

Law Society of Scotland – Written evidence (EEH0035)

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law Sub-committee welcomes the opportunity to respond to the EU Environment Sub-Committee’s call for evidence on *Future UK-EU relations: energy, environment and health*¹. We have previously commented on the European Union (Future Relationship) Bill and UK-EU Trade and Cooperation Agreement². We have the following comments to put forward for consideration.

Inquiry questions

1. Please indicate which of the following industries or policy areas are you responding in relation to: environment and climate change.

2. What is your assessment of the relevant provisions in the UK-EU Trade and Cooperation Agreement, and their impact on your business or policy area?

3. What do those provisions achieve?

The preamble to the EU–UK Trade and Cooperation Agreement (TCA) acknowledges the parties’ commitment to high environmental standards and to tackling climate change. Provisions in relation to the environment are scattered throughout the TCA, however, the underlying basis is

¹ <https://committees.parliament.uk/work/944/future-ukeu-relations-energy-environment-and-health/>

² <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-202021/european-union-future-relationship-bill/>

that both parties are free to determine their environmental regulation including climate change (Part Two, TITLE X, Article GRP.1). In addition to the key environmental provisions, environmental and climate change considerations feature throughout the TCA in other areas, for example, in public procurement³, subsidies⁴ and trade⁵.

Non-regression

Non-regression provisions in the agreement provide that a party shall not weaken environmental or climate levels of protection below those in place at the end of the transition period "in a manner affecting trade or investment" (Part Two, Title XI, Article 7.2.2). Environmental levels of protection are defined as those having "the purpose of protecting the environment, including the prevention of a danger to human life or health from environmental impacts, including in each of the following areas:

- (a) industrial emissions;
- (b) air emissions and air quality;
- (c) nature and biodiversity conservation;
- (d) waste management;
- (e) the protection and preservation of the aquatic environment;
- (f) the protection and preservation of the marine environment;
- (g) the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release or disposal of chemical substances; or
- (h) the management of impacts on the environment from agricultural or food production, notably through the use of antibiotics and decontaminants" (Part Two, Title XI, Article 7.1.1).

The provisions include non-regression as a result of inadequate enforcement. This recognises that legislating for protections will not produce the desired result unless effective enforcement makes them meaningful.

Environmental principles, procedures and enforcement

Part Two, Title XI, Article 7.4.1 commits parties to respecting the internationally recognised environmental principles to which they have committed⁶, in particular:

- (a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments;
- (b) the principle of preventative action to avert environmental damage;
- (c) the precautionary approach referred to in Article 1.2(2);
- (d) the principle that environmental damage should as a priority be rectified at source; and
- (e) the polluter pays principle.

³ Part Two, Title VI, Article PPROC.10

⁴ ANNEX ENER-2

⁵ Part Two, Title XI, Article 8.5

⁶ such as in the Rio Declaration on Environment and Development (adopted at Rio de Janeiro on 14 June 1992), and in multilateral environmental agreements, including in the United Nations Framework Convention on Climate Change (done at New York on 9 May 1992), and the Convention on Biological Diversity (done at Rio de Janeiro on 5 June 1992)

These environmental principles reflect those currently set out in the UK Environment Bill⁷ and UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021⁸.

Although the existing rules do not have to be followed, the TCA provides that parties reaffirm their commitments “to procedures for evaluating the likely impact of a proposed activity on the environment, and...this includes an environmental impact assessment or a strategic environmental assessment, as appropriate” (Part Two, Title XI, Article 7.4.2). The TCA also provides that these procedures shall involve “the carrying out of public participation and consultations and the taking into account of the environmental report and the results of the public participation and consultations in the consented project, or adopted plan or programme” (Part Two, Title XI, Article 7.4.3).

Part Two, Title XI, Article 7.5.1 concerns enforcement, and includes that parties shall ensure that domestic authorities that are competent to enforce the law relating to the environment and climate give due consideration to alleged breaches of the law that come to their attention and that those authorities have adequate and effective remedies available to them. The Article also requires parties to ensure that “national administrative or judicial proceedings are available to natural and legal persons with a sufficient interest to bring actions against violations of such law and to seek effective remedies”.

Part Two, Title XI, Article 8.2.1 stresses the importance of transparency, including requiring that parties shall “ensure that the general public is given access to relevant environmental information held by or for public authorities, as well as ensuring the active dissemination of that information to the general public by electronic means”.

These three parts taken together reflect the three pillars of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁹ - rights of access to information, public participation in decision-making, and access to justice in environmental matters.

Rebalancing

Part Two, Title XI, Article 9.4 concerns rebalancing measures. This provision recognises that the parties acknowledge that significant divergences in environmental or climate protection can be capable of “impacting trade or investment between the parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement”.

The TCA provides that if material impacts on trade or investment arise as a result of significant divergences between the parties, rebalancing measures may be taken to address this. In practice, that may mean that if one party imposes higher standards of environmental or climate protection that impact on trade and investment, while the other does not, 'rebalancing

⁷ At Clause 16

⁸ Section 13

⁹ Adopted at Aarhus, Denmark, 25 June 1998 and entry into force on 30 October 2001

measures' may be adopted. The measures are limited in scope and duration to what is "strictly necessary and proportionate in order to remedy the situation". These provisions may protect a party which seeks to take higher standards from the threat of the other party gaining a competitive market advantage as a result of lower standards.

If a mutually agreed solution cannot be found, an independent arbitration panel may be requested to assess the suitability of any countermeasures. Parties may not invoke the WTO Agreement or other international agreement to prevent measures being taken (Article 9.4.3(g)).

Dispute settlement

Part Six of the TCA concerns dispute settlement and horizontal provisions.

Part Six, Title II, Article COMPROV.5 notes that the parties "consider that climate change represents an existential threat to humanity and reiterate their commitment to strengthening the global response to this threat". The TCA provides that "each Party shall respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement."

Part Six, Title II, Article COMPROV.11 provides that while preserving their decision-making autonomy, the Parties will attempt to cooperate on "current and emerging global issues of common interest". Reference is made to this including climate change, sustainable development, cross-border pollution, and environmental protection.

Article COMPROV.5 concerning climate change is stated as constituting an "essential element of the partnership established" by the TCA (Part Six, Title II, Article COMPROV.12). Part Six, Title III, Article INST.35, provides that if either party considers that there has been "a serious and substantial failure by the other" to fulfil an essential element, it may terminate or suspend the operation of the TCA in whole or in part.

The TCA goes on to provide that "for a situation to constitute a serious and substantial failure to fulfil any of the obligations described as essential elements in Article COMPROV.12 [Essential Elements], its gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions" (Part Six, Title III, Article INST.35.4). "An act or omission which materially defeats the object and purpose of the Paris Agreement" is always to be considered as a serious and substantial failure (Part Six, Title III, Article INST.35.4). These provisions recognise the importance of climate change to the parties and mean that a serious breach can result in the suspension or termination of all or part of the TCA. We note that the test of "materially defeats the object and purpose of the Paris Agreement" is likely to be a high threshold to meet.

4. What, if any, challenges arise because of those provisions? How could these challenges be resolved?

The effect of the provisions generally on environmental protection and climate standards remains somewhat uncertain. While the preamble acknowledges the parties' commitment to high environmental standards and to tackling climate change and the TCA includes certain protections based on the recognised environmental principles, there is uncertainty as to what extent regression of standards would be sufficient to trigger the formal procedures for rebalancing and dispute settlement under the Agreement.

We also recognise the potential cultural issues surrounding the TCA (for example, to what extent will parties recognise each other's concerns?) and the potential implications for the nature of future relations between the parties.

Public participation

The TCA reflects a shift from a relationship based on legal rights and judicial resolution to one based largely on political mechanisms without direct rights for individuals or businesses.

The agreement provides that parties "shall consult civil society on the implementation of this Agreement and any supplementing agreement" (Part One, Title III, Article INST.6) and provides for consultation via Domestic Advisory Groups (Part One, Title III, Article INST.7) and a "Civil Society Forum" (Part One, Title III, Article INST.8). These bodies are expected to include representation from non-governmental organisations, business and employers' organisations, and trade unions.

However, there are no opportunities for individuals to engage with the mechanisms of the TCA, including the dispute settlement processes, or to directly raise concerns about the application and implementation of the agreement. In addition, the measures relating to access to environmental information, public participation in decision-making, access to justice in environmental matters are not specified within the scope of the non-regression provisions. This means that aggrieved individuals will rely on matters being raised via the consultation bodies or the parties themselves being willing to take action.

It is not clear from the TCA how these groups will be constituted, be accountable, be transparent and represent society in the UK.

Non-regression and rebalancing

In relation to the non-regression provisions, it is not clear when a weakening of environmental or climate levels of protection will be considered to be "in a manner affecting trade or investment" (Part Two, Title XI, Article 7.2.2) and this may be difficult to evidence. We welcome the provisions including non-regression as a result of inadequate enforcement as this recognises that legislating for protections will not be sufficient unless effective enforcement makes the protections meaningful.

The rebalancing provisions should, in theory, protect a party which seeks to take higher standards from the threat of the other party gaining a competitive market advantage as a result

of lower standards. However, the provisions are limited to circumstances where there is a material impact on trade or investment as a result of significant divergences between the parties. As referred to above, it is not clear when there will be "a material impact on trade or investment". There may also be a question as to the meaning of "between the parties" – for example, does a change of standards by one party which makes it more attractive foreign investors out with the UK affect trade or investment "between the parties"?

The TCA provides that an "assessment of these impacts shall be based on reliable evidence and not merely on conjecture or remote possibility". While this safeguard is welcome, there may be practical challenges in meeting the required standard (i.e. "material impacts on trade or investment...as a result of significant divergences") and provide necessary evidence in order to invoke the provisions.

We note the potential for differing environmental and climate standards to be taken within the UK. Regulatory divergence is a natural consequence of devolution, however, this may result in challenges around implementation of the rebalancing provisions.

Intra-UK

It is not yet clear whether, and if so, to what extent, the devolved administrations or legislatures will play a role in policy- and decision-making relating to the TCA and in the governance structures under the TCA, including in relation to dispute resolution. The Scottish Government has commented that "It will be vital that Scotland has meaningful representation within [the Trade and Cooperation Agreement's] Governance structures"¹⁰ and there has been a call from the Scottish Parliament's Culture, Tourism, Europe and External Affairs Committee for devolved representation in the governance structures which relate to devolved competencies¹¹. We commented on the TCA in our briefing on the EU (Future Relationship) Bill¹² that "The Government should explain how the devolved legislatures and administrations will have a role in this process."

The observation and implementation of international obligations is not a reserved matter under the Scotland Act 1998, Schedule 5. However, consideration will be required as to how the UK (as the party to the TCA) will ensure its responsibilities under the TCA are fulfilled, particularly in connection with matters which are devolved and including the measures concerning 'good regulatory practices' (Part Two, Title X).

5. What should the UK seek to accomplish with the EU in relation to your industry or policy area within the parameters of the Agreement in the short- and mid-term?

We have no comment.

¹⁰ EU-UK negotiations: outcome analysis, Scottish Government, <https://www.gov.scot/publications/eu-uk-negotiations-outcome-analysis/>

¹¹ https://www.parliament.scot/S5_Bills/20201230_EUFutureRelationshipLCMResponse.pdf

¹² <https://www.lawscof.org.uk/media/370151/uk-eu-tca-and-the-future-relationship-bill-291220.pdf>

