

Consultation Response

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.

The Society's Trade Policy Working Group welcomes the opportunity to consider and respond to the International Trade Committee's inquiry into *The impact of UK-EU arrangements on wider UK trade policy*.¹ We have the following comments to put forward for consideration.

Response to questions

Q1. How would different UK-EU customs regimes affect wider UK trade policy?

Current system

As a member of the EU, the UK is part of the EU-wide Customs Union (EUCU) and also participates in the Common Commercial Policy (CCP) or EU Trade Policy. Participation in the EUCU means that goods passing between the UK and other members are not subject to customs duties as a matter of law; in practical terms, it means that goods can pass between Member States without requiring the logistical process necessary to enforce the customs rules. For goods originating in third countries, customs duties apply at the border when the product first arrives in the territory of the EU (whether that is the UK or another Member State) but the goods can circulate freely thereafter.

Different customs regimes in the UK and the EU would mean that this border would be reinstated between the UK and the EU and goods passing between the two would once more need to be processed at the border, (whether they originated in the UK, EU or elsewhere). The extent to which this would impact businesses in practice will depend on eg the nature of the goods to be imported/exported (ie whether they

¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-trade-committee/news-parliament-2017/impact-of-uk-eu-trade-arrangements-inquiry-launch-17-19/>

are perishable) and the customs infrastructure in place on both the UK and EU sides to process the relevant goods.

Customs union

It is not necessary to be a member of the EU to participate in a customs union arrangement with the EU, as understood in WTO law. Under Article XXIV of the GATT it is possible to form customs unions between territories. This means that (with specific exceptions) “duties and other restrictive regulations of commerce ... are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories.” Furthermore, “substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.”² It is interesting to note the use of “substantially” in both these excerpts and in the latter context means that duties imposed on third country products do not need to be absolutely identical across the participating customs territories.

If the UK were to enter into a customs union arrangement with the EU,³ this would limit the scope and extent of future UK external trade policy. The precise impact would depend on the details of the arrangement. The EU’s relationship with Turkey may be instructive here as the two parties operate a customs union arrangement, where Turkey is obliged to apply the EU’s Common External Tariff to imported goods from third countries, including preferential tariffs under EU bilateral trade agreements. However, Turkish exporters do not receive the equivalent concessions on their exports to those countries (unless Turkey has negotiated this in its own free trade agreement (FTA) with such countries).

It is possible that an arrangement might be negotiated involving a customs union with the addition of other elements, such as some aspects of services trade. Areas which are not covered by the customs union agreement between the UK and EU would be matters on which the UK would be able to set its own terms in external trade relationships with third countries. Again, where there are common rules with the EU, the UK will not be able to depart from them in trade relations with third countries. That would apply, for example, should the UK retain membership of the European Economic Area.

It is also important to note that in a customs union arrangement, the UK would need to afford preferential access to the EU’s FTA partners but would not be entitled – without a separate agreement – to reciprocal access to their markets. In principle, this could be resolved by converting existing EU bilateral agreements into trilaterals, but this would not happen automatically and require both the EU and third countries to agree to this approach. An independent trade defence policy would also face challenges in a customs union environment.

A shared UK/EU external trade policy necessitated by a customs union arrangement would require robust

² See Article XXIV.8(i) and (ii) available at https://www.wto.org/English/tratop_E/region_e/regatt_e.htm

³ Distinct from remaining in the EU customs union

governance to ensure that UK economic interests were safeguarded and promoted. A key area for discussion would be applicable rules of origin for trade with third countries so that the administrative obstacles between the UK and EU would be effectively eliminated. The shared external trade policy would need to go beyond the negotiation of bilateral and multilateral trade agreements to include cooperation on engagement with international organisations, notably the WTO, and everyday market access issues.

Free Trade Agreement

If the UK were to pursue an FTA with the EU, that could still affect UK trade policy indirectly (in the same way that the conclusion of any particular FTA could influence future agreements). Whether or not this had a material impact on the outcome of other trade negotiations would depend on the nature of the UK/EU arrangements and the particular circumstances and balance of negotiations with third countries.

In terms of the UK's wider trade policy going forward, in the absence of a customs union, the UK would be able to more freely determine its own customs policy outside the EUCU and set different tariffs for goods arriving from different trading partners (subject to the WTO rules set out in the GATT). While customs regimes do not affect trade in services as such, there may be a secondary effect in terms of the wider UK trade policy given the multisectoral nature of modern FTAs.

Q2. What would be the implications of different UK-EU trade arrangements for UK customs and other border procedures for non-EU goods?

Based on statements from the UK Government, we do not anticipate that the procedures for goods arriving directly from or leaving directly to third countries should, in principle, be altered as a result of withdrawal from the EUCU. However, if the UK Government were to implement changes in customs tariffs these would, of course, impact upon non-EU goods. Similarly, where the UK currently trades with third countries on the basis of EU free trade agreements, in the absence of an agreement to "roll over" the current arrangements, import tariffs both here and in those other countries would be reset to the standard WTO rates.

Going forward different models of UK-EU trade arrangements could lead to different types of border procedures for goods coming from the EU, which would be more or less similar to those for border procedures for non-EU goods. In a Customs Union, there would be no tariff consequences for goods re-shipped from the UK to EU Member States. In an FTA, goods could not claim the preferential UK/EU tariff unless they were entitled to UK origin under the UK/EU FTA. To do that, they would need to satisfy the rules of origin which would be included in the UK/EU FTA.

Detailed assessment of the likely practical implications of potential models on day-to-day trade operations is a matter for those with direct experience of the logistical aspects of customs processes.

Q3. How would UK-EU arrangements pertaining to the regulation of goods affect wider UK trade policy?

The answer to this question depends on the model adopted in future EU/UK trading arrangements. If, as a result of the UK/EU arrangements, the UK continues to maintain a common rulebook on goods, this would limit the concessions it could make in trade negotiations with third parties. If, by contrast, it is simply UK exports to the EU that are required to comply with the *acquis* – as is the case with third country exports to the EU – that would give the UK flexibility to accept, for example, mutual recognition of standards in trade with third countries.

The same considerations apply to the questions below. Where there are common UK/EU regulatory frameworks in place, these constrain the nature and extent of UK trade policy vis-à-vis third countries. We note, however, that the Government has committed to maintaining the existing level of consumer protections, including standards on food safety, food labelling and food quality. It is therefore expected that the UK standards would remain at least as robust as those set at EU level.

If the UK formally committed to maintaining and transposing EU standards on an ongoing basis, then this could restrict its flexibility to reduce perceived regulatory barriers or limit the potential for regulatory cooperation with other trading partners. The example of the EEA/EFTA states may be instructive in this regard: Norway, Iceland and Liechtenstein are all bound to implement EU standards as a condition of their participation in the internal market⁴ (with the exception of goods in the area of agriculture and fisheries where they do not participate in the internal market) but also retain control of their own trade policy and do not participate in EU free trade agreements. However, as set out above, the UK Government seems unlikely to reduce standards, at least in the short term. Maintaining regulatory consistency between the UK and EU (whether on a bilateral or unilateral basis) might therefore have a more limited practical impact on UK trade policy, in the short to medium term.

In a sense, it may also be helpful to consider the position of EEC Member States prior to the conclusion of the Uruguay Round of trade negotiations (which led to the formation of the WTO in 1995). In that negotiation, Member States negotiated in areas where there was Member State competence (such as intellectual property), while the European Communities negotiated in areas of exclusive competence, such as trade in goods. There may be parallels in terms of the governance that was in place at that time that could be instructive for the post-Brexit arrangements. The one, rather significant, difference being that the UK will no longer be a Member State and therefore would need bespoke arrangements to be put in place.

⁴ While they are members of the internal market through the European Economic Area agreement, they do not participate in the customs union

Q4. How would UK-EU arrangements pertaining to the regulation of services and investment affect wider UK trade policy?

If the UK committed to maintaining the same regulatory approach as the EU, this would impact upon trade policy in other negotiations and, as in the case of goods, could limit the UK's flexibility in other negotiations. The UK would not be able to pursue regulatory cooperation with third countries if this was incompatible with UK/EU arrangements. However, as noted above, the Government has committed to maintaining existing levels of consumer protection: to the extent that the objective of regulation is to protect consumers, it is not anticipated that the UK would lessen regulatory requirements, which again may limit the practical impact of maintaining alignment

To the extent that the UK and EU agreed to work in partnership to determine their regulatory approach, this could also enhance the UK's ability to influence international regulatory standards, eg the Basel Committee on Banking Supervision.

Q5. How would UK-EU arrangements pertaining to cross-cutting regulatory issues – including data protection, competition policy, consumer protection and social and environmental legislation – affect wider UK trade policy?

Trade agreements may be used to positive effect to promote or reinforce values such as human rights or creation of “fairer” markets.

The recent trend in international trade agreements points to increasingly complex and wide-ranging agreements, encompassing issues such as those highlighted here.

The EU's General Data Protection Regulation (GDPR) attracted international interest and is widely regarded as the “gold standard” in terms of safeguarding individuals' rights to data protection. The UK has transposed the GDPR requirements into domestic law through the Data Protection Act 2018. The UK should seek to work with global partners to facilitate commonality of approach and cooperation between regulatory authorities where this can assist in fostering effective data protection. However, if the UK were to lower its protections or otherwise deviate from the GDPR requirements, this would affect its ability to obtain/retain recognition under the EU adequacy regime, with adverse consequences from an EU trade perspective.

Similarly, recent EU trade agreements have included commitments on competition policy requiring

participants to operate a domestic competition law system – see for example Chapter 10 (Competition) of the EU/Ukraine Association Agreement⁵ and Chapter 11 (Competition) of the EU/Korea FTA.⁶

Consumer protection issues are also included in trade agreements, for example the EU/Korea FTA provides for dialogue between the parties on regulatory issues raised by electronic commerce⁷ and recognises the importance of Geographical Indicators in ensuring consumers are not misled as to the true origin of the product⁸

Trade deals already routinely affirm that trade should not override social policy and environmental regulation – for example Art 6.1(g) of the EU/Korea reads as follows “measures to facilitate trade shall not prejudice the fulfilment of legitimate policy objectives, such as the protection of national security, health and the environment.” Furthermore, at Article 13.1 (2) “The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. They underline the benefit of cooperation on trade related social and environmental issues as part of a global approach to trade and sustainable development.” This does not necessarily require harmonisation of labour or environmental standards⁹ but it is interesting to note that in the same agreement at Article 13.5 the parties reaffirm their commitments to implementation of multilateral environmental agreements and the objective of the United Nations Framework Convention on Climate Change and its Kyoto Protocol and at Article 13.11 agree to initiating cooperative activities on trade-related aspects of social and environmental policies.

As referred to above, building alliances could enhance the UK’s ability to influence the global agenda on regulatory issues. To the extent that UK interests align with those of the EU, agreement on these strategic issues may strengthen the UK’s negotiating position in international conversations.

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⁵ See https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf

⁶ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN>

⁷ See Art 7.49

⁸ See Art 10.24

⁹ See Art 13.1(3)