

The Law Society of Scotland – Written evidence (PBS0039)

Introduction

The Law Society of Scotland is the professional body for over 11,000 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 Trade Policy Working Group welcomes the opportunity to consider and respond to the House of Lords UK Services Sub Committee Inquiry into the Future UK-EU Relationship on Professional and Business Services. The Working Group has the following comments to put forward for consideration.

General Comments

Trade in services should be firmly embedded in the UK's approach to trade. This requires a particular focus on removing non-tariff barriers to entry into, or maintaining a position within, overseas markets. These can include for example, foreign ownership caps, joint venture obligations, restrictions on types of commercial presence, nationality or residency requirements, or complex regulation. Other non-tariff barriers are even less visible and can be created by practical rather than legal considerations, for example application processing times.

Specific Comments

1. How important are the different UK professional and business services sectors to the UK's economy and trade in services? Please include data where possible.

Legal services sector "contributes 1.5% of UK Gross Value Added (GVA) and employs more than 338,000 people across the country, with two thirds of those jobs based outside London". Legal services form part of the UK's successful trade landscape – both as in their own right with "a record trade surplus of £6.5bn in 2018" – as well as playing an essential facilitative function for trade in other areas. (See City UK report 2019 - <https://www.thecityuk.com/assets/2019/Report-PDFs/294e2be784/Legal-excellence-internationally-renowned-UK-legal-services-2019.pdf>)

2. What are the UK's different professional and business services sectors' key priorities for the future UK-EU relationship? What are the key priorities of

smaller professional and business services providers and providers from the UK's regions and devolved nations in particular?

Market access commitments on legal services falling under Modes 1-4 of the GATS framework to remove barriers presented by reservations in the EU's existing GATS schedules; Removal of practical barriers such as ensuring availability of business visas (if required); and other issues which affect services/business such as data flow provisions.

The barriers to legal services providers vary between jurisdictions. Some jurisdictions are very open to foreign lawyers, allowing firms to establish, joint ventures with local lawyers, and an easy route to requalification. In others it can be far more difficult. The precise level of market access depends on the specific reservations by each country contained in the relevant part of the (prospective) trading partner's WTO¹ commitment schedules.

The types of barriers encountered in the context of legal services which might be encountered when trading on the basis of WTO rules alone include:

- i. limits on the ability to give advice which attracts legal professional privilege;
- ii. limits on ability to open an office or partner with local lawyers
- iii. limits on the ability to represent clients in European proceedings.

At present, commitments in legal services made by the EU and its members under GATS are limited to the provision of legal advice in public international law and home country law only. This excludes legal advice and representation under EU and domestic law. In terms of temporary movement of professionals, the GATS applies to limited categories of professionals as compared with most of the recently concluded FTAs and the internal market (for example, the GATS does not cover graduate trainees). It is also important to note the interaction between provision of services and national immigration regimes which may severely impede the freedom to provide services (especially on a temporary basis).

Legal professional privilege (LPP)

Any Agreement on legal services must also include recognition of legal professional privilege, both as an important end in its own right and to ensure that Scottish (and other UK) lawyers are on a par with those who are members of the local bar or law society. Legal Professional Privilege is conceptually a right of the client and is central to the rule of law and administration of justice. Its scope may vary slightly between jurisdictions but in general terms LPP protects confidential communications between companies or individuals and their legal advisers made for the purposes of, or legal advice in contemplation of, litigation. It is not possible to force such communications to be disclosed in legal proceedings or to regulators or other third parties. However, we note that restrictions may be set as to who qualifies as a legal adviser in this context.

Any business based in the trading partner country that obtains legal advice from a UK qualified lawyer must have the same protections afforded by the LPP under domestic law.

¹ World Trade Organization

The ability of UK qualified lawyers to provide advice on the basis that the privileged nature of those communications will be respected is also of key importance to the legal sector as a major contributor to the UK economy.

Securing legal privilege for communications between overseas clients and UK qualified lawyers should be included within the legal services negotiating priorities of the UK Government in order to ensure that UK qualified lawyers can function fully when acting for third country clients who wish to access their legal services and advice.

3. What preparations (if any) have UK professional and business services providers made, or planned to make, ahead of the end of the transition period?

From ongoing discussions with members since the EU referendum, the main obstacle to preparation has been the lack of certainty about the form the new relationship will take. Many, particularly larger firms – likely to have more international clients/business – created dedicated Brexit groups to coordinate efforts across specialisms and improve preparedness of law firms themselves as well as their clients.

4. What provisions should the Government seek to negotiate to minimise potential barriers to trade, particularly for smaller professional and business services providers? What steps should the Government take to preserve the competitiveness and innovation capacity of the UK's different professional and business services sectors?

The ability to provide legal services to overseas clients from a Scottish/UK base - under modes 1 and 2 and on fly-in-fly-out basis (mode 4) – is important to firms across the spectrum. Such services play a crucial role in facilitating foreign direct investment into Scotland/the UK in addition to supporting the international supply of goods and services.

The free flow of data also underpins the international provision of legal services. Even commercial legal transactions routinely necessitate transfers of personal data. Particular requirements, or even the basic fact of differing regimes, can present trade barriers, which may be particularly difficult for smaller firms to manage. Safeguarding the movement of data between the UK and EU on the longer term is therefore important for traditional legal services.

Data is also, of course, essential to support ongoing innovation in legal services. The sphere of legaltech is attracting increasing interest. The Law Society of Scotland launched their LawscotTech programme in 2018 and a new accreditation in legal technology (<https://www.lawscot.org.uk/members/career-growth/specialisms/areas-of-specialism/accredited-legal-technologist/>) (See further at q 11).

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

It is important that the Government consults sectors on prospective and ongoing FTA negotiations to ensure that sector-specific asks and intelligence can be communicated to the relevant teams. All of these should be given effect against a background of ensuring the following general principles: respect for the rule of law; providing access to effective justice and enforcement of rights for individual citizens and businesses; and respect for fundamental rights.

Market access arrangements must be supported by efficient business visa systems which allow lawyers to enter a country for the purposes of meeting their clients face-to-face. If a lawyer has to wait a long time for a business visa to be authorised, this could act as a practical barrier to provision of legal services. Additionally, clients may sometimes wish to travel to the UK to instruct or receive legal services, requiring an efficient business visa system for business visitors to the UK.

The Government should also seek to negotiate provisions around intra-corporate transferees, including provisions to allow UK trainee solicitors to complete part of their training contract in offices in the EU27 on a reciprocal basis. We support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. We welcome the recognition of the importance of engaging with the devolved administrations and legislatures.

We have consistently stressed the importance of ensuring that a whole of governance approach is extended to trade negotiations. As we have previously commented, Bernard Jenkin MP, the then Chair of the Public Administration and Constitutional Affairs Committee stated in his note to the Cabinet Office on “Leaving the EU and the Machinery of Government”, this is a “Whole of Government project”. The Whole-of-Government concept is important to recognise in terms of the negotiations with the EU because of the breadth, depth and scope of EU Law as it applies throughout the UK. In this context “Whole of Government” should be interpreted as “Whole of Governance” to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government.

The devolved legislatures and administrations have not played a formal role in negotiating international trade treaties to date. However, since the EU first took over responsibility for trade negotiations, there have been constitutional developments within the UK with the creation of the devolved legislatures and administrations- including the Scottish Parliament - and subsequent further devolution of powers to them. Determining the UK’s position across a raft of sectors encompassing products and services, which may be provided from anywhere in the UK, demands a holistic approach. A more in-depth discussion of devolved participation can be found in our responses to the International Trade Committee’s UK Trade Policy Transparency and Scrutiny inquiry and the Scottish Affairs Committee inquiry on Scotland and Brexit: Trade and Foreign Investment.

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?

We agree that mutual recognition of professional qualifications is a very important consideration.

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

Mode 3 (commercial presence) raises some more specific issues in terms of the barriers likely to be encountered. Many members of the Scottish profession now work for large international law firms that are likely to have offices across the globe. Smaller and mid-sized firms may operate through referral networks or seek to form joint ventures for particular projects to allow a comprehensive legal advice service on a particular project. It is important that such

joint operations can go ahead as this benefits both UK lawyers and their international colleagues. Availability of different forms of practice, particularly recognising limited liability, which is now standard practice in UK firms, is an important issue where foreign (i.e. UK) lawyers wish to establish a commercial presence. Both in terms of establishing a permanent office and setting up a joint venture, it is important to ensure that restrictions such as caps on shareholdings are avoided.

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?

Yes – for example in legal services sharing of information around disciplinary proceedings, criminal convictions etc. It is important to note that information exchange between regulators is a different thing from that between governments – eg as regulator we might share information with a foreign bar as its direct counterpart but it might not be appropriate for it to share that information directly with government.

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?

Existing agreements do not start from a base of close cooperation and do not therefore serve as a useful precedent for the level of ambition which we and other professional organisations have argued for throughout.

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?

It is not possible to give a single or simple answer to this question due to the very varied levels of openness across the EU 27. Commitments under the GATS are very limited.

The optimal outcome from the forthcoming EU-UK FTA (and any subsequent) negotiations would be to preserve the current system of rights and obligations to ensure that individuals, businesses and other organisations throughout the EU can obtain advice from the UK lawyer of their choice who can in turn cooperate and collaborate with EU colleagues and vice versa. This is in the best interests of both UK and EU clients as well as being of benefit to the legal profession in the UK and the EU. The crucial role that solicitors play in facilitating trade and investment lends an importance to substantive provisions on legal services that goes beyond the sector itself. See also comments on FTA priorities above.

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?

International legal services provision goes hand in hand with the free flow of data across borders. Where this data relates to individuals with the EU, the data must be handled in accordance with the General Data Protection Regulation (GDPR). It is important to note that this is not confined to advice to private individuals but may also be an important consideration in the context of commercial transactions or ensuring regulatory compliance.

Although it is possible for third countries to obtain an adequacy decision, this can be withdrawn at any time. We therefore favour a more robust arrangement agreed on a reciprocal basis, which would give greater certainty to businesses, while ensuring continued respect for the privacy and data protection rights of individual citizens. Provisions on data flows should go beyond the B2C issues addressed in the GDPR and ensure the free flow of data on a B2B basis. Data localisation requirements could present a barrier to trade in this area and positive commitments to ensuring those flows are key to ensuring that businesses such as law firms can continue providing services to clients.

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

The answer to this question is not yet clear and is dependent on a number of factors, in particular on the agreements the UK makes with countries around the globe and the extent to which professional services feature in those agreements.

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