Law Society of Scotland

Trade Bill

Law Society of Scotland briefing for second reading

September 2018

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.

In October 2017 the Department for International Trade (DIT) published its paper on *Preparing for our future UK trade policy*[1] to which the Law Society responded.[2] The Society welcomes the opportunity to consider and respond to the Trade Bill[3] and has the following comments to put forward for consideration.

General Remarks

We continue to support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. In particular we consider that trade in services should be firmly embedded in the UK's approach to trade and that free trade agreements should include commitments to facilitate trade in legal services. The legal services sector facilitates trade across all other sectors as well as being an important contributor to the UK economy in its own right.

Furthermore, it is important that trade agreements can be used to effect a wide range of changes in the relationship between states and regions. In many such agreements provisions are a means to promote or reinforce the application of the rule of law. Trade negotiations should take into consideration the need to ensure protection for Human Rights minimum standards or norms and respect for the rule of law, the interests of justice and access to justice.

In our response to the DIT consultation, we welcomed the recognition of the importance of engaging with the devolved administrations and legislatures. We also emphasised that it is important to ensure that a whole of governance approach is extended to trade negotiations. In this regard we note that one of the

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654714/Preparing_for_our_future_UK_trade_policy_Report_Web_Accessible.pdf

[2] https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf

[3] https://services.parliament.uk/bills/2017-19/trade.html

principles agreed at the JMC(EN) in October was that there should be a framework to ensure the UK can negotiate, enter into and implement new trade agreements and international treaties. At the same time, the Trade Bill focuses on "rollover" of the GPA and existing international trade agreements in which we participate through membership if the European Union: this briefing therefore concentrates on comments in the specific context of the current Bill.

Comments on the draft bill

Scope of delegated Powers

We are concerned by the extensive scope of delegated ministerial powers under the Act, mirroring concerns previously identified in relation to the use of Henry VIII powers in the context of the European Union (Withdrawal) Bill.[4] It is not clear why the Government considers such wide powers to be necessary.

Under clause 1(1), the Bill grants an appropriate authority the power to make regulations which it considers "appropriate" to implement GPA. We consider that if the intention is to ensure implementation of the 1994 GPA then the authorities should be required to make such provisions. In this specific context, it could be helpful to allow the relevant authority discretion, facilitated by the current wording, to make regulations which it considers appropriate to implement the GPA to ensure continued alignment with EU requirements.

Clause 2(1) provides that an appropriate authority may make such provision as the authority considers appropriate to implement a future agreement. We believe this power should be limited to making regulations which are considered "necessary" to implement the agreement.

We are concerned that clause 11(1) grants a very wide discretion to HMRC to require information. The scope of this provision should be more clearly defined to give greater certainty as to the extent of information and the anticipated frequency and method of data collection.

Similarly, clause 12(1) could involve disclosure of personal data relating to individuals or sensitive commercial information. Limitations should be enshrined in clause 8 to ensure that their rights are not affected. Similarly, any disclosure of information should be subject to the requirements of protecting legal professional privilege

We welcome the introduction of the reporting obligations set out in clauses 3 to 5 as this gives the opportunity for greater scrutiny of the arrangements for "rolling over" existing trade agreements.

[4] See our response to the Government's White Paper in May 2017 - https://www.lawscot.org.uk/media/9969/grb-white-paper-response.pdf at p4

Clarity of drafting

The principle of certainty is central to good law-making.

Under the definitions in clause 8(1) “an international trade agreement” means a “free trade agreement” or “an international agreement that mainly relates to trade, other than a free trade agreement”. However, “mainly” does not grant sufficient certainty in terms of interpretation. We note that the explanatory notes define international trade agreements as follows: “International trade agreements are agreements between two or more countries aimed at reducing the barriers to trade in goods or services between them.” It would be helpful if clause 8(1) were amended accordingly.

We welcome the amendment of to the text in clause 12(6) (formerly 8(5)) to take account of the introduction of the Data Protection Act 2018.

Issues of relevance in the context of devolved administrations

At present, free trade agreements negotiated by the EU are classified as exclusive or mixed agreements, depending on whether the matters dealt with are within the exclusive competence of the EU or also apply to areas where competence is shared between the EU and Member States. For mixed agreements – including the recent EU-Singapore FTA and CETA – approval is required from national parliaments, which in the UK means approval by both Houses of Parliament.

Currently international relations and regulation of international trade is reserved to and the UK Government and Parliament.[5] The Scottish Parliament and the Scottish Government (as with the other devolved legislative authorities) have no formal role in negotiations or approval of EU agreements. However, in our response to the consultation on the Future of UK Trade Policy, we highlighted the importance of extending a whole of governance approach to trade negotiations. We would urge further consideration of how trade negotiations will be handled where they intersect with the powers of the Scottish Parliament and other devolved legislative authorities where any proposed trade agreement will affect an area of devolved competence. We explored this issue further in our response[6] to the House of Commons International Trade Committee’s inquiry into *UK Trade Policy Transparency and Scrutiny*. We also note, in this regard, the Scottish Government’s recent discussion paper, *Scotland’s Role in the Development of Future UK Trade Arrangements*.[7]

[5] Scotland Act 1998, Schedule 5 at para 7

[6] https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf

[7] https://www.gov.scot/Resource/0053/00539758.pdf

We note that clause 2(5)(a) would also affect devolved legislation. However, where legislation has been devolved, the Sewel convention would be engaged, requiring Scottish Parliament consent to any changes taking effect in Scotland. We also note the position of the Scottish Government set out in the Legislative Consent Memorandum[8] which indicates that the "Scottish Government does not currently intend to lodge a legislative consent motion in relation to the Bill."[9] The allocation of responsibility and extent to which a UK or Scottish minister would have the relevant powers and duties should be dealt with explicitly in the legislation.

Entry into force

It is important that regulations can be put in place in advance of the UK's withdrawal from the EU to ensure continuity in relation to the GPA and other international trade agreements.

However, currently the UK cannot conclude trade agreements independently of the EU, meaning regulations under clause 2 could not come into effect until exit day. We therefore welcome the amendments at clause 2(2)(b), 2(3)(b) and clause 7(2) to take account of this.

At the same time, it is unclear what the impact of a transitional period (as set out in Article 122 of the draft Withdrawal Agreement of 19 March 2018) would be in relation to international trade agreements with third countries. Under draft Article 124, the EU and UK would work together to seek to ensure continuation of existing trade agreements until the end of the proposed transition period. We note that this is subject to the Withdrawal Agreement being finalised. As noted previously, we consider a transitional period is imperative to allow citizens and businesses in both the UK and EU to adjust to whatever relationship follows withdrawal. Further information regarding the Government's discussions with third countries in this respect would be helpful.

UK participation in the European medicines regulatory network

In relation to the new clause 6 of the Bill (UK participation in the European medicines regulatory network) there are two issues which merit further consideration. These concern the clarity and accessibility of the clause rather than the underlying objective of continuing UK participation in the European medicines regulatory network.

Firstly, the scope of the Bill is primarily to make provision about the ratification and implementation of international trade agreements and focuses on "rollover" of existing relationships, both the GPA and other international trade deals. Continuing participation in the European medicines regulatory network does not

[8] http://www.parliament.scot/SPLCM-S05-12-2017.pdf

[9] See para 3 on page 1

seem to fall within the scope of international trade deals but rather within the ambit of the UK's future relationship with the EU. We think it would be preferable if the issue were addressed within legislation about the Future Relationship with the EU. The Government could undertake to enact an equivalent to clause 6 in such a measure and therefore enhance transparency.

Secondly, clause 6 is designed to create an objective for "an appropriate authority to take all necessary steps to implement an international trade agreement which enables the UK to fully participate after exit day in the European medicines regulatory network". The difficulty which we perceive is that clause 6 refers to implementation, but without an actual agreement; for clause 6 to work it should include an obligation to negotiate such an agreement. Furthermore, the object of implementation could be frustrated if an agreement on continued participation were reached that did not fall within the definition of "international trade agreement" as identified in clause 8. We take the view that clause 8 should not be amended to extend the scope of "international trade agreement" to take account of this. Rather, if clause 6 is to be retained, the reference to "international trade agreement" should be deleted and reference should be made simply to an agreement.

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