 4, recognition of qualification is key because you could guarantee market access but if there is no recognition of qualification, that is also a very important aspect.

Chair: Just before you move on to another point, I am aware that on this point both Gareth Thomas and Owen Smith want to come in.

Q254 **Gareth Thomas:** I just want to follow up on Owen's question to Mr Laurans. There are some people who think that lawyers are almost as unpopular as politicians. If I were an enthusiast for Brexit I might think, listening to you speak, that it is not that serious, a no-deal Brexit. A few highly paid lawyers not being able to go to Paris does not sound like a great loss of British wealth as a result of a no-deal Brexit. Is that not a fair assessment of the evidence you have given to us so far?

Mickaël Laurans: The way I am going to answer this question is that obviously I have focused on market access because that is the purpose of the Committee. There are other aspects of EU membership and the co-operation that we may want to have with the EU as part of the future relationship. As part of that, judicial co-operation mechanisms are important and they do impact on family matters, on consumer matters, on road traffic accidents and so on. When can you get compensation if you have an accident in Germany on holiday? Can you seek compensation in the UK courts or do you have to go to Germany in order to do that? There are other aspects that have a direct impact on families, citizens, consumers and so on, and obviously we have made a number of submissions on that important aspect of judicial co-operation and what to look for in the future relationship with the EU on these aspects.

Q255 **Owen Smith:** I was also following up on something you said, Mickaël. I think you said there were 50-odd British firms in France, Anglo-US firms in France. I presume those US firms use that partnership in order to access EU markets. If that is right, I presume that in future if we are no longer members of the EU there will not be any point in being partnered with a British firm and they will then find somebody else to partner with.

Mickaël Laurans: When I said Anglo-American firms, what I meant by that was American or UK-headquartered firms. Some of them have gone through transatlantic mergers, it is true, but on the position of US lawyers within the EU, US lawyers have been active within the EU since after World War I and then again since the Marshall Plan. They have been

[1] Professor Jacobsson submitted the following correction to her statement due to mishearing the question: "The above is true when one compares the chances of an American firm to set up in Estonia or France or another EU country. When it comes to the possibilities of an American law firm to provide services from France to Estonia, that is after having first set up in France, the scenario is different as a law firm with an EU establishment can then benefit from free movement of services in the EU and the GATS commitments of each separate EU Member States are no longer relevant (they remain relevant for self-employed US lawyers only with no company structure in the EU as well as in terms of professional qualifications). This difference under EU law is quite clear."

active in many other member states. However, the law firms are active but the US lawyers, the persons, do not necessarily have access to the different markets. France is one of these examples, actually, where as a third-country lawyer a US lawyer cannot be based in Paris. Often they have used London or the UK as a springboard into Europe—

Owen Smith: That is my point.

Mickaël Laurans: —whether it is through individual solicitors or through structures, opening up branches of UK LLPs in various member states. It is also, for them, a challenge. When you open up in a country obviously you will hire local lawyers, train them up and in due course they will take over the management of that local office, but it does create layers of complexity.

Q256 **Owen Smith:** My simple point, bluntly, is that hitherto we have been an access point to European markets for US firms because we have been a European member state. Will that be the case in future?

Mickaël Laurans: Every firm is different. We have 100 US firms out of the 200 foreign firms in the UK. Every firm will have a different business model but yes, for some of them, they have used the UK as a springboard to other European countries.

Q257 **Matt Western:** Professor Jacobsson, is there anything you want to add to that?

Professor Jacobsson: I agree with your analysis. The legal sector, as many other professional sectors, is an area where the UK really benefits from EU membership because of the mutual recognition agreements that you have, especially in the legal sector. If UK lawyers no longer have access to those rules it is a catastrophe, or at least a very serious thing.

Mickaël Laurans: A challenge.

Professor Jacobsson: Yes, a challenge. Let us put it as a challenge for UK lawyers.

Q258 **Chair:** Is it a catastrophe or a challenge? Is the challenge near catastrophe or is it—

Mickaël Laurans: It is challenging and complex.

Professor Jacobsson: It is a big challenge. It is a big challenge, yes.

As was brought up by Madame Guei before, the professional qualifications are really the key and how countries recognise those. Even if you have access, even if you get a visa, if you cannot practise your profession then there is not much you can do. This is where the UK has to guarantee a far-reaching professional qualifications regime with the European Union and this is where the WTO really is not far at all.

Q259 **Matt Western:** Can I just ask a slightly more general question? This sort of area sounds a bit dry to a lot of people, possibly a bit esoteric, but in the world of professional sport where would footballers, say, fit in? Would they come under mode 4? I am interested.

Professor Jacobsson: If it is for games then it is mode 4, but if you are employed, say, in a national league as a foreign employee, then it is immigration. It depends on what we are talking about.

Françoise Guei: I would say it is a mode 4.

Professor Jacobsson: I would say that if it is an employment relationship then it is not mode 4 unless there is a specific commitment for a football player, which I believe most members have.

Françoise Guei: You have a commitment.

Professor Jacobsson: Specifically for football players?

Françoise Guei: But you have it.

Professor Jacobsson: Okay.

Q260 **Matt Western:** So, yes?

Françoise Guei: I would say yes. Yes, indeed.

Professor Jacobsson: It depends on the commitment and the country.

Q261 **Chair:** Certainly, I was aware that at Celtic, people felt that Celtic was at a disadvantage to Dutch and Portuguese teams due to the UK Government's approach to non-EU migrants and the number of visas they would give for players. Teams like Porto and Benfica were able to develop players from outside the EU to the benefit of those clubs. There was certainly a frustration at high levels in the Celtic board at one time, but the Celtic board at the time were very connected to the Government of the day so sympathy is limited.

Françoise Guei: I think you have a visa for sportspeople in the UK. You have a special visa.

Chair: That might be the situation, yes.

Françoise Guei: You have a visa regime for this kind of sport, yes.

Q262 **Chair:** Just before we come to the end of this—and thank you very much for keeping to time—our brief mentions a research paper by Sam Lowe from the Centre for European Research, and he comments that hostility to immigration can directly undermine services exports. It is probably no secret across the world, with the ability that many people have in the English language to be able to pick up newspapers from the United Kingdom and see daily, on the front pages, hostility to immigration. How does that play out? We are talking quite drily here of our subject. We are almost looking at the economic side of it. When we are looking at the media/social side of it, how does that affect the movement of people onwards towards the economy?

Professor Jacobsson: In my opinion it is crucial and we have other experiences of this; for example, the United States. In the last 10 years or so the US is not even negotiating mode 4 anymore because of the congressional position. The US Congress has become so sceptical about mode 4 that they do not even want to negotiate it anymore.

I think the key problem is that people do not really understand what mode 4 is and it is confused with immigration. I see this as a big risk in the UK as well. Considering the current political climate in the UK, I think the UK will have difficulties negotiating mode 4. This is why I, first of all, analytically as a scholar think that mode 4 should be distinguished from labour immigration, but I also think that politically it makes a lot of sense to keep them carefully separated in terms of avoiding a big public counter-reaction to negotiations on mode 4.

Chair: Matt Western, am I detecting some enthusiasm?

Q263 **Matt Western:** Yes. How should the UK be going about this and what sort of approach should it adopt over mode 4 in its negotiations on free trade?

Professor Jacobsson: It is hugely in the interests of the UK with mode 4 to liberalise it, first of all for legal services and for many other professional services as well. The UK has an offensive interest in mode 4 but it also has to be ready to face pressure, especially from developing countries who want more access under mode 4, especially for contractual service suppliers. There may be some trade-offs that the UK can make, again with the caveat that contractual service supply is the one category that comes close to labour immigration and where the UK negotiators have to be really careful in order not to block that because of immigration pressure.

Françoise Guei: I do not believe in a multilateral system on mode 4. I think the better result would be at a bilateral level. The idea is to think in terms of opportunities, what opportunities as the UK you gain with mode 4, and also for the other side. Within bilateral agreements I think it is possible to get results but also to insist on the fact that this is professional movement. It is very important to insist on the fact that this is professional movement of highly skilled or low-skilled people.

You have more chance to have a better result with a bilateral agreement than at the WTO because for the time being there is no movement on mode 4. It is true, as you mentioned, that it is very sensitive, but it does show clear regulation with the other partners if we have clear rules on the categories and how you apply them. I think it is possible to implement it at that level.

Mickaël Laurans: I think that it is going to be a key aspect for consideration and decision as part of the future UK trade policy. You are right, it will be in the UK's interest to ask for mode 4 commitments in other jurisdictions.

Q264 **Chair:** On that, what is the interplay, then, between mode 4 and immigration policy?

Mickaël Laurans: I was coming to that in relation to what other jurisdictions will be asking of the UK. I think other jurisdictions that the UK would want to have free trade agreements with will come up with their own mode 4 requests and/or immigration requests.

Q265 **Chair:** I think India, in fact, already did.

Mickaël Laurans: Yes. I noted the recent report from the Foreign Affairs Select Committee on UK-India partnership. India is the largest market in the world that is completely closed to the establishment of foreign law firms and the ability of foreign law firms to fly in and fly out in India is regularly challenged in the Indian courts.

For us, it would be a clear interest for the UK to negotiate an FTA with India in relation to the legal services sector. We know very well from the EU-India FTA negotiations that India will request visas for IT and engineering professionals. I think another stumbling block was generic medicine. These issues will be back on the table whenever the UK is ready to start negotiating with India, and India will make the same requests in relation to the UK. It is a very important aspect for UK trade policy to consider.

Chair: Thank you all very much. We are running to time very well this morning and I am obviously pleased about that. Can I thank the three of you for your time, your expertise and sharing your knowledge so openly? Hopefully, we will see you again but certainly this is very useful for our report.

Examination of witnesses

Ruth Bergan, Coordinator, Trade Justice Movement; Professor Markus Krajewski, Chair in Public Law and Public International Law, University of Erlangan-Nuremberg; Dr Kamala Dawar, Senior Lecturer in Commercial Law, University of Sussex; and Kate Ling, Senior European Policy Manager, NHS Confederation.

Q266 **Chair:** We will get going with the second panel. Can I ask the second panel to introduce themselves? We probably have about 45 to 50 minutes for this panel. Therefore, without further ado, on my right?

Kate Ling: I am Kate Ling and I am from NHS Confederation, which is the organisation that represents NHS commissioners and providers of services in England, though we do also have offices in Northern Ireland and Wales.

Dr Dawar: I am Kamala Dawar, I am at Sussex University and I am with the UK Trade Policy Observatory.

Chair: The famous Sussex University that everybody is relying on in this Brexit period. Thank you.

Professor Krajewski: Good morning. My name is Markus Krajewski. I am Professor of Public International Law at the University of Erlangen-Nuremberg in Germany.

Chair: Thank you very much for coming.

Ruth Bergan: Ruth Bergan, senior adviser at the Trade Justice Movement, which is a network of 70 civil society organisations.

Q267 **Chair:** Thank you. If I can kick off, to both Professor Krajewski and Dr Dawar, is there any commonly accepted definition of "public services"? I infer by the looks that are going on—

Dr Dawar: Well, we know generally what we are talking about but it is not clearly defined because it is a moving target. You can say it is activities the Government conduct in the public area for the public good or we can say it is things that are performed for the public to their benefit.

Q268 **Chair:** In this moving target, what is currently within that target area?

Dr Dawar: Broadband, for example, now is seen in some areas as a public service whereas 20 years ago it would not have been seen that way.

Q269 **Chair:** Has broadband always been seen as a utility?

Dr Dawar: It is a utility but it is also seen as a public service. In some areas it is seen as a human right to have access to that because of access to information and to be able to communicate. The target changes.

Q270 **Chair:** This will be very welcome to a lot of citizens who have been missed out by the UK being enthralled to competition rather than co-operation and planning, that they will get their broadband services at some point soon.

Professor Krajewski: I would say if you ask whether there is a defined concept of public services in international law or international trade, the clear answer is no. The term is such that it does not even exist in any of the trade agreements. We have different terms that are normally associated with the debate on public services. We have the term, "services supplied in the exercise of governmental authority", which is a very narrow term, very narrowly defined. Only the core governmental functions would fall under that definition. Then in the GATS and all the other trade agreements, you have very specific definitions. You have a term called "public utilities" in some of the EU agreements and also in the EU GAT schedules. Then you also have in some of the EU agreements the

EU term, “service of general economic interest”. You may even have other definitions where they talk about specific sectors, whether they are publicly or privately financed.

The short answer is no, there is no term. The long answer is if you talk about public services, it is— as Kamala was saying—a fluid concept, it is a blurry concept. I did some research on this in the late middle ages. If you talked about public services in this country, you were talking about ferrymen and innkeepers. I am not sure whether anyone still considers innkeepers as public services but—

Chair: Hangmen might have been in the same consideration. Thank goodness we do not have those guys anymore.

Q271 **Owen Smith:** We are getting almost to the crux of this. Which are the most controversial areas that, for example, might be counted as public services in a UK setting? Which are the areas around which there will be a row?

Professor Krajewski: I would certainly say the most controversial areas are health services, education probably as well, and then to the extent that you would count social services—elderly home carers and so forth—as public services as well. They are probably the more controversial ones. Postal and courier services would probably also be relevant. Telecommunications used to be relevant. It is now pretty much liberalised so I don’t think that that would be a big issue.

Q272 **Owen Smith:** Notwithstanding what Dr Dawar said in respect of broadband provision?

Professor Krajewski: It might come back. That is the point, isn’t it? We do not know whether in 10 years down the road we are reconsidering some of the decisions that we made or some of us made 20 years ago. That is the important point to understand when we discuss the concept of public services, that there are trade rules that were designed in the 1990s or the early 2000s and they reflect the idea of what public services were or were not at that time. They may be different from what we consider to be public services today or in 15 years down the road.

Q273 **Owen Smith:** Does the EU have a definition of what it thinks constitutes public services and does that have any implications in terms of internal market obligations?

Dr Dawar: It has a concept of services of general interest and services of general economic interest, but it has left that very fluid because it knows the member states have very different culture priorities and economic values. They have clarified it in case law. We know that usually it is something with a public service obligation, so there is a clearly defined mandate for the undertaking, whether it is a public or private undertaking, to conduct this activity. They have been very sensitive to the fact that different countries have very different ideas of what is a public service and how they want to protect that. They have been able to do that by not defining it and letting the case law and directives and communications clarify more what it is.

Q274 **Owen Smith:** Does the fact that there is such vagueness in respect of the definition of public services necessarily mean that in the event of us being outside the EU it is a free-for-all in terms of how other countries may wish to define public services when looking to encompass those within the remit/ambit of a free trade agreement?

Dr Dawar: We have concepts of the exercise of governmental authority, which are non-commercial, not in competition with one or more suppliers, which comes under the GATS, so the UK is not completely liberated from the concepts that have been developed at the EU level.

One of the reasons the EU has developed that is because of the concept of state aid and competition law. They want to make sure that when Governments do conduct these activities in the public good, or if they give exclusive or special rights to undertakings to do that, they do not abuse their position in the market and they do not become anti-competitive and Governments do not oversubsidise.

The UK will still have to think about competition issues and state aid subsidies in regard to the UK internal market, so it is important that the UK understands how these concepts have developed at the EU and regional level. Depending on what the deal is at the end of the day, they will not be bound necessarily by the EU's competition and state aid laws that do, at present, cover a lot of economic services of general interest.

Q275 **Owen Smith:** Those people who fondly imagine that if we are outside the EU we will be liberated from the constraints of state aid legislation are in for a rude awakening; there will still be implications for Britain?

Dr Dawar: There will. State aid is a UK competence so there are implications for the devolved regions as well.

Q276 **Chair:** Fascinating. Just thinking about the telecoms being a public service, then not a public service, then back to being a public service again, is the pressure to change back to being a public service when the market fails?

Professor Krajewski: Yes, that is definitely something that we are observing in many countries that experiences with liberalisation and privatisation have gone wrong in some context and countries may decide or may have decided that they want to go back because the experiences show that what economists will call the market failure is happening.

When we compare it with different countries, it is very interesting. You would think that the US would be the country where there are no public services at all, but the truth is that the key public service in the US, when it comes to trade negotiations, is postal services. That is a completely different concept than maybe in Europe and we do not know why concepts have changed. It also has something to do with policy choices and, of course, with experiences with liberalisation.

Q277 **Chair:** I love the term "market failure" because it is just where the market cannot make a profit. The market could still operate at a loss presumably but, therefore, it will not so we have the idea of market failure.

Professor Krajewski: Sure.

Q278 **Matt Western:** To pick up on what you were talking about, Dr Dawar, I am interested to hear more about how GATS defines public services and how that differs or how it compares to the EU approach. Could you just elaborate a bit more?

Professor Krajewski: GATS does not define public services. It has a term called, "services supplied in the exercise of governmental authority". That is defined as any service that is supplied neither on a commercial basis nor in competition with one or more service suppliers. There has been a lot of debate on that term. We do not have any case law but there has been a lot of both policy and scholarly debate. I think that the consensus is now that it is very narrow. It is a very narrow definition. Both the terms "commercial basis" and "in competition with one or more service suppliers" are relatively broad. At the end of the day, those services that are supplied under governmental authority, which also makes sense if you think about the notion of governmental authority, are judicial services, key administrative services, services or state activities—I would rather call them activities—that are generally globally not considered to be part of a market, however you define it.

Other than that, the GATS itself does not define or does not exclude. It does not have any rules on public services, the GATS framework. You will then have to go—and this was already mentioned in the first session—into the specific schedules of each member state and look at how they approach that. There we have in the EU schedule, which the EU also copied in all free trade agreements, the term "public utilities". Again, the term "public utilities" is only a limitation for very specific obligations. Under the EU GATS commitment it only applies to market access. It only applies to public monopolies. It is not a broad exception for public services. It is a specific regulation.

The next question is what are public utilities, and if you talk to UK lawyers or UK trade experts they may have a different understanding of the term "public utilities" than other European and also, of course, lawyers from other parts of the world. That is why it is sometimes defined with more specific references to specific sectors. Then you have a third level, which is when you go into the specific sectors. For example, if you go into the health services, which is again split into hospital services and medical professional services, if you go then into the hospital sector you will have to see whether the specific EU member state made a commitment in that area or not. That is the level that you have there.

Ruth Bergan: From a civil society perspective, we approach this quite differently. The GATS was very controversial among quite a lot of civil society organisations, particularly in the global south. One of the reasons for that was that it was the first time we saw this kind of very strong codification of services, including public services, as something that was marketable and tradeable. Obviously, in the UK we are quite used to that concept because our banking is no longer considered to be publicly provided. That is not the case in lots of other countries.

From our perspective, the coverage is quite broad and what you choose to include is up to the country because it is on a positive listing basis, so you choose what to liberalise. What would be quite nice is to say health services in, education services out, but you cannot approach it quite like that because you have 12 different sectors and 150 different subsectors and they are provided in four different modes of supply. What you tend to see is that countries make commitments in quite a lot of sectors and subsectors but they choose which modes they want to supply them in.

The UK, for example, is quite liberalised in terms of commercial presence. Our general approach, and the approach that seems to be made when we listed our schedules at the end of last year, was that we were going to be quite liberalised in terms of commercial presence. If you want to set up a health company in the UK, that is fine. We are not so interested in cross-border supply, so you are not going to be able to do your GP consultation from the US by Skype, for example. We are also not very liberalised in terms of movement of people, which is mode 4. You cannot ship in a doctor from the US to the UK to provide treatment in the absence of an established business here. It is quite complicated and if you look through the list of sectors that the UK—

Q279 **Chair:** But a doctor can come with a company from the US if the company sets up?

Ruth Bergan: What we seem to be saying is that we are quite happy—and this reflects the status quo in the UK at the moment—to have US companies come and establish a private health or electricity or energy company in the UK. What we are not so keen on is either cross-border supply, so where there is no commercial presence—

Chair: There is no commercial presence, no.

Ruth Bergan: You can imagine that would be problematic. If you were providing a health service from a country that did not have a commercial base here, it would be hard to figure out which rules and regulations applied. Even if you were clear that UK regulations applied, how would you enforce them if there was no commercial presence here?

Q280 **Chair:** The doctors working for the company with the commercial presence will be UK doctors or UK approved?

Ruth Bergan: Probably, unless you also liberalise mode 4. Mode 4 allows you to move people as well. Then you can bring your US doctors in. Depending on what your specific commitments are, you could potentially bring your US doctor across to deliver the service.

When you try to work out the impact of GATS it is complicated because of all of those things. There was a study in about 1999 that showed that something like 1,500 of about 3,000 commitments had been mis-scheduled, so lots of countries were scheduling things incorrectly. It is a complicated piece of trade law.

Q281 **Chair:** What hope for the rest of us if the alleged experts are mis-scheduling? Are they mis-scheduling deliberately or accidentally?

Ruth Bergan: Accidentally.

Professor Krajewski: Yes.

Chair: Accidentally, okay. There is no cynicism—

Dr Dawar: The US as well.

Professor Krajewski: Germany as well.

Q282 **Julia Lopez:** A lot of my questions have been covered, but do you think that partly in terms of cross-border services one of the reasons that they do not want, say, the US doctor providing a service in the US to the UK is about tax as well and a changing perspective on how you tax goods and services to make sure that you are not undercutting your own domestic workforce? That was one of my questions. As I say, you have sort of covered the question, but insofar as you could say there were any public services in the UK that were exempt from the GATS, could you say what they were?

Professor Krajewski: What is generally exempt, apart from the narrow governmental authority, is, as the basis of the EU GATS schedule, all publicly financed health, education and social services. That always raises the question of what is publicly financed. In the GATS the EU has not clearly defined what it means. Only in its most recent trade agreement it has defined that publicly financed means at least a certain amount of public money. Only if it is 100% privately financed it is not publicly financed, put it that way.

We do not know whether that definition that the EU found in its most recent trade agreement would also apply to the GATS. A while ago I had a discussion with colleagues from Cambridge and they were telling me, "Our university is certainly not mostly publicly financed". That is a big question. How do we approach that? I do not know how it is with the NHS or with other forums, what the general public in the UK would perceive as a public service or publicly provided but that when you ask how it is funded there is also the question of what you are looking at. Are you looking at the specific service? Are you looking at the service supplier? I can only talk about the education service. Universities may be financed publicly but they may offer graduate programmes, which are completely financed privately.

Kate Ling: Following on from that, as other witnesses have said, the GATS definition—inasmuch as there is a definition—is very narrow about services supplied in exercise of governmental authority and it is debatable exactly which kind of services that would cover. I think you were just referring to the definition in CETA, I believe. The EU has gone further than that. In its trade deal with Canada, it has adopted the wording, "The EU reserves the right to adopt or maintain any measure with regard to the supply of all health services which receive public funding or State support in any form". There are these questions about how much public funding you have to have. It simply says, "health services which receive public funding ... in any form". That does not mean that they have to be 100% publicly funded. It is debatable but that sort of clause going forward, if the UK were to replicate that in future trade deals, that kind of wording would be extremely helpful.

On the issues that Ruth was referring to earlier, we have to bear in mind that already the UK has a pretty liberal market when it comes to health services, so I am not sure how much difference some of this would make in future. We already open ourselves—

Q283 **Chair:** We have to remember there are four National Health Services within the UK as well, which have different rules of access.

Kate Ling: Yes. As you know, there are different approaches taken within the four National Health Services when it comes to commissioning and procurement of services.

Ruth Bergan: To finish the CETA definition, Kate is right that that is what it says, but at the end of the definition it says, "and are therefore not considered to be privately funded", which is something that we think is a little bit worrying because you then—

Q284 **Chair:** Is that contradictory, then?

Ruth Bergan: It seems a little bit contradictory. It is a much better exception than we have seen in other FTAs, so we think that is positive, but it has not been tested. That, "and is therefore not considered to be privately funded" we think is quite worrying, and what we would like to see is a specific exception in UK FTAs for the NHS and for—if we can find a definition—public services, something in the annexes where you can be clear about what you are excepting. Otherwise we think that it is still open to interpretation.

Q285 **Chair:** This is a point of nervousness in Scotland, for instance, because you might have a Government that have a very right-wing agenda potentially negotiating and taking on and speaking for a nation within the UK, but you have another nation that is trying to run its health service on a different ethos and could have something imposed upon it. That would seem to be a particularly important point.

Ruth Bergan: Could I come back to the point of: we are liberalised so what difference does it make? The big difference with a trade deal is that it locks in the level of liberalisation that you have. This is for FTAs, not for GATS, but more often rather than a positive list where you choose what you want to liberalise, you have a negative list, which says everything is liberalised except these specific things that we say we do not want to liberalise. You have to think very carefully about what you want to exempt. You have to be looking to the future. We have talked about broadband. You might not know what you think will be necessary to exempt in future. That we think is a bit problematic. That is your positive or negative listing.

Then you have a thing called a standstill clause, which says anything you have liberalised to this point will be fixed. You cannot go back on it so any attempts at, say, renationalising the railways or electricity would be out. You also have ratchet clauses, which mean that if at any point beyond the level that you set it at you decide to liberalise further, that locks that in as well.

That is the big difference from where we are today. Yes, we have liberalised, but at the moment we could choose to undo some of that. There would still be consequences in terms of contracts, but under an FTA the price of doing so is much greater because you have to then negotiate with your trade partner.

Q286 **Chair:** I hope I am not cutting across Julia Lopez here, but presumably, just going back to the four National Health Service examples, if the devolved Government of Scotland and the UK Government for England had completely different points of view, it would presumably be possible to negotiate within that free trade agreement—I am seeing some nodding—that you would open up the English NHS in the manner that the Westminster Government wanted while keeping the Scottish NHS or the Welsh NHS at a different level regarding what the Scottish and Welsh NHS wanted. You would presumably then need the agreement of the other side at the negotiating table as well.

Ruth Bergan: Technically it might be possible but, for example, to go back to the CETA text, the exemption applied to market access but they did not exempt under investment. You could do it but you would need to know that your Scottish trade negotiators had looked very carefully at every aspect of the deal and made sure that it was properly exempt.

Q287 **Chair:** There was no side avenue into it. Yes, Professor?

Professor Krajewski: Can I just comment on that? What the UK might have to do, or could do at least, is what Canada and the US are also doing. In their trade agreements they schedule commitments based on the state jurisdiction. In the Canadian and in the US trade agreements you have an annex 1 and an annex 2 in which each Canadian province and each US state has their own limitation. I would assume a future UK agreement would also have a schedule or an annex 1 or 2 in which—

Chair: Assuming there is a future UK agreement.

Professor Krajewski: Yes. Well, whatever. That is for you to decide. Assuming there is a future UK/third country trade agreement, you could have a schedule that says this is what England says, this is what Wales says, this is what Scotland says and this is what other jurisdictions say. That will be possible, but that would, of course, be something that the other trade partner would have to agree to, that you are scheduling that in that way. That is basically what other federal states when they negotiate their trade agreements are doing as well.

Of course, under a negative list approach free trade agreement you are much more locked in, but the commitments made under the GATS are also something that the WTO members have agreed and they also lock in something already. We need to be sure that even if by the time the UK leaves and there is not going to be any other agreement, then of course the UK falls back to the general GATS to start with, and there are already a number of liberalised commitments in the GATS that will not go away. That is important to realise.

When it comes to the question of what kind of clause a future UK free trade agreement should have to protect public services, I would think that it would be better not to rely on how these services are financed because that may change depending on how you structure it. It should rely on whether a democratically elected Government or public authority decides that a particular service is considered a public service. There are suggestions out there in the debate how you could negotiate that and how you could have terminology in your trade agreements where you are saying public services are excluded and public services are defined as services that are under a specific regulatory regime, which the legislator defined as public services.

Q288 **Chair:** Just to pick up one point, you said that in the GATS they are quite liberalised. Is that an indication that you might want to have a trade agreement that would be less liberalised than in the GATS, so the GATS would not be a floor, or would you—

Professor Krajewski: There are political claims out there that the GATS is already too far and that raises the question: can you go back? You would have to negotiate with all the other trade partners in the WTO, which is difficult these days.

Q289 **Chair:** What about in a two-country FTA?

Professor Krajewski: Of course, you could schedule; practically you could do that. There are some out there who say that that would violate the GATS but, practically speaking, assuming that you had an agreement with Canada that is less than the GATS commitments, it would not make any difference because Canada could rely on the GATS commitments then.

Chair: Yes, I am with you.

Q290 **Owen Smith:** I wanted to follow up on the point the Chairman was making about the way in which different constituent parts of the UK may wish to protect their public services, and I say so as a Welsh Labour MP. Professor, I think what you were saying is the only way in which, for example, the Welsh Government could make sure that the provisions of an FTA signed by the UK Government did not apply to Wales—for example, in England where we have to some extent privatised commissioning of services but that does not apply in Wales—is to have a separate annex negotiated and written into the free trade agreement. Are there any other ways in which Welsh or Scottish Governments might be protected?

Professor Krajewski: Do you mean in terms of a trade agreement?

Owen Smith: Yes, so without a specific negative listing in respect of those Welsh provisions or Scottish provisions.

Professor Krajewski: You can also do it in a positive listing. You could protect your domestic jurisdiction special roles under both systems. It is basically what you also have in the EU GATS schedule; you have positive commitments that are different from different member states. You have more liberal member states of the EU and less liberal member states in certain sectors. You could do that under a positive list approach as well.

You can also imagine different elements. You could even think of whether you want to devolve trade policy. Then you would have an England/India trade agreement that does not apply to Wales. That is a question for British constitutional law to decide but that is, from an international law perspective, entirely possible.

Q291 **Owen Smith:** Broadly speaking, those are the only two ways in which you could do it?

Dr Dawar: There is always the general exceptions, and these are for one-off measures that are in violation of the agreement, and then you have to defend them as necessary to protect public health or the environment. Governments are less happy to rely on those because it puts the burden of defence on to the Government to prove why their instrument is necessary and it is not more trade restrictive than necessary and so forth. There will always be those general exceptions and security exceptions to rely on but they are not the first best option.

Ruth Bergan: For us, those exceptions when applied to services look quite strange because it says your policy must be no more trade restrictive than necessary to achieve a legitimate public policy objective. Who decides what is necessary and legitimate tends to be the trade lawyers. For us, that is not an appropriate test of a public service, so we find those sorts of tests quite problematic.

Q292 **Owen Smith:** The lawyers make hay, I am sure. A general question: does the fact that we have such a liberalised market in the UK and such a mixed economy in key public services—health, postal, all sorts of other things—going to make it more difficult for Britain to negotiate free trade agreements because there will be so much contested territory? Is it going to make it easier for lawyers to contest those free trade agreements even if they are agreed?

Dr Dawar: The UK needs to know what its offensive and defensive interests are anyway. When it goes into a negotiation it should know already, "These are the things that we are just not going to negotiate, and these are our offensive market access interests. Our businesses are interested in getting into other countries". That is the homework you do before you do a trade negotiation. The difficulty is it is complicated and it is easy to overlook certain things or be lobbied too heavily by the wrong constituents and not civil society constituencies.

All trade negotiations are complicated and in a free trade agreement there are often cross-sectoral negotiations, so I will give a bit on this but I will take a bit on that. That also compromises the message that you are putting forward. But a lot of it is for the British Government to work out what the offensive interests are of British businesses and then to protect the defensive interests as well.

Professor Krajewski: It also depends, of course, who you are negotiating with. If you are negotiating a free trade agreement with the US, then the question of whether there are offensive US interests of US service suppliers who want to access the UK market is completely different than when you are negotiating a free trade agreement with India or with Japan or with Canada or with Australia. You have very different interests from those different countries and the key question—this is a question that often comes—is how we know how endangered our public services are when we look at these free trade agreements. The answer is always that it depends on which other trading partner you are looking at.

Q293 **Owen Smith:** Let me be blunt. What I am thinking about, obviously, is what happens in the event we are conducting a free trade agreement with America and Kaiser Permanente is clearly looking to have a piece of the UK market and is unable to argue, because of the hitherto very liberalised market and mixed economy we have, that they ought to be allowed. Are we going to find ourselves in a more difficult position than had we not had such a liberalised market previously?

Ruth Bergan: The question is almost the reverse. We have a liberalised market already, which makes it difficult for us to offer more, so we can lock that in, but if you are a US pharmaceutical company you probably already have quite a lot of the access that you already want. First, we already offer a quite liberalised market; secondly, there has been lots of talk of joining the Customs Union or aligning with the Customs Union. We are not going to have much to offer. If that happens, we will not have much to offer in terms of tariffs. Our concern is that we are then squeezed into having to offer much more than we otherwise would in terms of services, so possibly pushing out on different modes of supply; possibly going deeper into some service areas that we have not liberalised so much before; aspects of the NHS or aspects of cultural services, the BBC, for example; pharmaceuticals are an offensive interest for the US; areas like that, because our negotiating capacity will be diminished.

Professor Krajewski: It is very important to realise that when you negotiate with the EU you have the UK but you also have agricultural countries and, as a third country, you are looking at the entire market. Then the EU may say, "We are not doing this but we may do that". Once you are only negotiating with the UK a lot of those policy options are gone.

Q294 **Chair:** So we can sacrifice Welsh lamb for something or other, as long as it is not Scottish lamb we are sacrificing. Kate Ling, you wanted to come in as well, did you?

Kate Ling: I wanted to bring in a not completely different angle. We have been talking a lot about what the UK may or may not do in future free trade agreements with third countries. We have not talked about our most important trading partner, which is the one that we currently belong to, the European Union, and what our future relationship is going to be with them. From the point of view of healthcare but in, I am sure, all other sectors there is a big issue about what we would lose from exiting our current arrangements with the EU and how we might replicate or how we might deal with that in the future.

That is absolutely vital because you cannot talk about the kind of arrangements that we will have with third countries who we do not currently have free trade agreements with without considering to what extent we might be constrained by whatever commitments we have with the European Union in future. They are all the things that currently apply.

Q295 **Gareth Thomas:** Just very quickly because we have touched on this already quite a bit, have you set out your view as to the listing approach that the UK should take in terms of listing its services commitments in future FTAs?

Professor Krajewski: That depends very much on the capacity that you are going to give to the Department for International Trade. If that is going to be a huge bureaucracy with a lot of experts, a lot of work for lawyers, then you can do the negative listing approach because you just need to have a lot of people looking at that.

It is obviously easier for countries to approach the positive listing approach because, as was already said, the dangers that you will forget something or that you are scheduling something by mistake are reduced if you go for the positive list approach. Theoretically, though, it does not make a difference but that is only the theory. So far the trend seems to be within northern, western countries to go for a negative list approach. Even the EU, which used to be the champion of positive listing in the past, is now moving towards mostly a negative list approach.

What is important is that if the country opts for the negative list approach to understand the differences between annex 1 and annex 2. Annex 2 is where you preserve your policy space. What we are seeing increasingly now is that even with a negative list approach countries are increasingly carving out elements in the annex 2 precisely to avoid ratchet and standstill clauses, which normally only apply to the annex 1. From that answer you already see that negative list approach is much more complicated and is often more restrictive on the broad regulatory autonomy.

Q296 **Gareth Thomas:** Ms Bergan, presumably the civil society would want the positive listing approach to protect the various institutions like the BBC from US companies and so on?

Ruth Bergan: We could take a slightly broader approach to this, which is to say there is still an ongoing debate about what a public service is, as we found, but also whether or not they are best run by private companies. Most people would probably view public services from the point of view of delivering a public good, not as something that you want to necessarily trade and market.

Our position is that your starting point would be that you are not going to include public services in trade deals unless there is a very good reason to do so. It does not mean that you cannot privatise or liberalise but you leave open the option of changing your mind if privatisation does not work or liberalisation does not work. You do not commit future Governments to a particular policy through a trade agreement. It is an easy way of maintaining your policy space.

Starting point, do not put your public services in; then yes, if you use your positive listing approach, avoid ratchet and standstill clauses and also look across other provisions within trade agreements to make sure that you are not inadvertently tying your hands with things like regulatory co-operation or your investment chapters.

Q297 **Chair:** It is perhaps to the University of Sussex I want to direct this question. How might investment agreements or investment provisions in trade agreements affect the delivery of public services? That might also be something for Kate as well.

Dr Dawar: In free trade agreements usually you do not have the mode approach, mode 4 and mode 3. You would have a chapter on investment. The chapters on investment are very controversial. How you deal with disputes is very controversial.

Chair: Well, good.

Dr Dawar: In the past it has been felt that the investors have had much more strength than the Government have in defending measures. For example, if the Government changed their regulation and they became tougher on environment or public health, an investor could potentially go to an investor-state dispute settlement mechanism and say, "You have changed the conditions that we entered into this agreement under and now our investment is no longer worth anything because you have changed your regulation".

In the EU model, there has been a shift in changing the dispute settlement mechanism. It is not perfect. A lot of people have a problem with it and you have to be wary that that is there. However, what civil society is more worried about now is just the fear that an investor could bring a case about a regulation in the future, what they call a regulatory chill. It has made Governments much more cautious about changing regulation for fear that they will have investor disputes.

Clearly, there is an issue with guarding public services with the investment chapter, but again there are avenues for protecting public health. It is just how clear Governments are when they craft these investment chapters, that they make sure that there is a carve-out for public services and there is always the exception for introducing a measure for public reasons as long as it is necessarily legitimate to achieve that aim.

Overall, investment has a huge effect on public services and it has to be brought into the discussion because it is the mode 3 in GATS.

Professor Krajewski: It is important to realise that when it comes to investment protection we do have cases where Governments have adopted measures, broadly speaking, to support public services, which have been challenged, and where Governments were also sentenced to pay because they violated some clauses of these investment agreements.

In the past, when we discussed trade in services only, a lot of people have said, "Show us your cases, show us whether this has ever been a problem". When we look at investment protection we can point to cases in Argentina but also in the Czech Republic and Germany where governmental regulations have been challenged and Governments have faced huge difficulty.

It is crucial that if you negotiate a free trade agreement and you have an investment chapter, then the first question is: is it an investment chapter that only is mode 3 in that term, because that could be possible too, or whether it is an investment protection chapter. If it is an investment protection chapter, then the red alert should start, especially if it includes what is going to be still considered investor-state dispute settlement if it allows private investors to make those claims.

Q298 **Chair:** Thinking of the current political circumstances, I am looking for any experience in the change of a composition of a state. Currently, the favourite to be the next UK Prime Minister put Scottish independence at 53%. If the UK was to change, if it starts a negotiation and something like Scottish independence comes their way—which would not be a conflict for Scotland because it would just adopt what the European Union has—the UK is now in a negotiation. Does it make it easier or more difficult that the state is likely to change, easier from the point of view that you are a less diverse state or more difficult in that you are a smaller state after that? How would that change the dynamic of a trade negotiation? Has it happened in the past that a state has changed its composition during the negotiation of a trade agreement?

Professor Krajewski: You mean during the negotiation a state changed its composition?

Chair: Yes.

Professor Krajewski: We do have experiences not with a state but with the EU enlargement. Of course, throughout the negotiation of trade agreements more countries came to the EU and that has caused not problems but technical difficulties. The answer would depend on whether there are any specific economic questions that would arise. If, for example, the UK was negotiating a trade agreement that also involved fisheries issues and then Scotland leaves the UK, that may change the expectations of the other trade negotiating partner. To my knowledge, there have not been any trade negotiations in which at least there has been a peaceful dissolution of a state during the negotiations.

Q299 **Faisal Rashid:** Can I turn to Kate, please? I do understand you did mention that we should look at EU and UK trade relations as well, absolutely well in point, but it is important that we understand the UK/US future trade agreement. How would that impact on our NHS as well? Lots of people have anxiety; that is the key public service we have. How might potential services liberalisation provisions in a UK/US free trade agreement affect the delivery of NHS services, in your view?

Kate Ling: We have to make a distinction between the funding model, the way in which the NHS is funded and organised—which is taxpayer funded, free at the point of use, which is absolutely within the gift of the UK Government domestic political control—and who provides the services. At the moment, domestic policy decisions by successive Governments mean that many NHS services are already delivered by independent sector providers. So far, being part of the EU has not led to large numbers of EU contracts. Under the EU procurement rules, if there are services to the value of over €750,000 then they should be advertised across the EU for competitive tendering unless there is a reason not to do so. In practice, there is often a reason not to do so because there is only one possible local provider, for example, or because there is no cross-border interest in providing those services.

I am not sure to what extent that would change if the trading partner concerned is the US. I stand to be corrected by other witnesses, but I imagine it would probably be mode 3 in the sense of US-owned companies that have a presence in the UK, which would want to provide services. Indeed, I think some already do. For our Government in conducting those negotiations, leaving the EU will give us more flexibility in deciding what to commit and what not to commit regarding public services and we could be more or less liberal depending on the objectives of the Government.

Q300 **Faisal Rashid:** Is it likely that the US will seek provisions in a UK/US FTA related to pharmaceuticals, in particular, and medical devices?

Kate Ling: Absolutely, yes.

Q301 **Faisal Rashid:** What impact would that have?

Kate Ling: If you look at the US's negotiating mandate, they are pretty clear about it. They are quite keen on extending data exclusivity periods for—sorry, this is all very technical—non-generic medicines. In other words, a company develops a medicine or a medical device and they are the patent holder. The provisions in the USA are much stronger from the point of view of protecting the investment that the company has made in developing that product and keeping the patent and the data exclusivity rights going for longer. In the US, I believe it is 12 years normally and 10 years in the EU at the moment.

It is clear that they would want to try to preserve that as much as possible. There is always a conflict of interest from the point of view of patients and healthcare systems that our objective is to get medicines, new treatments, medical devices and innovations to the patient as quickly as possible so that patients can benefit, and as cheaply as possible. That means, for example, generic medicines rather than branded medicines. Whereas from the point of view of companies, clearly they want to get a return on their investment. There is always going to be that sort of tension.

We have to bear in mind, it is worth pointing out, that we also have offensive interests there because the UK has a very strong life sciences, medical devices, medtech sector, so we also have an interest in selling those products and services in other countries. But the US would not be a target market for us, to the point that Markus was making that it depends on who you are negotiating with. There are some countries that if they have a strength in that sector then you are not going to make much headway there, whereas there are other countries where you may very well want to sell your services or goods into those countries.

Faisal Rashid: Dr Krajewski, you wanted to come in.

Professor Krajewski: I just wanted to say that it depends on who you are negotiating with and, of course, the fact that—

Q302 **Faisal Rashid:** I want to understand what impact that would have.

Professor Krajewski: The impact it would have—that is what I am trying to say—is if you compare the US with other EU countries that is not the right comparison because other EU countries have, broadly speaking, similar systems. They are different but they are all very much publicly regulated, publicly financed, even if you have insurance models. You have a completely different play when it comes to the US. The question then that Kamala would have to answer is if in a trade agreement with the US the Government procurement market would also cover public services, especially health services. My assumption is that that would make a significant difference.

Dr Dawar: This is an important point. In the Government procurement agreement and in Government procurement chapters in FTAs, the Government procurement chapter does not open up markets, it opens up markets that are already open under the services and the goods chapters for Government procurement. That means that Government procurement can never go above what has already been negotiated in the services agreement.

In the Government procurement agreement, for example, if you look at the entities that opened up, you will see the Department of Health and the Department for Education have opened up. That does not mean that people can sell to them. It means you have to go to the services chapter and then you look at what services are opened up. I think that the closest to public services there is sanitation and sewage. Those are the only sectors that those bodies can—

Q303 **Faisal Rashid:** That can be included into the future negotiations.

Dr Dawar: The services would come before the procurement, so it would be the services negotiations would decide that we are going to open up the UK for this and this and this—

Q304 **Chair:** You could unilaterally open up presumably?

Dr Dawar: But the procurement is dependent on what has opened up in the services chapter. If you have a Government procurement chapter, it does not necessarily mean that you are going for full-blown liberalisation. It is very much pegged to what services the negotiators have opened up. That is quite important when it comes to thinking about—

Q305 **Faisal Rashid:** That is up to the Government whether they open it up or not?

Dr Dawar: It has to be opened up and then the Government can procure from that.

Ruth Bergan: Can I just come in on the US negotiating objectives? They have very strong objectives in terms of intellectual property but they also very clearly have in their sights NHS purchasing. They do not particularly like the NICE guidelines about cost effectiveness and affordability. They think that it is a monopoly that should be broken up and that we do not pay enough for our pharmaceuticals. They are very clearly saying seek standards to ensure that Government regulatory reimbursement regimes are transparent, provide procedural fairness, are non-discriminatory and provide full market access for US products. They really do have the pharmaceuticals market and NHS purchasing well in their sights.

Q306 **Chair:** Alas, we are coming towards the end. Kate Ling, you want to say something very briefly, do you?

Kate Ling: Yes, it was to add to that about the US negotiating mandate. They are very clear also about what they regard as non-tariff barriers, regulatory standards, and talking about wanting to move to a science-based standard. The EU adopts this precautionary approach, if in doubt then you do not go for it, whereas the US is saying that unless there is positive scientific proof that something is harmful then it is okay. There is a whole issue about alignment of regulatory standards. That is a big one from the point of view of services.

Chair: We will test it on ourselves first to find the scientific proof, which is the tension in the middle of that. Thank you very much for your time this morning. An idea that has crossed through me there is that perhaps an inquiry we should look at is defining the priorities of both offensive and defensive. That would certainly be useful for any UK Department of whichever Government going forward to see what they might be wanting in FTAs. Thank you for that idea. Thank you for what was a very enlivening and interesting discussion. I am sorry we cannot go further with it at the moment, but I am sure we will at some other time in the future. Thank you for your time and your expertise.

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