Dr Belén Olmos Giupponi – Written evidence (PBS0030)

Please note that the responses provided below are based on the questions sent by email in the request for written evidence. Questions 1-4 have not been included as they fall outside the witness's relevant expertise.

Summary

The aim of this submission is to provide recommendations in the area of investment protection, trade in services, right of establishment and professional services.

- It is worth noting that this is a bespoke agreement which is not comparable with other international treaties concluded by the European Union (EU), as it aims to regulate future relations with a former member state after more than forty years of regulatory alignment. This is a blended type of international agreement including some contemporary Free Trade Agreements (FTAs) resembling provisions, but which will encompass sui generis provisions tailored to the specific object and purpose.
- Like in most areas currently comprised in the EU-UK negotiations, the UK's negotiating position favours a continuity of market access and a certain level of freedom of circulation and establishment commensurate to the present level along the lines of other free trade agreements already concluded by the EU in recent years, like the EU-Canada Comprehensive Economic and Trade Agreement (CETA).
- In turn, the EU's position reflected in the respective negotiating document communicated to the UK in March 2020, regulates these issues in Part Two, Title VI of the draft text, governed by the principle that "the Parties affirm their commitment to establish a favourable climate for the development of trade and investment between them" (Article SERVIN.1.1.1).
- Against this background, the UK Government should insist on the inclusion of clear provisions for the future cooperation, including: clear and comprehensive investment protection clauses, liberalization of services going beyond market access clauses, digital trade, temporary business permit for natural persons (Mode 4), and mutual recognition of professional qualifications.
- Wherever possible, the UK should negotiate more comprehensive investment protection clauses, reciprocal commitments on trade in services, and foresee future specific arrangements for the recognition of equivalent levels of professional qualifications.

Name of expert: Dr Belén Olmos Giupponi
Job title: Associate Professor of Law
Institution: Kingston University London

Academic's expertise: Throughout her career, Dr Belén Olmos Giupponi has undertaken research in EU law, international economic law, and environmental law. She has extensively analysed labour, and environmental standards in the EU trade and investment policy, EU state aid, and Brexit legal implications, modelling alternative solutions for EU-UK trade and investment relations. She has been a visiting scholar at the University of Cambridge, the Institute of Advanced Legal Studies, and Stanford Law School. Dr Olmos Giupponi is co-convener of the Interest Group on International Business and Human Rights at the European Society of International Law and has authored several articles in peer-reviewed journals and books such as *International Environmental Law Compliance in Context* (Routledge 2020 *forthcoming*), *Trade Agreements, Investment Protection and Dispute Settlement in Latin America* (Wolters Kluwer 2019), *Rethinking Free Trade and Human Rights in the Americas* (Hart 2016), and the Chapter on EU Common Commercial and Investement Policy in *The Law of the EU* (Oxford University Press 2015).

5. What type of arrangements should the Government seek to negotiate with the EU for the mobility of professionals?

1. Mobility of professional entails regulatory cooperation across a range of issues. Key arrangements to be negotiated in this regard comprise the mutual recognition of professional qualifications per sector, work visas, temporary entry and reciprocal national treatment to service providers holding professional qualifications from the other party's institutions.

6. How important are arrangements on the mutual recognition of professional qualifications to professional and business services providers in the UK and EU? How could a future UK-EU agreement best allow for this?

2. Mutual recognition is crucial to ensure a smooth transition into a new modus vivendi for the future relations between the EU and the UK, in particular, in the field of regulated or accredited professional degrees. In terms of other less-regulated professions, an appropriate level of equivalent recognition of qualifications would be advisable. There is relevant case law forming part of the *acquis communautaire* to guide the interpretation of some alike provisions. However, in the future CJEU will not have, in principle, a say in these matters. After the end of the transition period, the relevant representative professional bodies in their respective territories should be involved to jointly develop and provide recommendations on mutual recognition of the qualifications. This is a standard clause encompassed in recent FTAs concluded by the EU.

7. What provisions should the Government seek to agree with the EU on cross-border investment and rights of establishment?

3. From the outset, it should be underscored the relevance of negotiating and agreeing on suitable provisions in this area. Since foreign direct investment falls under the exclusive competence of the EU, it is highly unlikely that any Member State will be authorized in the future to negotiate and conclude a separate stand-alone Bilateral Investment Treaty (BIT) with the UK. Hence, there is a clear need to include "fit-for-purpose clauses" setting out a legal framework that will foster investment protection in the years to come. It is also worth noting that under Section 3 on "Services and Investment", the EU negotiating directives state that the future agreement "should include ambitious, comprehensive and balanced provisions on trade in services and investment in services and non-services sectors, respecting each Party's right to regulate" (paragraph 34).

4. At the moment, one can observe divergent positions in the realm of cross-border investment. Under the EU draft, various investment provisions are already included, such as Articles SERVIN.2.2 [Market Access], 2.3 [National Treatment], 2.4 [Most Favoured Nation Treatment], 2.5 [Senior management and boards of

directors] and 2.6 [Performance Requirements]. Equally important, the EU has put forward its position concerning dispute settlement. Consistent with its overall approach to the negotiations, the EU negotiating directives and draft text, provide for CJEU's intervention regarding disputes raising questions of Union law. The EU has been keen to promote the reform of the multilateral investment dispute settlement system, articulating a new type of dispute resolution with more detailed rules instituting a permanent appellate tribunal as already provided for in Section F of the CETA.

5. In turn, the UK's "approach to negotiations" foresees the inclusion in the future partnership of provisions on the protection of investments addressed in Chapter 9 (entitled "Investment"). There is already a common ground with the EU, as the UK's position also calls for the incorporation of provisions on Market Access, National Treatment, performance requirements, senior management, and Most Favoured Nation Treatment. The UK's proposal goes beyond that to include "exceptions, for example on national security" (Chapters 29-31, paragraph 82). In terms of dispute settlement, the UK's approach to negotiations does not contain any explicit reference to the inclusion of mechanisms for the resolution of disputes between an investor and a Party (ISDS), only referring to the necessity of providing "mechanisms for dialogue, and, if necessary, dispute resolution" (Chapter 32, paragraph 83). In sharp contrast to the EU's position, there will be no role for the CJEU in dispute settlement (Chapter 32, paragraph 83).

6. Bearing mind that the draft presents a unique opportunity to negotiate investment protection and rights of establishment, the text should be as complete as possible. To complement the level of protection afforded in the treaty, the UK should also aim to include additional standards and more detailed provisions as those comprised under Section D - Investment protection of CETA (for instance, compensation for losses, expropriation).

7. In brief, key provisions in terms or cross-border investment that should be agreed upon are the prohibition of performance requirements (also affecting rights of establishment), inclusion of other investment protection standards as well as the incorporation of specific clauses relating (for instance, those regarding specific exceptions). As matters stand, it would be more arduous to reach an agreement on dispute settlement. Consensus in this contentious area boils down to the concessions each negotiating party is willing to make in order to strike a deal before the end of the transition period.

8. Should there be regulatory cooperation between the UK and the EU on professional and business services? If so, what form should such cooperation take?

8. There should be enhanced cooperation in these matters between the partners for the future, taking stock of the harmonization and regulatory alignment currently in place. Going forward, this cooperation should be harnessed through a committee or specialized joint body created under the treaty which will coordinate information exchange between national authorities.

9. What lessons, if any, can be learnt from the EU's existing trade agreements with other third countries including services, or negotiations on trade in services?

9. Recent treaty practice provides helpful precedents to draw upon. In addition to CETA (previously referred to), the EU-Japan Partnership and the free trade agreements EU-South Korea and EU-Vietnam may also offer useful insights. The EU-Japan Partnership Agreement (in force since February 2019) regulates in Chapter 8 trade in services, investment liberalisation and electronic commerce. In comparison, this Chapter 8 is a bit more ambitious in some specific areas than the current joint UK-EU positions read together. The EU-South Korea Agreement (provisionally applied since July 2011 and formally ratified in December 2015), often cited as another potential source for the final EU-UK Agreement, contains in particular a chapter pertaining to these issues, Chapter 7. Trade in Services, Establishment and Electronic Commerce. The EU-Vietnam Trade Agreement (set to enter into force in 2020) regulates in Chapter 8 on "Liberalisation of Investment, Trade in Services and Electronic Commerce", although it is less detailed than CETA comprises provisions that could be helpful for the ongoing negotiations. Moreover, the EU-Vietnam Investment Agreement includes quite comprehensive investment protection provisions even though the type of dispute settlement mechanism set out therein falls outside the scope of UK's stance.

10. The UK should also consider the multilateral negotiations (under the WTO and the GATS) on trade in services for a Trade in Services Agreement (TiSA) led by some WTO members (including the EU). TiSA represents an attempt to set a new international standard in services liberalization addressing barriers to trade, relying on current FTAs provisions. However, the caveat in this regard is that the negotiations seem to be stalled.

10. To what extent could UK-EU trade in professional and business services continue in the absence of a UK-EU agreement covering services? How effective would the WTO General Agreement on Trade in Services be in supporting such trade, and what arrangements (if any) could be put in place to go beyond the WTO framework?

11. In the event of a lack of agreement on services, professional and business services may continue under the multilateral legal framework until a new form of bilateral cooperation between the two negotiating parties is articulated in an inter-governmental manner. In this case, the EU and the UK would fall back on the WTO GATS commitments governed by the principles of non-discrimination, comprising the obligations of most-favoured-nation treatment (Article II:1 of the GATS) and national treatment (Article XVII of the GATS). Effectiveness depends upon the scope of the protection and the enforcement of the provisions in light of the cases settled by the WTO dispute settlement body in this area. There are 160 sub-sector commitments on trade in services that will be then applicable. Overall, the definition of "trade in services" under the GATS is quite broad, in practice, any measure affecting trade in services is caught under the regime, even if the measure regulates other matters. Jurisprudence laid down by various panels and the Appellate Body has developed legal test to determine if in a specific case a measure has breached most-favoured-nation and national treatment obligations. Although the UK is a WTO member with independence of the EU since the establishment of the organisation in 1995, the commitments are comprised in the same package. Thus, this scenario will also entail "unbundling" the UK's commitments from those put forward by the EU.

11. If there were no reciprocal data adequacy arrangements in place between the EU and UK by the end of the transition period, what would the implications be for professional and business services providers?

12. This would create an incredibly difficult situation potentially leading to disruption, but it could be dealt with by a temporary arrangement in the short run. However, because of the trade, service and financial flows between the UK and the EU, a solution must be found in the medium term. An option in this regard could be securing an adequacy decision. In other words, the Commission can recognise the UK as providing fully adequate data protection. This solution has been adopted with other States such as Argentina, Israel, New Zealand and Japan. If this is not feasible, additional safeguards through Standard Contractual Clauses (SCCs) could be relied upon even if this may be burdensome in practice.

12. What opportunities (if any) could the UK's withdrawal from the EU offer to the UK's professional and business services providers?

13. Although there is a certain perception that there will be less red-tape due to fewer regulatory constraints and "taking back control" (by not being subject to the oversight of the Court of Justice of the European Union), the substitution of the actual regulatory framework may create legal uncertainty in the beginning. Throughout all these years of EU membership, joint regulation and harmonization have facilitated the operation of professional and business services providers. The new legal framework should be of equivalent significance to maintain a similar level of operation. Because of the geographical proximity and the level of interaction with the EU market is crucial to maintain an appropriate degree of regulatory alignment for the years to come. That should be the priority in the negotiation of these specific issues.

June 2020